IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF an Arbitration

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

and

PAFCO INSURANCE COMPANY and COOPERATORS GENERAL INSURANCE COMPANY

Respondents

AWARD

Heard: July 11, and July 12, 2013

Counsel:

Victor Bulger for the Applicant, Jevco Insurance Company

Tricia McAvoy for the Respondent, Pafco Insurance Company

Bruce Keay, for the Respondent, Cooperators General Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction[1]

This loss transfer dispute arises out of two motor vehicle accidents occurring July 7, 2006, and August 27, 2006. The Statutory Accident Benefits Schedule ("SABS") claimant, David Stewart, was operating a 1986 Yamaha motorcycle at the time of both accidents. He was insured by the applicant, Jevco Insurance Company[2] for both accidents. He applied to, and received SABS from Jevco for both accidents.

Jevco seeks loss transfer indemnification from either, or both of the respondents, Pafco Insurance Company ("Pafco"), and Cooperators General Insurance Company ("Cooperators").

For the purposes of this loss transfer arbitration, Pafco and Cooperators concede that their insureds were liable for the accidents, and that their vehicles were vehicles that would qualify under the loss transfer regulation[3]entitling Jevco, as the insurer of Mr. Stewart's motorcycle, to loss transfer indemnification from them.

The issue, more specifically stated later in this Award, is whether Jevco is entitled to recover loss transfer indemnification from one or both of Pafco, and Cooperators, the proper apportionment, if any, between Pafco and Cooperators of any indemnification amount, and the quantum of any indemnification amount.

[1] The information for the Introduction is taken from Exhibit 2, Agreed Statement of Facts or from facts not in dispute based on the evidence.
[2] At the time of the accidents Jevco Insurance Company was known as Kingsway General Insurance Company. This award will refer to the applicant as "Jevco" throughout.
[3] Regulation 664 made pursuant to the *Insurance Act*, RSO 1990, C. 198, as amended.

The Issues[4]

1. Whether the Applicant, Jevco Insurance Company, is entitled to loss transfer indemnification from the Respondent, Pafco Insurance Company, and/or the Respondent, Cooperators General Insurance Company, in regard to the accident benefits paid by the Applicant to or on behalf of David Stewart as a result of two motorcycle accidents, which occurred on July 7, 2006 and August 27, 2006.[5]

2. In the event that it is determined that the Applicant is entitled to loss transfer indemnification from the Respondents or either of them, the percentage or the amount in which the indemnification is to be paid by the Respondents or either of them to the Applicant.

3. The amount of costs to be paid by any party.

Evidence

The following documents and *viva voce* testimony were introduced into evidence at the arbitration hearing.

Exhibit 1: Arbitration Agreement executed in counterpart, November 30, 2010, and January 11, 2011.

Exhibit 2: Agreed Statement of Facts executed July 11, 2013.

[4]Quoted from Exhibit 1, Arbitration Agreement.
[5] The Arbitration Agreement erroneously refers to the second accident as August 26, 2006. The correct date has been inserted here. Nothing turns on this typographical error.

Exhibit 3: Joint Document Brief, Volumes I – VI, Tabs 1 – 109.

Exhibit 4: Transcript of Examination under Oath of Dr. Jason Azad, April 18, 2013.

Exhibit 5: Transcript of Examination under Oath of Carolynn Stewart, April 18, 2013.

Exhibit 6: Transcript of Examination under Oath of Laura Anne Miller, April 18, 2013.

Exhibit 7: Benchmark Rehabilitation Inc. Confirmation of Service (Catastrophic Impairment Designation), 20 pages.

Exhibit 8: Explanation of Benefits (OCF – 9), June 8, 2010.

Exhibit 9: Pafco letter to Jevco, April 26, 2010.

Exhibit 10: Cooperators letter to Jevco, May 7, 2010.

Exhibit 11: Loss Transfer Summary.

Exhibit 12: Jevco letter to Cooperators, March 12, 2010 Enclosing Loss Transfer Request for Indemnification, March 12, 2010.

Exhibit 13: Anderson Wilson letter to Pafco and Cooperators, August 6, 2010, enclosing Benchmark Rehabilitation Inc. Multidisciplinary Insurers Examination (Catastrophic Impairment Determination) Report.

Exhibit 14: Lomax Law Firm letter to Jevco, July 10, 2008, Enclosing Application for Expenses (OCF – 6), July 9, 2008.

