

**BETWEEN:**

**FANTU GABREMICHAEL**

**Applicant**

**and**

**ZURICH INSURANCE COMPANY**

**Insurer**

**REASONS FOR DECISION**

**Before:** John Wilson

**Heard:** June 7, 8 and 9, 1999, at the Offices of the Financial Services Commission of Ontario in Toronto.

**Appearances:** Michael J. Henry for Ms. Gabremichael  
Pamela Stevens for Zurich Insurance Company

**Issues:**

The Applicant, Fantu Gabremichael, was injured in a motor vehicle accident on October 7, 1995. She applied for and received statutory accident benefits from Zurich Insurance Company (“Zurich”), payable under the *Schedule*.<sup>1</sup> Zurich terminated weekly income replacement and other benefits on September 20, 1997. The parties were unable to resolve their disputes through mediation, and Ms. Gabremichael applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98.

The issues in this hearing are:

1. Is Ms. Gabremichael entitled to receive a weekly income replacement benefit at the rate of \$511.86 per week from September 20, 1997, and ongoing, pursuant to section 7 of the *Schedule*, on the basis that she suffers a substantial inability to perform the essential tasks of her employment?
2. Is Ms. Gabremichael entitled to payment for supplementary medical expenses for prescription medication, pursuant to paragraph 36(1) of the *Schedule*?
3. Is Ms. Gabremichael entitled to payments for housekeeping services from September 20, 1997 and beyond, pursuant to section 55 of the *Schedule*?
4. Is Ms. Gabremichael entitled to a special award pursuant to section 282(10) of the *Insurance Act* on the basis that the Insurer has unreasonably withheld or delayed payments?
5. Is Zurich liable to pay Ms. Gabremichael's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*?
6. Is Ms. Gabremichael liable to pay Zurich's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*?

**Result:**

1. Ms. Gabremichael is entitled to receive a weekly income replacement benefit at the rate of \$511.86 per week from September 20, 1997 and ongoing, pursuant to section 7 of the *Schedule*.
2. Ms. Gabremichael is entitled to payment for supplementary medical expenses for prescription medication pursuant to section 36(1) of the *Schedule*.
3. Ms. Gabremichael is entitled to payments for housekeeping services from September 20, 1997 and beyond, pursuant to section 55 of the *Schedule*.
4. Ms. Gabremichael is entitled to a special award in the amount of \$10,000 pursuant to section 282(10) of the *Insurance Act*.
5. The issue of expenses may now be addressed, if necessary.

**EVIDENCE AND ANALYSIS:**

**Summary of Events:**

Fantu Gabremichael was a thirty year old Toronto resident at the time of the accident. She had been employed steadily since first arriving in Canada from Ethiopia almost a decade before. She was celebrating her engagement to Jimmy Sototow by accompanying him on a trip to New York. On October 7, 1995, Thanksgiving weekend, Ms. Gabremichael was a front-seat passenger in a van driving through Niagara Falls, New York. Another vehicle apparently ran a red light and

struck the van. The van was hit on the right side passenger door, at the point where Ms. Gabremichael was sitting.

Ms. Gabremichael was taken by ambulance to hospital where she was examined. X-rays and a CT-scan were done. Ms. Gabremichael reported that she hit her head and blacked out briefly following the accident. At the hospital, she was prescribed a neck collar and medication for pain. She was discharged late that night, and was advised to see her family physician upon her return to Toronto.

For the next few days, Ms. Gabremichael experienced severe headaches on the right side of her head, and pain in her neck, lower back, right hip, and groin area. In addition, she had difficulty sleeping. On the Tuesday following the long weekend, she saw her family physician, Dr. V. Harizanov.

On October 25, 1995, Dr. Harizanov completed a Health Practitioner's Certificate, listing her physical injuries, and also mentioning anxiety and post-traumatic stress disorder. He indicated that a return to work might be expected in 10 to 12 weeks. Dr. Harizanov referred Ms. Gabremichael to a physiotherapy clinic and continued to follow her progress.

Ms. Gabremichael applied to Zurich for accident benefits, which were paid until September 19, 1997. Zurich paid income replacement benefits, rehabilitation and housekeeping benefits, as well as reimbursement for the costs of her extensive range of prescription drugs.

Ms. Gabremichael had worked as a pharmacist's assistant at the Rosedale Pharmacy in Toronto prior to the accident. In addition, she claimed she was working as a bartender/cook at the Marathon Restaurant in Toronto on a part-time basis. Her claim for compensation for this secondary employment was not accepted by the Insurer.

Unfortunately, Ms. Gabremichael's recovery did not match her physician's early prognosis. While her physical injuries began to resolve as early as November 29, 1995, chronic pain and psychological problems began to be the focus of her ongoing impairment.

Ms. Gabremichael tried to return to work at the pharmacy in late November 1995, but was unable to cope with the strains of the working environment. Dr. Harizanov referred her to a neurologist for headaches, and she began seeing both a psychologist and a psychiatrist. It became increasingly clear that the problems preventing her return to work were primarily her headaches and her psychological problems. Her own physician, her psychiatrist, her neurologist and numerous other professionals, some engaged by the Insurer, identified headaches, depression and post-traumatic stress as her limiting factors.

Just under two years from the date of the accident, Zurich gave notice to Ms. Gabremichael that her benefits would cease on September 19, 1997. Zurich based its decision on a report of a psychiatrist, Dr. M. Bail, and of a chiropractor, Dr. J.A. Nathanson, both of whom had examined Ms. Gabremichael at the behest of the Insurer.

**Issue 1: Is Ms. Gabremichael entitled to receive an income replacement benefit from September 20, 1997?**

Section 7(1) of the *Schedule* provides:

An insured person who sustains an impairment as a result of an accident is entitled to a weekly income replacement benefit if the insured person meets any of the following qualifications:

1. The insured person was employed at the time of the accident and, as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of that employment.

Ms. Gabremichael claims that as a result of the accident, she suffered and continues to suffer a substantial inability to perform the essential tasks of her employment. The Insurer claims that at least from September 20, 1997 Ms. Gabremichael no longer suffered an impairment that resulted from the accident, and should have been able to resume her employment.

### ***Nature of Ms. Gabremichael's Impairment***

Dr. Harizanov's initial Health Practitioner's Certificate, dated October 25, 1995, identified Ms. Gabremichael's most serious injuries as neck, hip, and upper leg problems. Potential psychological problems were listed as third and fourth, on a scale of severity. Because of the nature of the physical injuries, a reasonably prompt resolution was expected. The reports of International Managed Health Care, the rehabilitation provider, echo these sentiments.

As early as November 1995, an assessment by Dr. Harizanov showed Post-Traumatic Stress Disorder as the first item on a list of impairments, although he still expected Ms. Gabremichael to start vocational training shortly.

A report dated November 29, 1995, by Dr. George O'Connor of the Psychology Department of International Managed Health Care, identified the trauma of the accident as an important factor in Ms. Gabremichael's condition. Dr. O'Connor lists complaints of severe headaches, sleep disturbances, flashbacks, and emotional sensitivity. He made a tentative link to reactive depression, and remarked that the loss of appetite, low energy, fatigue and feelings of worthlessness experienced by Ms. Gabremichael would be consistent with depression.

Although Ms. Gabremichael continued to complain of pain and physical restrictions due to the accident, by early 1996 the reports by health care providers began to focus increasingly on her depressed state and her severe headaches.

Ms. Gabremichael complained of severe headaches. Her family physician, Dr. Harizanov, referred her to Dr. A. Mossanen, a neurologist, who diagnosed headache affecting the right occipitocervical area involving the right cranium. This was summarized as “cervicogenic migraine” in a report dated December 13, 1995. Dr. Mossanen tried a variety of treatments with varied success. Ultimately, he decided to hospitalize her at the Toronto East General Hospital for observation and treatment. Mr. Mossanen also noted Ms. Gabremichael’s anxiety and depression.

Dr. Mossanen continued to see Ms. Gabremichael over a period of time, and monitored and adjusted her headache and pain medication. Latterly these headaches were controlled by medication. Ms. Gabremichael confirmed this at the hearing. I find that the headaches, although controlled by medication, form part of Ms. Gabremichael’s disability.

On January 12, 1996, Ms. Gabremichael saw Dr. P.S. Links, a psychiatrist from St. Michael’s Hospital. Dr. Link’s diagnosis consists of post-traumatic stress disorder, and a major depressive episode. He also noted that Ms. Gabremichael had no prior psychiatric history.

At the arbitration hearing, Dr. Links testified that Ms. Gabremichael is a good example of a case of chronic depression, complicated by post-traumatic stress disorder, chronic pain syndrome, and relationship stress.

Dr. Links testified that a major depressive episode, of the nature suffered by Ms. Gabremichael, can dramatically affect a person’s ability to function. Sleep, eating habits, and the ability to concentrate are all affected. He stated that she had made suicide attempts, but that currently her risk of suicide was not so high as to warrant hospitalization.

On June 6, 1997, Dr. Links wrote to Zurich to reiterate that Ms. Gabremichael was still limited by depressive symptoms and chronic pain. He, again, advanced the diagnosis of post-traumatic stress disorder with chronic pain syndrome and major depressive episode.

Although Ms. Gabremichael continued to complain of pain and discomfort, it is clear from the reports of the various treating and consulting physicians, that her psychological problems were preventing her from returning to the workplace in September 1997.

The Insurer's position that Ms. Gabremichael is not psychologically disabled is supported principally by Dr. Bail's report. Since Dr. Bail's reports and testimony are crucial to an understanding of the circumstances surrounding the stoppage of benefits by Zurich, and have ramifications for all aspects of Ms. Gabremichael's claim, I will deal with them at this point.

***Dr. Bail's examination***

Dr. Bail, a psychiatrist, saw Ms. Gabremichael for about one hour on August 14, 1997, for an insurer's examination. Dr. Bail concluded in his reports and testified at the hearing that Ms. Gabremichael does not suffer from a psychiatric disorder caused by the motor vehicle accident. Rather, he opined that she has some sort of personality disorder. His conclusion is that Ms. Gabremichael's reported symptoms really amount to malingering, motivated by gain.

Dr. Bail testified at the hearing that he discounted most of Ms. Gabremichael's problems, because of perceived inconsistencies in the materials provided to him as well as her presentation during the interview. His reports consist of a listing of Ms. Gabremichael's supposed inconsistencies and contradictions.

Dr. Bail testified that he gave Ms. Gabremichael no opportunity to explain or correct any of these supposed inconsistencies. He added that he did not confront people with inconsistencies because they would cause bodily harm or destroy his office.

The contradictions that Dr. Bail referred to included Ms. Gabremichael's expressed interest in returning for a visit to Ethiopia. This was portrayed as being inconsistent with her story of her

departure as a refugee. Dr. Bail made no allowance for any change in political climate in Ethiopia since Ms. Gabremichael's precipitate departure that might have made such a visit possible.

Dr. Bail also assumed from a cursory examination of an OHIP claim summary that Ms. Gabremichael wrongly asserted that prior to the accident she enjoyed good health. A more detailed examination of the record would have shown claims for dental surgery, among others, that did not support Dr. Bail's conclusion that Ms. Gabremichael's health was poor prior to the accident, and that she was misleading the Insurer.