Witness: Chrislyn Alexander, Accident Benefits Claims Examiner – Jevco.

Analysis

The first issue to be addressed is whether Jevco is entitled to loss transfer indemnification from Pafco and/or Cooperators.

As I indicated in the Introduction, there is no issue that the Pafco and Cooperators vehicles qualify under the loss transfer regulation as vehicles the insurers of which are responsible to indemnify an insurer of a motorcycle for SABS paid. Fault for the accidents is also conceded by Pafco and Cooperators, so section 275 (2) is satisfied.[6]

No limitation arguments regarding Loss Transfer Requests for Indemnification were raised by Pafco or Cooperators.

Pafco did arguethat it was open to me on the evidence to find that Jevco could be found partially disentitled to loss transfer indemnification by failing to meet the appropriate claims handling standard of a first party loss transfer insurer seeking indemnification from a second party loss transfer insurer.Pafco submitted that Jevco could be found to have not met the standard by not directingthe catastrophic impairment assessors to consider both the July 7, 2006 and August 27, 2006 accidents in determining whether Mr. Stewart was catastrophically impaired.

I will consider this argument in more detail in my analysis of the catastrophic impairment assessment.

[6]The *Insurance Act*, *supra,* note 3.

Chrislyn Alexander testified on behalf of Jevco to explain Jevco's handling of Mr. Stewart's SABS claim. She is an accident benefits claims examiner with 10 years' experience. She began handling Mr. Stewart's file in early 2009.

Ms. Alexander said that Jevco received two separate SABS applications for the July 7, 2006, and August 27, 2006 accidents. They were handled in a manner which she termed a "side-by-side" administration, as benefits were paid for a period of time for both claims.

The SABS paid to Mr. Stewart by Jevco consisted of payments for Medical and Rehabilitation Benefits, and Attendant CareBenefits.

Ms. Carolynn Stewart, Mr. Stewart's stepmother, became Mr. Stewart's court appointed substitute decision-maker, so Jevco dealt with Ms. Stewart with respect to the submission of treatment plans for David Stewart.[7] The appointment of Carolynn Stewart as David Stewart's substitute decision-maker occurred as a result of a perceived deterioration in his condition as time went on after the accidents.

Ms. Alexander summarized the SABS payments made for the two accidents, as allocated by Jevco. I have reproduced the breakdown of the payments here:[8]

<u>July 7, 2006</u>

Medical and Rehabilitation Benefits	$46,322.34
Attendant Care Benefits	$31,840.00

[7]Carolynn Stewart was appointed as David Stewart's substitute decision maker February 10, 2009 (Exhibit 5, Q. 8).
[8] The summary of the payments is confirmed in Exhibit 11.

Expenses	$23,435.94
Total for first accident	$101,598.28
August 27, 2006	
Medical and Rehabilitation Benefits	$575,197.32
Attendant Care Benefits	$138,661.80
Expenses	$ 81,082.79
Total for second accident	$794,941.91

Ms. Alexander testified that out of the total amounts indicated above, Jevcoconcluded that it was entitled to section 275 loss transfer indemnification in the net amount of $688,705.90. Jevcoreduced this amountduring the course of the hearing, acknowledging adouble payment of Attendant Care benefits.[9] The total loss transfer indemnification being sought by Jevco from Cooperators and Pafco is $666,505.90.

The significant disparity in the allocation of SABS payments between the two accidents is the main issue in this arbitration. Ms. Alexander explained that the reason Jevco allocated the majority of the SABS payments to the August 27, 2006 accident is the conclusion of the Multidisciplinary Insurers Examination (Catastrophic Impairment Determination).[10] The CAT Assessment was completed between March 4, 2010, and April 17, 2010. The report is dated June 14, 2010.

[9]Refer to page 147 of this Award for an explanation of the reduction.
[10]Exhibit 3, Tab 63 (“CAT Assessment”).

The CAT Assessment concluded that as a result of the August 27, 2006 accident, Mr. Stewart had a Marked Impairment (Class IV) under criterion G of the AMA Guidelines, and that he met the 55% whole person impairment criteria to qualify for the catastrophic impairment designation. The conclusion appears to have been reached on the basis that the August 27, 2006 accident was the "subject motor vehicle accident" for the purposes of the catastrophic impairment designation.

Ms. Alexander testified that based on this conclusion, effective April, 2010, Jevco stopped allocating to both the July 7, 2006, and August 27, 2006 accidents SABS paid to Mr. Stewart. From that point forward, Jevco allocated SABS paid only to the August 27, 2006 accident.

This allocation is reflected in the various Loss Transfer Requests for Indemnification ("LTRI") submitted by Jevco to Cooperators and Pafco.[11] Between September, 2008, and April, 2010, Jevco submitted to Cooperators 5 LTRI, seeking indemnification for SABS paid in the total amount of $72,226.15. In response to these LTRI, Cooperators paid a total of $23,946.00.

In a May 7, 2010 letter from Cooperators to Jevco, Cooperators declined to make any further payments.[12]

Between September, 2007, and December, 2009, Jevco submitted to Pafco 7 LTRI seeking indemnification for SABS paid in the total amount of $139,789.65. In response to these LTRI, Pafco paid a total of $69,237.58.

[11]Complete details of the dates of the various LTRI, the indemnification amounts requested, and the amounts paid by Cooperators and Pafco in response to these LTRI are contained in Exhibit 2, paragraphs 11, and 12.
[12]Exhibit 10.

In an April 26, 2010 letter from Pafco to Jevco, Pafco declined to make any further payments.[13]

Between July, 2010, and May, 2013, Jevco submitted to Pafco a further 25 LTRI seeking indemnification for SABS paid in the total amount of $588,164.79. As indicated, no payments were made by Pafco after April, 2010.

No evidence was introduced by any party to explain the reason for the difference in the allocation of SABS in the LTRI sent to Cooperators and Pafco prior to April, 2010.

Neither Cooperators nor Pafco dispute the appropriateness of Jevco's decision to pay SABS to Mr. Stewart on the basis that he was entitled to the larger limits available to a catastrophically impaired person.[14] The dispute between them is limited to how the amounts paid by Jevco should be allocated between Cooperators and Jevco for the purposes of loss transfer indemnification.

Subject to any impact on quantum of Pafco's argument regarding Jevco's handling of the CAT Assessment, the only dispute with regard to quantum raised by Cooperators and Pafco in connection with SABS payments made by Jevco relates to some lump sum payments for Attendant Care. I will deal with the reasonableness of payments issue as it relates these payments for Attendant Care after I have dealt with the main issue –the proper apportionment of loss transfer indemnification between Cooperators and Pafco.

[13]Exhibit 9.
[14]Exhibit 2, paragraph 10.

To determine the issue of how loss transfer indemnification should be apportioned between Cooperators and Pafco, a comprehensive analysis of the voluminous evidence, and the submissions of counsel following the two day hearing is required.

Before commencing my analysis I would also like to point out that this is a case which highlights very clearly the different focus and methodology of medical and legal professionals in their approach to these matters.

Medical opinions deserve deference when those opinions are based on medical expertise being applied to accurately reported, recorded, and interpreted facts and assumptions. As the medical experts will concede however, if any of the reporting, recording, or interpretation of these underlying facts and assumptions is done incorrectly, then frequently the medical opinion is incorrect, or incomplete.

The primary focus of the medical professionals is to try to determine a diagnosis, or what is wrong with a patient, and then to try to come up with a plan to treat the problem so that it can be cured or alleviated. In doing so they must interpret information provided to them, and they generally assume that they are being provided with accurate information. Apart from the limited circumstances where validity testing is required, the role of the medical professional is not to cross examine the provider of the information at length to determine its veracity, or to launch a detailed fact verification exercise to ensure the correct interpretation of the information being provided. Generally speaking, the medical expert takes the information at face value and pursues the previously stated medical objectives.

Medical professionals are usually concerned with the cause of a medical problem only to the extent that it is relevant to the diagnosis and treatment of that problem. In a case like Mr. Stewart's, although a conclusion that he sustained multiple instances of head trauma can make a difference in diagnosing the problem, and in formulating a prognosis, assigning greater or lesser responsibility to one accident or another is not the primary focus of the medical professionals.

The role of counsel, and certainly my role as arbitrator, is much different. My task is to determine the proper allocation of legal responsibility between two accidents for SABS payments made to Mr. Stewart. To do that I must I must apply the proper legal test of causation to the evidence, and decide whether the evidence indicates that one or both accidents are responsible for Mr. Stewart's problems. This exercise requires an evaluation of the foundation upon which medical conclusions were made. I must test the reliability of information provided, determine whether that information has been properly interpreted, and decide on the weight to be given to the medical opinions based on an examination of the underlying facts and assumptions for those opinions.