Dr. Bail testified that in evaluating a patient he acts as judge and jury. Unfortunately, from my reading of his reports, and from listening to his testimony, it is obvious that he has appropriated to himself another role, and has become an advocate for the Insurer, rather than an impartial expert witness.

In *Harrison and Wellington Insurance Company* (FSCO A96-000785, July 23, 1998), Arbitrator Makepeace dealt with the testimony of a partisan medical examiner. She stated: "I reject Dr. Costa's report in all other respects because he appears to have focussed mainly on identifying discrepancies in the Applicant's claim." Likewise, Dr. Bail's partisan approach and his focus on inconsistencies are troubling and seriously weaken the credibility and weight of his testimony.

I find that Dr. Bail's opinion on the nature of Ms. Gabremichael's psychiatric disabilities is not convincing and should be disregarded. I accept Dr. Link's characterization of Ms. Gabremichael's condition as chronic depression complicated by Post-Traumatic Stress Disorder, Chronic Pain Syndrome, and relationship stress.

***Did these impairments arise from the accident?***

The Insurer takes the view that if Ms. Gabremichael suffers some psychological impairment, it is not due to the accident. The conclusions of Dr. Bail's report of May 10, 1999 (Exhibit 3, Tab 41) effectively summarize this:

Any psychological phenomena she is truly experiencing (and it is difficult to discern what is for real, because I feel she has been misleading and she has not been forthright to various investigators, including myself) are related to pre-existing and ongoing psychosocial stressors which have nothing to do with the MVA.

***Was there a Pre-existing Personality Disorder?***

Dr. Bail testified that he believed that Ms. Gabremichael's symptoms could be accounted for by a pre-existing personality disorder. Dr. Bail attributed Ms. Gabremichael's psychological problems to pre-existing conditions based on his characterization of Ms. Gabremichael's symptoms as a "personality disorder." Since, in his opinion, personality disorders are present in an individual since childhood, Dr. Bail concluded that this disorder must necessarily have been a pre-existing condition.

Dr. Paul S. Links, Ms. Gabremichael's treating psychiatrist, testified at the hearing. Dr. Links, who is a professor of psychiatry at the University of Toronto and Rotenberg Chair in Suicide Studies at the University of Toronto, is the author of many articles and books on personality disorders, and was a contributor to the *DSM IV* (The *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition) on the subject of personality disorders.

Dr. Links was asked to comment on Dr. Bail's diagnosis of personality disorder. Dr. Links testified that there can be some overlap in the diagnosis of personality disorder and depression, but disagreed with a diagnosis of personality disorder in the case of Ms. Gabremichael.

Dr. Links testified that Ms. Gabremichael was apparently functioning at a high level prior to the accident, and that this is inconsistent with a personality disorder. He also stated that a major depression will demonstrate aspects compatible with a personality disorder, and could be mistaken for such.

Both Dr. Bail and Dr. Links made reference to the *DSM IV* in their testimony. The *DSM IV* at page 633, under the heading "General Diagnostic Criteria for a Personality Disorder," specifies that a diagnosis of a personality disorder should not be made in the presence of another mental disorder, such as major depression, which could better account for the enduring pattern of reported symptoms.

Virtually all the other medical examiners referred to Ms. Gabremichael's depression, and most categorized it as a major depressive episode. In light of this, the manner in which Dr. Bail proceeded with his assessment, and the testimony of Dr. Links, I find Dr. Bail's diagnosis of "personality disorder" unconvincing.

Dr. Bail's claim that Ms. Gabremichael's problems pre-dated the accident, which appears to be founded on this diagnosis of personality disorder, is not supported by the evidence. I find Dr. Bail's views on the causation of Ms. Gabremichael's disability not convincing.

***Other Causes: Drug Interactions***

The Insurer also sought to link the symptoms complained of by Ms. Gabremichael to other incidents, extraneous to the accident. Relying on the reports of Dr. Bail, it suggested that Ms. Gabremichael's disability was due to the interaction of a range of prescription medications, treating both her headaches and her depressive condition.

In his letter dated May 10, 1999 (Exhibit 3, Tab 41), Dr. Bail remarked that Ms. Gabremichael had been given "... a cocktail of several potent psychoactive substances." He further alleged that: "...this 'cocktail' of medication she is imbibing is in all probability contributing to her subjective sense of dysphoria."

At the hearing, Dr. Bail acknowledged that all the medications prescribed were related to the conditions for which Ms. Gabremichael was being treated. Dr. Bail's curriculum vitae, which was marked as Exhibit 11, lists no particular qualifications in psychopharmacology, beyond the basic level expected of any physician.

Dr. Links testified that Dr. Bail's concerns about the medications were overstated, and that the drugs prescribed have been used safely. Dr. Links said that he recognized the possibility of interactions and this was monitored. No problems were observed. On re-examination, he elaborated that Ms. Gabremichael had not complained of side-effects from the drugs, and that there was no evidence that she was addicted to any of the medications.

I accept Dr. Links' opinion that drug interactions were not the source of Ms. Gabremichael's impairment and find that Dr. Bail's views are mere speculation with no apparent basis in fact.

### ***Relationship problems***

The other “psychosocial stressors” that Dr. Bail refers to are primarily the relationship problems Ms. Gabremichael experienced with her fiancé, Jimmy Sitotow, which ultimately culminated in their break-up. In Dr. Bail’s opinion, this stress was unrelated to the accident.