I will say at the outset that my review of the totality of the evidence leaves me with considerable concerns regarding the reliability of what Mr. Stewart has said in connection with both accidents. I take a somewhat more cynical view of Mr. Stewart's presentation and motives than did many of the medical professionals whointeracted with him. I appreciate however, thatmy training and expertise is different, and my task as arbitrator requires a different methodology than that employed by the medical professionals. I have also had the benefit of considering much additional evidence not

available to the medical professionals during their involvement with Mr. Stewart. I will elaborate on these comments as appropriate, in my analysis which follows.

I will also stress here that I appreciate my task is not to decide whether the large amount of SABS that have been paid to or on behalf of Mr. Stewart ought to have been paid. For the purposes of this proceeding it has been agreed that Mr. Stewart is catastrophically impaired, and payment of benefits on a catastrophic impairment level by Jevco was appropriate. The main issue that I must decide is the proper apportionment of loss transfer indemnification for the SABS paid by Jevco between Cooperators and Pafco.

To give my analysis some context, I will summarize the positions taken by Cooperators and Pafco on the apportionment issue. I will address their arguments on the law later when I come to my analysis of the cases.

Cooperators submits that as a result of the July 7, 2006 accident Mr. Stewart sustained minor injuries, and at most, a mild concussion. It was only as a result of the second accident of August 27, 2006 that he suffered impairments that ultimately resulted in the catastrophic impairment designation, as confirmed by the CAT assessment in 2010.

Consequently, Cooperators submits that it should be responsible to pay what Jevco allocated to it for medical and rehabilitation benefits – $46,322.34, plus half of the Attendant CareJevco attributed to Cooperators as a result of the July 7, 2006 accident, with the other half being attributed to Pafco. A total of $31,840.00 was attributed to the July 7, 2006 accident for the first two years of Attendant Care. If this was reduced as

suggested by Cooperators, then only $15,920.00 of this amount would be allocated to Cooperators.

Alternatively, as a worst-case scenario, Cooperators submits that its exposure should be for no more than the non-catastrophic limits of $72,000.00 for Attendant Care, the maximum allowable to the second anniversary of the August 27, 2006 accident,and $76,000.00 for medical and rehabilitation benefits, for a total of $148,052.92.

Pafco submits that the two accidents both contributed to Mr. Stewart's impairments that ultimately led to the catastrophic impairment designation.Pafco argues thatthe two accidentswere similar in nature and consequences. They were approximately 6 to7 weeks apart. On the evidence, it is notpossible to differentiate between the accidents to the point of concluding that the July 7, 2006 accident did not contribute to the catastrophic impairment designation, and that it was only the August 27, 2006 accident thatshould be responsible, in law, for the catastrophic impairment designation.

Pafco submits that the CAT Assessment conclusion that Mr. Stewart was catastrophically impaired as a result of the August 27, 2006 accident does not preclude a finding that the July 7, 2006 accident contributed, in law, to that condition. Therefore, what is required is an equal apportionment between the two accidents of the SABS paid by Jevco for the purposes of loss transfer indemnification.

Regarding Cooperators' argument concerning the split of the first two years of Attendant Care benefits attributed to it, Pafco submits that the manner in which Jevco has allocated this and any other benefits ought not to determine the issue. At the very

least, the $40,280.00 paid for both accidents for the first two years ofAttendant Care should be split equally between Cooperators and Pafco.

As discussed later in this Award, Cooperators and Pafco jointly submit that Jevco's loss transfer indemnification for the total Attendant Care amount paid ($170,501.80) should be further reduced by at least $23,660.00 for the 21 months between the second anniversary of the August 27, 2006 accident, and May 31, 2010, and by approximately $25,000.00 between July 7, 2006 and October 29, 2007.

I will summarize Mr. Stewart's health condition prior to both the July, and August 2006 motorcycle accidents. It is clear from a review of the records, in particular, the clinical notes and records of Mr. Stewart's family physician, Dr. Azad, and his psychiatrist, Dr. Rai, that Mr. Stewart had significant physical and psychiatric problems prior to either 2006 accident.[15]

Mr. Stewart was a patient at the St. Thomas psychiatric Hospital in the mid-1990s. Documentation in the ODSP file[16]references this, and confirms the extent and duration of his psychiatric problems. A summary of his medical status as at October 21, 1996 in this file states as follows, "*extended drug and alcohol abuse has negatively affected his concentration, memory and mood shifts*." It is noted that he was diagnosed with schizophrenia and a severe anxiety disorder. The records indicate that he was on various psychotropic and pain medication for many years prior to the 2006 accidents.

Mr. Stewart began seeing a psychiatrist, Dr. P.K. Rai, in February, 1998. As is documented in Dr. Rai's records, and later confirmed by Dr.Rai in letters to Ms. Shirley

[15]Exhibit 3, Tab 101 (Dr. Rai), and Tab 102 (Dr. Azad).
[16]Exhibit 3, Tab 103.

Lee of the Acquired Brain Injury Team at the Windsor Metropolitan Hospital, Mr. Stewart was diagnosed as suffering from Anxiety Disorder and Personality Disorder. He was treated with Oxazepam, Effexor, Tegretol, and Mogadon. He was being seen every three months. He had a history of sleeping difficulty, and a history of reported drug use at age 13. He was also a smoker. Medication management and psychotherapy were recommended.

The ODSP indicates that as far back as the late 1990s he was designated as permanently unemployable as a result of these conditions. He had not been gainfully employed in many years leading up to the 2006 accidents.

Dr. Azad's clinical notes and records indicate that Mr. Stewart had a significant problem with back pain as far back as the records go (June 2001). It would appear as well that his head injury problems go back at least that far. There is a June 21, 2001 entry where he reports to Dr. Azad that he had fallen off a roof 1 to 2 months earlier. He had been complaining of pain in his left temple and a twitch in his left eye for two weeks. He was also told that he hit his head at a party. He had numbness in his left arm and hand.

Dr. Azad's notes contain a consultation report from an orthopedic surgeon dated December 21, 2001 to whom he was referred for mid and low back pain. In the "history of complaint" section, the note states as follows, "*This man has had mid and low back pain for a number of years. He used to race motorbikes and drag race. He has had multiple injuries*."

There is a reference in Dr. Azad's notes on March 4, 2003 that he had been in the Hospital with headaches. An Emergency Record from the Hotel-DieuGrace Hospital dated February 17, 2003[17] confirmingan attendance for headache complaints indicates that Mr. Stewart gave a history of "*numerous facial/head injuries and motorcycle accidents*."

There is a second attendance at the Hotel-Dieu Grace Hospital only two days later on February 19, 2003. The note authored by the consulting neurologist, Dr. Desai, states, "*This gentleman rides a motorcycle and has had 50 motorcycle accidents over many years and has had several injuries including injury to the face and broken bones.*"

A record from the Hotel-Dieu Grace Hospital dated May 23, 2005 states, "*pt fell off motorcycle Saturday @ 1400. – c/oRt arm pain – states brief LOC.*" The Hospital record also states that Mr. Stewart stated, "*I'm not here just to get drugs*".

This denial of drug seeking theme is repeated in subsequent Hospital visits both before and after the motorcycle accidents. In an April 21, 2006 visit to the Hotel-Dieu Grace Hospital, Mr. Stewart wanted a "nuclear bone scan" because of chronic back pain. The note states, "*Pt denies he is drug seeking*."

Dr. Azad's notes and the Hospital records contain multiple entries confirming that Mr. Stewart's back problems continued right up until the 2006 accidents.

Dr. Azad's notes confirm that he had been prescribed various medications for many years right up until the time of the two 2006 accidents. These included Lorazepam, Oxycocet, Celebrex, Xanax, and Mobicox, to name just a few of them.

[17]Exhibit 3, Tab 100.

It is in the context of this pre-existing state of significant physical, psychological, and head injury problems that the impact of the 2006 motorcycle accidents must be assessed.

The Motor Vehicle Accident Report ("MVAR") for the July 7, 2006 accident[18] indicates that at approximately 2:23 p.m. Friday afternoon, Mr. Stewart's motorcycle collided with a minivan. The MVAR records indicate that Mr. Stewart was transported by ambulance to Windsor Metropolitan Hospital.

The Ambulance Call Report for the July 7, 2006 accident[19]indicates that the emergency services arrived at approximately 2:27 p.m., just four minutes after the reported time of the accident Mr. Stewart was found lying supine on the road. He was still wearing his helmet. There were no obvious signs of trauma. The ambulance attendants removed his helmet and placed him on a backboard for transport to Hospital. His chief complaint was noted to be back pain. The incident history which appears to have been obtained from Mr. Stewart indicates that he was riding his motorcycle when it collided with a minivan at a low speed causing him to fall from his motorcycle. No loss of consciousness was reported. He was not ambulatory prior to the emergency services arriving, nor was his helmet removed. He complained only of back pain. Mr. Stewart reported a history of anxiety and osteoporosis. He also gave details of the medications that he was taking as well as an allergy to penicillin. His Glascow Coma Score was noted to be 15/15.