Ms. Gabremichael testified, and the reports confirm, that her fiancé, Jimmy, was driving the vehicle at the time of the accident, and was injured in the accident. It is hard to accept, without any credible supporting evidence, that the shift from what Ms. Gabremichael had described as a “perfect” relationship to a dysfunctional one was totally unrelated to the accident and its effects on the couple.

Daniel Betsuamlak, a friend of Ms. Gabremichael, testified about her social involvement before the accident. Ms. Gabremichael provided emotional support and encouragement to more recent arrivals from Ethiopia. In Mr. Betsuamlak’s case, Ms. Gabremichael even helped him prepare traditional Ethiopian food, which he found difficult due to a handicap. He described her as an active, busy, charismatic woman, who was involved in a stable relationship with her fiancé, Jimmy.

After the accident, Ms. Gabremichael withdrew from the community, no longer cared how she dressed, and was hard to reach. She was in need of support, instead of being the strong person who gave support to fellow community members. She no longer would talk about her relationship with Jimmy. She was not the same Fantu that he had known previously.

Hargu Ashagre, another friend of Ms. Gabremichael, echoed Mr. Betsuamlak’s comments, and added that Ms. Gabremichael was now emotionally depressed and cried a lot.

I accept that the accident and Ms. Gabremichael's resulting depression profoundly affected her relationship with others, including her fiancé, and find that the deterioration of Ms. Gabremichael's social relationships was the result and not the cause of her depression.

### ***Cause of Impairment***

In *Malabanan and Canadian General Insurance Company* (OIC P96-00073, February 4, 1998), at page 5, Director's Delegate Draper examined the test of causation used by the hearing arbitrator.

In reaching her decision, the arbitrator applied the correct test. She asked whether the accident **significantly or materially contributed to [the Applicant's] disability.**

[Emphasis added]

In addition to Dr. Bail's reports and testimony, the Insurer pointed to Dr. J.R. Garber's report in support of its position that Ms. Gabremichael's disabilities were not the result of the motor vehicle accident. Despite a long and critical examination of Ms. Gabremichael's complaints, Dr. Garber stated in his report dated June 14, 1996 (Exhibit 3, Tab 23, pages 32 and 33): "...Ms. Gabremichael manifested serious and significant indices of a Major Depression." However, Dr. Garber concluded that: "... I am unable to *fully* support the etiology of Ms. Gabremichael's Major Depression as being related *primarily* to the sequelae [sic] of the subject motor vehicle accident." [Emphasis added]. It is clear Dr. Garber recognized that the accident contributed to her depression and only balked at primarily attributing causation to the accident. He did not rule out a significant or material contribution of the accident to Ms. Gabremichael's depression.

Dr. Sergio Bacal, a psychologist, met with Ms. Gabremichael on March 1 and March 5, 1996 as part of the Designated Assessment Centre ("DAC") process. His report dated March 8, 1996 (Exhibit 3, Tab 15) found that her emotional dysfunction and its effects upon her physical status

amounted to a psychological impairment. He concluded that her disability resulted from the accident.

Dr. Links testified that the depression was precipitated by and due to the accident.

Whatever the diagnosis the physicians use to put a name to the changes in Ms. Gabremichael's psychological condition, I note that her condition changed coincidentally with the accident, and changed significantly for the worse. In spite of the claims of Dr. Bail, significant, credible evidence shows that Ms. Gabremichael was happy, functional and free of psychological problems prior to the accident.

The testimony of Ms. Gabremichael and her friends, and the reports of her family physician, Dr. Harizanov, shows that she suffered a serious psychological trauma following the accident, consistent with a reaction to the shock of the accident. I conclude that the emergence of Ms. Gabremichael's psychological symptoms after the accident is not a coincidence. I find that these symptoms, and the disorders themselves, arise from the accident and significantly and materially contributed to Ms. Gabremichael's disability.

### ***Essential tasks of Ms. Gabremichael's employment***

The parties agreed that Ms. Gabremichael worked primarily as a pharmacist's assistant at the Rosedale Pharmacy, and had been working there for about seven years prior to the accident. She testified that, as part of her work, she assisted in the mixing and dispensing of prescriptions, carried and filled vials, ran the computer and cash, and served customers.

Ms. Gabremichael testified that the job required concentration and included a great deal of responsibility. She would stand for most of the day, with the exception of lunch, sometimes

carrying packages for re-shelving, or assisting disabled customers in carrying out their purchases. Ms. Gabremichael worked hard to service the pharmacy's customer base. A letter from Mr. S. Haber, Pharmacist, filed as exhibit "10", stated:

...she very capably fulfilled her duties. She was particularly adept in customer relations and developed a following of devoted customers, many of whom asked for her after she had left.

In her testimony, Ms. Gabremichael emphasized the importance of the customer relations aspect of her job and reiterated that in her current depressed condition she could not deal with the public.

Ms. Gabremichael also claimed that she had a second part-time job in the Marathon Restaurant, working as a bartender and cook. She testified that this job involved heavier work, including lifting and carrying cases of beer and boxes of bottles. It also involved prolonged standing, and dealing with the public.

The Insurer did not accept that this second part-time job was legitimate, since it had not been included on the original application. Ms. Gabremichael testified that she did not understand that a secondary job could be included on the benefits application. It was added as soon as she was aware that it formed a valid part of her claim.

A statement by the employer was filed with the Insurer as were T4s and tax statements from 1995 (Exhibit 1, Tabs 52 and 53). These show that Ms. Gabremichael declared and paid tax on employment income of \$3,405 in excess of the amount received from Rosedale Pharmacy. The only reasonable conclusion is that she was employed in another position, in addition to her work as a pharmacist's assistant. I accept that Ms. Gabremichael was employed at the Marathon Restaurant on a part-time basis, and find that her essential tasks, for the purposes of section 7(1)

of the “*Schedule*,” included those tasks associated with her work as a bartender and cook at the Marathon Restaurant.