[18]Exhibit 3, Tab 1.
[19]Exhibit 3, Tab 100.

After being attended to for approximately 20 minutes at the scene of the accident, Mr. Stewart was taken by ambulance to the Windsor Regional Hospital[20] where he arrived at approximately 2:55 p.m.[21]the incident is described as a low speed accident, with low impact and minimal damage. Once again no loss of consciousness is noted. He complained only of midto lower back pain and was diagnosed with lower back sprain. An x-ray of his spine was described as clear. He was seen by the emergency room physician at 3:22 p.m., and was noted as having been discharged at 5:20 p.m.

After being discharged from Hospital, Mr. Stewarttook a cab to the Windsor residence of his father, and stepmother, now substitute decision maker, Carolynn Stewart. This evidence comes from the transcript of the examination under oath of Carolynn Stewart in this loss transfer proceeding.[22]Their residence is located at 1430 Dougall Avenue, Windsor.

Carolynn Stewart was initially confused on this point because she thought that the events she described of her meeting with David Stewart on the day of his accident related to his August 27, 2006 accident. A careful reading of the transcript However, confirms that it was the day of July 7, 2006 accident that Carolynn Stewart saw David Stewart. Carolynn Stewart and David Stewart's father resided at their trailer in Leamington between mid-April and the early part of September. Carolynn Stewart testified that on Thursdays and Fridays she would stay at their Windsor Home. The July 7, 2006 accident occurred on a Friday. The August 27, 2006 accident occurred on a

[20] The Windsor Regional Hospital records are part of Exhibit 3, Tab 100.
[21]The Triage record places his arrival time at 2:50 p.m.
[22]Exhibit 5.

Sunday. She therefore concluded that it must have been after the first accident when she saw David Stewart at her Home in Windsor.

According to Carolynn Stewart, David Stewart showed up at her Home on the afternoon of July 7, 2006 still wearing a Hospital gown. She indicated that in reference to his attendance at the Windsor Regional Hospital he stated, "*They didn't see me. They sent me Home without seeing me."*The Hospital records for that date confirm that this information is wrong. Mr. Stewart seemed concerned to impress upon Carolynn Stewart that the accident was not his fault. In her testimony, Carolynn Stewart added the editorial comment to this fact, "*I get this all the time*". There is no indication in the transcript as to what she meant by this comment. Carolynn Stewart stated that David Stewart gave no other details about the accident.

The main thing she remembered about seeing him the day of the July 7, 2006 accident is that he was complaining he had a headache, and that he was dizzy. He was Holding his head and made a comment to the effect of, "*My head hurts*". Carolynn Stewart stayed up with David Stewart until midnight. She actually called the Hospital and was advised that, "...*if it was a concussion, I needed to stay up with him and keep him up for six Hours.*" I will note here that David Stewart did not make any complaints of headaches or dizziness to the emergency services personnel or at the Hospital.

Carolynn Stewart related a telephone conversation she had with David Stewart's father that day about the situation. She said that she told his father, "*David has been in an accident. I'm scared to leave him alone. I do not want to find him dead in my House when we come back."*

She sat up with David until midnight and then both she and David went to bed. She returned to the trailer in Leamington the next day. Carolynn Stewart stated that David Stewart went back to Laura Anne Miller's Home.

Carolynn Stewart was examined concerning when she next saw David Stewart. My impression from her evidence is that she really had no memory of when she next saw Mr. Stewart, other than to say she saw him once, or maybe twice before the end of 2006. It is clear from her evidence that he was not a frequent visitor at her and his father's residences, nor they at his. When asked how often during the course of the fall, 2006 she saw David Stewart she replied, "*Not very often. We went out to where he lived, didn't go in the House, and brought food a couple of times, but I could not even tell you which month. I know one was before Christmas…*". In other parts of her evidence she was asked, "*The next time you saw him* (after July 7, 2006)*, would that have been September for sure or more into October, do you know?*" She replied, "*I honestly don't remember. Too long ago.*" "*…you had said earlier over the course of the fall 2006 you didn't see him that often. Are you able to help us with how often?*" Carolynn Stewart responded, "*Too long ago to remember*."