***Inability to perform essential tasks***

In the initial disability report, Dr. Harizanov expressed the hope that Ms. Gabremichael’s symptoms would resolve in some ten weeks, at which time she would be able to return to her normal tasks. From a purely physical point of view, Dr. Harizanov was probably correct in his estimate.

As early as February 6, 1996 (Exhibit 3, Tab 13), the DAC centre at Mount Sinai Hospital concluded that:

The clinical examination failed to identify any significant musculoskeletal or neurological pathology warranting further investigation or treatment. Given that there were numerous non-organic features, to proceed along a course of investigation and further treatment, would only re-enforce in Ms. Gabremichael the belief that she remains seriously injured.

Other reports confirm the opinion of the DAC that the physical consequences of the accident had essentially resolved prior to the date that Zurich ceased paying benefits. The conclusions of the reports of the treating and examining physicians can be summarized briefly. While fewer physical symptoms were manifested, the psychological symptoms were increasingly present and material — the psychological and pain component of the damages which form the crux of Ms. Gabremichael’s disability claim.

On June 23, 1997, Voc-Care Rehabilitation Management (“Voc-Care”) performed an assessment to determine vocational options for Ms. Gabremichael, at the request of Zurich (Exhibit 3 at

Tab 37). They based their report on an interview with Ms. Gabremichael and on a selected group of documents, including an “Impartial Psychiatric Assessment” prepared by Dr. Bail. They also appeared to rely heavily on the report of Dr. Nathanson. The Voc-Care report concluded that Ms. Gabremichael could do the work of a postal clerk, a sales clerk, or a supermarket clerk.

The report of Dr. Nathanson, dated June 15, 1997 (Exhibit 3 at Tab 35), states categorically at page 25 that Ms. Gabremichael should have been able to: “ ...perform the essential tasks of her employment as a pharmacist assistant, as a part time bartender as well as perform her activities of daily living...”

The preponderance of evidence, however, has been that Ms. Gabremichael was unable to perform the essential tasks of her employment at the time benefits were terminated and onwards, due to the psychological ramifications of the accident. To that extent, Dr. Nathanson’s report, and others focussing on her physical capabilities, are basically irrelevant. Ms. Gabremichael may have been physically able to perform many of her workplace tasks, but in the presence of major psychological problems, her capacity to work has remained limited.

I find that the opinion of Ms. Gabremichael’s treating psychiatrist provides the most convincing evidence of Ms. Gabremichael’s condition and capabilities. Dr. Links stated in his report dated March 29, 1999 (Exhibit 3, Tab 40) that:

The prognosis is somewhat guarded. The patient has had a moderate response to the antidepressant medication. Her response has been attenuated because of chronic pain disorder, ongoing difficulties in her relationship and some exacerbation of both the depression and her pain because of her passivity and dependency.

In his testimony, Dr. Links stated that Ms. Gabremichael would not be able to return to work as of the day of the hearing. I accept Dr. Link's conclusion.

I accept that a seriously depressed individual, suffering from ongoing pain and the resultant problems, could not successfully perform the job of pharmacy assistant. Ms. Gabremichael is not able to interact effectively with the clientele of the pharmacy, and cannot be depended upon to pay close attention to the dispensing of medications.

I also note that a person who has attempted suicide and remains depressed should not be placed in proximity to dangerous and potentially fatal drugs. I find that Ms. Gabremichael could not perform the essential tasks of her employment as a pharmacy assistant in September 1997, and continues to be so prevented, by virtue of her chronic depression, post-traumatic stress and chronic pain.

Ms. Gabremichael's position as bartender/cook involved more heavy lifting and physical exertion than her work in the pharmacy. Dr. Links testified that as a result of depression, Ms. Gabremichael had become deconditioned. She would not likely find lifting cases of beer an easy job.

The evidence shows Ms. Gabremichael's "people" skills also suffered due to her depression. Her propensity to burst into tears, reduced functional abilities and loss of concentration make it unlikely that she would be kept on as a bartender/cook, even if she felt able to undertake the work.

I find that, as a result of her ongoing depression, she is unable to perform the essential tasks of her job as bartender/cook in the Marathon Restaurant.

***Duration of Ms. Gabremichael's impairment***

Dr. Links testified that Ms. Gabremichael has shown some signs of improvement on her current medications. He testified that Ms. Gabremichael has not recovered, but is making progress. He further testified that Ms. Gabremichael would still be unable to return to work, as of the day of the hearing.

Dr. Links pointed out a gradual improvement in Ms. Gabremichael's condition at present, but cautioned that in some 20 to 30 percent of patients treated for serious depression the condition takes a protracted and chronic course.

Based on the testimony of Ms. Gabremichael and Dr. Links, and in the absence of credible psychiatric evidence to the contrary, I find that Ms. Gabremichael's psychological impairment has continued and continues to prevent her from carrying out the essential tasks of her employment as a pharmacist's assistant as well as a bartender/cook.

**Issue 2: Is Ms. Gabremichael entitled to payment for supplementary medical expenses for prescription medication claimed?**

Section 36 (1)(c) of the *Schedule* provides that an insurer shall pay for all reasonable medication expenses incurred by an insured person, as a result of the accident, if the insured has sustained an impairment as a result of the accident.

I found that Ms. Gabremichael has suffered from a loss or abnormality of psychological function. She suffers from major depression, post-traumatic stress, and chronic pain. Her family physician, Dr. Harizanov, her neurologist, Dr. Mossanen, and her psychiatrist, Dr. Links, have all prescribed medications to deal with aspects of her disorders.