On July 19, 2006 Mr. Stewart gave a statement to the police about the July 7, 2006 accident.[23] He described driving his motorcycle west on Shepherd Street near its intersection with Pierre Avenue when a green van crossed in front of his lane and stopped. He braked, was not able to stop, and remembered hitting the front of the van. He said he was not traveling fast.

[23]Exhibit 3, Tab 2.

On July 19, 2006 he spoke with Cindy Phillips, a claims adjuster with SCM Adjusters Canada Ltd., who had been assigned his file for the July 7, 2006 accident.[24] I will note from the outset of dealing with the involvement of Ms. Phillips in the matter, that some of the dates of events in this and other reports Ms. Phillips sent to Jevco do not coincide with the dates in her Claims Notes[25] for the same period. I am not sure of the reason for this. It could be that some of the dates in her Claims Notes represent dates that she entered the information (*e.g.* a docket date), rather than the date the event occurred. I do not believe anything turns on the differences in the dates, but I have noted it nonetheless.

In her first report[26] she states that after several attempts to reach Mr. Stewart she spoke with him for the first time on July 19, 2006. Mr. Stewart seemed "ill at ease" and was uncertain about speaking with the adjuster. He seemed dubious as to whom she represented and was concerned about getting into trouble if he spoke to anyone about the accident. Ms. Phillips scheduled a meeting with Mr. Stewart for July 24, 2006. Mr. Stewart missed this appointment and another one before they finally met on August 1, 2006.

In between his first contact with the adjuster, and his meeting with the adjuster on August 1, 2006, he attended upon his family physician, Dr. Azad, on July 21, 2006. Dr. Azad was examined under oath in connection with this loss transfer arbitration.[27] On that examination he stated that his note for the July 21, 2006 visit reads, in part, as

[24] Adjuster Phillips incorrectly describes the date of the accident as July 10, 2006, rather than July 7, 2006. This error is repeated in her first 3 reports regarding this accident.
[25] Exhibit 3, Tab 104 for the July 7, 2006 accident, Exhibit 3, Tab 105 for the August 27, 2006 accident.
[26] Exhibit 3, Tab 3.
[27] Exhibit 4.

follows, "*Was involved in a motorbike accident less than two weeks ago… Was knocked out for a short period of time.Landed on right shoulder and lower back.Went to E. R. X-rays negative. And to the side I put 'ringing in both ears'*."

Is noteworthy that in Mr. Stewart's report of the accident to Dr. Azad he stated that he had been unconscious for a short period of time. Mr. Stewart made no mention of this to the emergency services personnel, or to anyone at the Windsor Regional Hospital. This is also the first report to anyone of the ringing in the ears symptom.

The remainder of Dr. Azad's examination related to Mr. Stewart's musculoskeletal complaints including his right shoulder, back, and left knee. Dr. Azad's plan was to recommend physiotherapy and follow-up as needed.

On August 1, 2006 he met with adjuster Phillips at the Howard Avenue, Windsor offices of SCM Adjusters Canada. She gave him an Application forAccident Benefits Package. He reported to Ms. Phillips that he was living with a woman who was a nurse at the Windsor Regional Hospital (Laura Anne Miller). Although he wanted treatment for his injuries so that he could get better he did not want treatment at the Hospital where Ms. Miller worked because he did not want her to find out about the accident, and he was concerned about causing trouble for her. Ms. Phillips states in her first report, perhaps in an effort to explain what she thought strange behaviour on the part of Mr. Stewart, "*It appears, from what the insured has told us, that she*(Ms. Miller) *may not be very understanding or supportive of him with respect to this accident…*"

Indeed that assessment proved to be rather prophetic. Ms. Miller was examined under oath for this loss transfer proceeding. I will have more to say about her evidence

later, but for now, suffice it to say that the transcript[28] of her examination conducted April 18, 2013, makes it clear that if she were correct in her view about the genuineness of Mr. Stewart's impairments, Mr. Stewart ought not to have been classified as catastrophically impaired as a result of one or the other or both of the 2006 accidents, if he could be considered impaired at all.

In her second report dated August 22, 2006[29], adjuster Cindy Phillips describes her second meeting with Mr. Stewart. On August 18, 2006, he called Ms. Phillips in a "*very agitated state*". He told Ms. Phillips that his motorcycle had been stolen along with all his paperwork and medication. He was upset and frustrated. Without his medication he was having difficulty walking because of pain. He said that he was in so much pain that he needed help getting out of bed and was relying on his father to help them.