Dr. Harizanov, in a letter to Zurich dated May 12, 1997 (Exhibit 3, Tab 32), listed Ms. Gabremichael's medications at that time as: Paxil, Amitriptylin, Cytomel, Rivotril and Imitrex. From the contents of this letter and others, it is apparent that Dr. Harizanov, Ms. Gabremichael's primary physician, monitored and followed up on prescriptions issued by consulting specialists as well as himself.

Dr. Bail's reports, filed on behalf of the Insurer, took issue with the drugs prescribed by Ms. Gabremichael's physicians, and speculated on possible drug interactions. However, Dr. Bail admitted in his testimony that none of the drugs prescribed were inappropriate to the conditions being treated. He was concerned about potential interactions and the expense of the drugs, but acknowledged that other physicians would prescribe the same drugs in similar circumstances.

Ms. Gabremichael has testified that she suffered severe headaches and depression as a result of the accident, and most medical reports submitted support her in this assertion. The medications claimed were for treatment of these impairments and were prescribed by qualified physicians.

Ms. Gabremichael testified that she borrowed considerable funds from friends, and cashed in savings and investments to pay for her drug therapy. This underlines her view of the necessity of continuing the drug therapy.

It is not in the expertise of the arbitrator to second-guess physicians and decide on the most effective drug therapy for an applicant. I accept that these drugs have been prescribed for Ms. Gabremichael by medical experts, for conditions that required treatment, and that the prescriptions were appropriate to the conditions being treated. I find therefore that the prescription drug expenses were reasonable and necessary expenses as outlined in section 36(1)(c) of the Schedule, and related to the accident, and should be reimbursed by the Insurer.

**Issue 3: Is Ms. Gabremichael entitled to payments for housekeeping services from September 20, 1997 and beyond, pursuant to the *Schedule*?**

Section 55 of the *Schedule* allows an insured person to claim from the insurer for “... additional expenses, reasonably incurred by, or on behalf of the insured person as a result of the accident for housekeeping and home maintenance services.”

Ms. Gabremichael has claimed reimbursement for the housekeeping services provided by Askale Adera subsequent to the accident. Ms. Gabremichael testified that she cannot take care of her personal needs unassisted, nor clean the apartment, or do the laundry and dishes. Ms. Adera also assisted Ms. Gabremichael by making traditional Ethiopian foods, the preparation of which is time-consuming.

Following the accident, Ms. Gabremichael had physical injuries that were estimated by Dr. Harizanov to take some 10 to 12 weeks to resolve. The initial tenderness, pain and strain would have made heavy housework difficult. The first Health Practitioner’s Certificate from Dr. Harizanov clearly identified prolonged standing and walking as a restriction. This would have affected Ms. Gabremichael’s ability to prepare traditional foods, and carry out dishwashing and clean-up tasks.

I have already dealt with the Insurer’s argument that Ms. Gabremichael did not sustain an impairment as a result of the accident, and therefore was not entitled to additional expenses for housekeeping services.

In support of the proposition that housekeeping services were neither reasonable nor necessary, the Insurer relied on the reports of Drs. Bail and Nathanson, as well as the report of Physiogenic Rehabilitation Services.

I will deal first of all with the report of Dr. Nathanson. Dr. Nathanson, a chiropractor, examined Ms. Gabremichael on June 24, 1997. An insurer's examination a year earlier by Dr. Garber, a psychologist, had concluded that Ms. Gabremichael manifested "... serious and significant indices of a major depression." Dr. Garber had described Ms. Gabremichael in this report as: "...exceedingly isolated and vulnerable". Dr. Nathanson's report mentions that he had reviewed past file documentation, including Dr. Garber's report and the reports of Dr. Links, Ms. Gabremichael's treating psychiatrist.

Given that Dr. Nathanson was aware of Ms. Gabremichael's vulnerable psychological state, the circumstances surrounding his examination of Ms. Gabremichael raise questions about the conduct of this examination.

Ms. Gabremichael testified that during the examination, Dr. Nathanson began to take photographs of her, without her authorization. He refused to desist when she protested. She further testified that immediately following the examination she returned to Dr. Nathanson's office, intent on retrieving the unauthorized photographs.

An altercation ensued in which Dr. Nathanson brought in the police to evict Ms. Gabremichael. Ms. Gabremichael claimed to have been kicked and beaten and to have been treated for broken ribs as a result of the police intervention. This evidence was uncontradicted at the hearing.

I cannot help but conclude that Dr. Nathanson's report is tainted by this regrettable conclusion to the examination.

The report dated March 18, 1996 by Karen Kennedy (Exhibit 3, Tab 17) of Physiogenic Rehabilitation Services referred to by the Insurer in its response is the functional capacity portion of a multi-disciplinary assessment. Ms. Kennedy found that:

There is insufficient objective evidence to support the presence of any physical impairment or disability in this claimant. Thus, it would be expected that this claimant should be physically capable of performing any physical activities or work that she could do prior to the motor vehicle accident.

Ms. Kennedy's conclusion about physical disability must, however, be read in the context of the complete DAC report which supports the view that Ms. Gabremichael's capacity was seriously compromised by her psychological problems.

I accept that the evidence shows that the same psychological impairments which prevented her return to work, consistently prevented Ms. Gabremichael from caring for herself adequately.

It is clear that the "impairment," referred to in section 55 of the *Schedule* as a pre-condition to the payment of housekeeping expenses, may include a psychological impairment. As Arbitrator Palmer stated in *Kats and AXA Insurance (Canada)* (OIC A97-000194, December 22, 1997): "In my view, it is also noteworthy that physical impairment is not the only reason such services will be provided. Psychological impairment also qualifies."

On October 22, 1996, Dr. Links, Ms. Gabremichael's attending psychiatrist, wrote a letter responding to the Insurer's questions about "attendant care giver services." At Exhibit 3, Tab 27, Dr. Links stated:

In my discussions with [Ms. Worku], I understand that [Ms. Gabremichael's] homemaker is coming in six days a week and is assisting her with laundry, cooking, cleaning and shopping. Ms. Worku reports she needs this instrumental help because of ongoing chronic pain and she feels that she is functionally limited to carry out these activities. In addition, I have noted on the patient reports that the attendant provides a great deal of emotional support to the patient.

Ms. Gabremichael testified at the hearing that a homemaker was necessary, and that she still had difficulty preparing meals and looking after herself and her apartment. Ms. Gabremichael also testified that the person who had been performing her housekeeping services had left her employ when it became apparent that she might be called to testify in this matter, and cannot now be found.

Dr. Bail, the Insurer's medical witness, stated in his report dated August 14, 1997 at page 8 (Exhibit 3, Tab 36): "From a psychiatric point of view, the housekeeping services that have been provided are extremely excessive and totally unreasonable and unnecessary."

Dr. Links was questioned about Dr. Bail's statement and the issue of whether the provision of housekeeping services fed into the "sick role behaviour." Dr. Links indicated that he would like Ms. Gabremichael to gradually take back her housekeeping role.

Dr. Bail's recommendation of a discontinuance of housekeeping services has the same weight as the rest of his report. I have already found that his conclusions were not convincing. Dr. Links, as Ms. Gabremichael's treating psychiatrist, testified as to her need for assistance, and as well her need to regain her independence, by gradually reducing the level of assistance provided. I accept Dr. Link's conclusions on this matter.

I find that, based on the evidence provided to me, the provision of housekeeping services up to the time of the hearing, as claimed by Ms. Gabremichael, was reasonable, and that the provision of these services was necessary due to Ms. Gabremichael's disabling depression, which arose from the accident.

I find, as well that, in accordance with Dr. Link's testimony, a reduced level of housekeeping services should be provided henceforth, and Ms. Gabremichael shall be entitled to the provision of the equivalent of about one day of housekeeping services per week, while her disability persists.

**Issue 4: Special Award**

Section 282(10) of the *Insurance Act* provides that an arbitrator shall make a lump sum award of up to 50 percent of the amount to which an applicant is entitled at the time of the award if the arbitrator finds that an insurer has unreasonably withheld or delayed payments.

Zurich ceased paying Ms. Gabremichael's income replacement and other benefits on September 20, 1997. It withheld all payments subsequent to that date because of its belief that no benefits were either owing or due.

I found that Zurich's obligation to pay Ms. Gabremichael's benefits continued past September 20, 1997, and continues to date. If I find that Zurich unreasonably withheld these payments, then I am obliged to make a special award against it.

In a letter to Fantu Gabremichael, dated September 3, 1997 (Exhibit 1, Tab 57), Zurich gave notice of the imminent stoppage of benefits. Zurich gave, as support for its decision, the reports of Dr. Nathanson and Dr. Bail.

If Zurich ignored all other available evidence, and concentrated only on the reports of Dr. Bail and Dr. Nathanson, it might be able to argue that it was justified in cutting benefits to Ms. Gabremichael. Dr. Bail had concluded that Ms. Gabremichael was not psychiatrically disabled as a result of the motor vehicle accident, and Dr. Nathanson had found that physiologically Ms.

Gabremichael was not disabled. Both reports unequivocally support the position of the Insurer, but both are flawed.

Prior to commissioning Dr. Bail's report, however, Zurich had received documentation from Ms. Gabremichael's physicians, which pointed to a psychological impairment as the primary disability suffered by Ms. Gabremichael. The Insurer had, in addition, sent Ms. Gabremichael for assessments with Dr. Sergio Bacal, a Psychologist, Dr. Joseph Garber, Psychologist, and Dr. Harvey Stancer, Psychiatrist. All of these experts confirmed that Ms. Gabremichael was suffering from clinical depression, and all referred to a causal linkage between her depressive disorder and the motor vehicle accident.

The Medical Brief (Exhibit 3) lists at least fourteen examinations and assessments of Ms. Gabremichael as part of the adjustment of her claim by the Insurer. Counsel for Ms. Gabremichael implied that Zurich might have been on a quest for a favourable report, or "doctor shopping." The fact that the Insurer's examinations appear to have ended once Dr. Bail confirmed its opinion gives some credence to this suggestion..

Letters from Watson Insurance Adjusters Inc., dated February 26, 1996 and May 24, 1996, were filed as part of the joint production brief (Exhibit 1, Tabs 38 and 39). These letters contain reports on Ms. Gabremichael's housekeeping claim, and her claim to have worked part time for the Marathon Restaurant. The letters are couched in language that treats Ms. Gabremichael and her claim with doubt and suspicion. At page 4 of the letter of February 26th, Mr. K.R. Watson writes:

I cannot believe your insured did not understand the instructions in the application, or their intent. Why would she not then declare that she had this part time job if she was not able to perform the duties of that job?

The only reason that makes sense to me as to why she would not inform you of that part time job is if she intended to continue working there, unknown to you,

while a weekly benefit was being paid because of her alleged inability to work at her primary job. She of course will deny that.

Mr. Watson's letter of May 24, 1996 also deals with the secondary job issue. It concludes:

If in fact she worked at this restaurant as alleged, any tips she made on a nightly basis, she would keep and therefore the cheque allegedly represents the income earned on an hourly basis. Clearly none of the figures coincide however we shall advise further after our visit to the bank. I don't believe any of this.

In the absence of testimony by a representative of Zurich, these internal adjustor's letters are the only direct evidence of Zurich's attitude to Ms. Gabremichael, in processing her claim. However some indirect clues as to the state of mind of the Insurer's representatives are available.

The report of Dr. Garber (Exhibit 3, Tab 23), at page 4 lists a review of relevant materials he received from the Insurer. He quotes from the "Letter of Request" from Zurich Canada:

She complains of headaches and the inability to sleep at nights having "flashbacks" about the accident... With respect to counselling, please advise if this is in relation to the accident, as there was a death in Ms. Gabremichael's family back in Ethiopia after the motor vehicle accident.

Dr. Garber noted that she did not mention the death in the family when questioned about trauma and "...denied any significance to the aforementioned." The "death of a family member" is mentioned nowhere else in the materials nor in the oral evidence, and seems likely to have been, at best, speculation.

I note that in resisting Ms. Gabremichael's claims for benefits Zurich advanced theories that Ms. Gabremichael's symptoms were due variously to pre-existing conditions, relationship stress, or malingering motivated by gain. My impression is that Zurich was open to considering every

possible explanation for Ms. Gabremichael's problems except the most obvious one: a reactive depression and post-traumatic stress arising out of the motor vehicle accident.

Zurich did not choose to call any evidence on its decisions leading to the stoppage of benefits. It seems to have made no attempt to reconcile the mass of expert evidence in favour of a finding of disability, with the opinions expressed by Dr. Bail. In fact, Zurich seems to have proceeded selectively taking the potentially favourable elements from any reports, and ignoring anything that did not support its position.

Arbitrator Seife in *Maas and State Farm Mutual Automobile Insurance Company* (OIC A-015935, October 16, 1996) examined the question of an insurer's obligation in terminating benefits:

In my view, when considering termination of benefits, an insurer must not rely selectively on reports that tend to support termination. It must consider the totality of the evidence available to it.

Counsel for the Applicant pointed out that the date of the cutoff by the Insurer was just short of the date when the Insurer would have been under the obligation to make a Loss of Earning Capacity Benefit offer pursuant to section 21 of the *Schedule*. While there was no direct evidence presented of bad faith on behalf of the Insurer, this coincidence does raise suspicions about the reasons underlying the cutoff of benefits.

Ms. Gabremichael testified that she was severely affected by Zurich's decision to terminate her benefits. As the evidence indicated, she continued to be depressed, and unemployable. Since she did not view it as proper to go on welfare, she was forced to liquidate her assets, and borrow extensively to continue to pay for her medication and daily living expenses. It is hard to imagine that this added stress did anything to promote Ms. Gabremichael's recovery from depression.

As Arbitrator Palmer wrote in *Plowright and Wellington Insurance Company* (OIC A-003985, October 29, 1993):

Whereas I view the obligation of the Insurer to work as a partner with the Applicant, his family doctor and other health care professionals in the rehabilitation of this insured person, in many respects the claims of [the Applicant] have been treated with suspicion, more like those of a third party in the tort system of damage compensation.

I am left with the similar conclusion that, from 1996 onwards, Zurich ceased to work as a partner in the rehabilitation of Ms. Gabremichael.

In the face of convincing evidence as to the existence of a substantial psychological disability, Zurich exacerbated Ms. Gabremichael's situation by ceasing to pay for necessary medications, and refusing to pay further income replacement benefits.

I find that the Insurer's reliance on the reports of Dr. Bail and Dr. Nathanson, in the face of consistently credible information to the contrary, was unreasonable. I find therefore that Ms. Gabremichael has met the test for a special award pursuant to section 282(10) of the *Insurance Act*.

### ***Amount of Special Award***

Under section 282(10) of the *Insurance Act*, an arbitrator has the discretion to set the amount of a special award, up to 50 percent of the amount awarded to an applicant.

The Insurer did pay benefits for almost two years to Ms. Gabremichael and, although her claim may have been treated with suspicion by some persons in the employ of the Insurer, her basic

needs for medication and support were met, at least in the initial period. I find that this mitigates the effect of the Insurer's later actions to some degree.

The amount of the special award should however bear some relation to the serious consequences of the failure to pay benefits. Ms. Gabremichael has testified that she suffered financially and emotionally as a result of the unreasonable actions of the Insurer. Therefore, I order that Zurich pay to Ms. Fantu Gabremichael \$10,000, inclusive of interest, as a special award.

**EXPENSES:**

The issue of expenses was not addressed at this hearing. I am prepared to hear submissions on expenses, if the parties are unable to agree.

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John Wilson  
Arbitrator

October 12, 1999

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Date

**BETWEEN:**

**FANTU GABREMICHAEL**

**Applicant**

**and**

**ZURICH 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. Zurich shall pay a weekly income replacement benefit at the rate of \$511.86 from September 20, 1997 to date and ongoing (plus indexation, where applicable ), pending Zurich's delivery of a loss of earning capacity benefits offer and compliance with the procedures set out in sections 21 to 23 of the *Schedule*.
2. Zurich shall reimburse Ms. Gabremichael for all outstanding prescription expenses, pursuant to section 36(1) of the *Schedule*.
3. Ms. Gabremichael is entitled to a payment of \$1,000 per month for housekeeping expenses from September 20, 1997 to present, and \$200 per month henceforth, while her disability persists.
4. Zurich shall pay to Ms. Gabremichael \$10,000 as a special award.
5. Zurich shall pay interest on overdue amounts in accordance with section 68 of the *Schedule*.
6. The issue of expenses may now be spoken to.

October 12, 1999

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John Wilson  
Arbitrator