Adjuster Phillips met with Mr. Stewart on August 18, 2006 at his father's and Carolynn Stewart's residence in Windsor. Ms. Phillips found to him to be very confused and frustrated about the entire accident situation. He said that hewas not welcome at his father's residence, but he did not have a way of getting back to his residence in the country, and did not know the address there. Ms. Phillips gave Mr. Stewart another Application for Accident Benefits Package.

Mr. Stewart told Ms. Phillips that he could not get to the doctor because he had no transportation now that his motorcycle had been stolen. He also stated that the woman he lives with will not drive him.

[28]Exhibit 6.
[29]Exhibit 3, Tab 5.

Ms. Phillips again found Mr. Stewart to be "*…very confused about the whole situation*",so she decided that the best course of action would be to assist Mr. Stewart in completing the Application for Accidents Benefits (OCF 1) to facilitate obtaining the necessary documents to complete the package. Ms. Phillip's second report appears to confirm that she did assist Mr. Stewart in completing it, as she states in her report, "*From our conversation with him and from completing the application for accident benefits, we wish to provide you with the following information:…*"

The fact that Ms. Phillips completed the Accident Benefits Application for Mr. Stewart is important, because when Ms. Miller was examined under oath counsel did not appear to be aware that Ms. Phillips was the person who completed the Accident Benefits Application for the July 7, 2006 accident (and as it turns out, for the August 27, 2006 accident as well). There was considerable questioning of Ms. Miller by Jevco's counsel in an effort to determine whether it was she who assisted Mr. Stewart with the completion of the Applications for Accident Benefits. Ms. Miller testified that although she did not think that the handwriting in the Applications was hers, she acknowledged having assisted Mr. Stewart with paperwork at times, and she could not be certain that she did not assist with the completion of the Applications for Accident Benefits. In my opinion the evidence leaves no doubt that it was Ms. Phillips, and not Ms. Miller, who completed the Accident Benefits Applications for Mr. Stewart.

The remainder of Ms. Phillips second report summarizes the information that she obtained from Mr. Stewart about the July 7, 2006 accident, which is reflected in the information Ms. Phillips put into the Application for Accident Benefits.

Mr. Stewart reported to Ms. Phillips that he did not remember exactly when the accident occurred. He could only remember that he was coming from a doctor's appointment.[30] As to the details of the accident, Ms. Phillips recorded, "*The insured only remembers that he was hit by a car*."It is important to note here that Mr. Stewart apparently remembered quite a bit more detail about the July 7, 2006 accident when he gave his verbal statement to the police about a month earlier on July 19, 2006.[31]

He explained to Ms. Phillips that he was living "*…with a woman (Ms. Miller) who he used to be in a relationship with, However the relationship did not work out.*" He told Ms. Phillips that he would take care of (Ms. Miller's) for children in exchange for a place to live since he could not manage on his own.

Ms. Phillips recorded that Mr. Stewart described his injuries from the July 7, 2006 accident as follows:

"entire back sore

left leg goes numb from his knee to his hip

a ringing/whistling/loud noise in the back of his head

bruises and soreness on his entire right side"

Mr. Stewart described for Ms. Phillips what happened after the accident. He told her there was some confusion about what to do with him. He did not want to be taken to Windsor Regional Hospital because that is where the woman he lives with, who is a

[30]Dr. Azad's clinical notes and records, and his testimony on his examination under oath confirm that Mr. Stewart attended upon Dr. Azad on July 7, 2006 before the accident occurred that day.
[31] See Exhibit 3, Tab 2.

nurse, worked. He was not sure what treatment he had at the Hospital. He describes confusion about whether he should be kept in the Hospital or released. Somehow he ended up wandering around outside the Hospital on Tecumseh Road in his Hospital gown speaking with the 911 operator. The operator told him he should be staying in the Hospital, and shortly thereafter he told Ms. Phillips that the police "arrested" him. The police discovered that he had been in an accident but Ms. Phillips stated she was somewhat confused about where the police took him.[32]In the concluding portion of her report, adjuster Phillips states the following:

> He has vocalized that he wants treatment because he wants the noises in his head to go away and he wants treatment for his other pain…He is confused about who he has talked to about the accident. We cannot say for sure if this confusion existed before the accident or if there is some type of cognitive injury from the accident. The claimant advises he was not like this before the accident. He advised that he did hit his head, his helmet had a crack on it, and he was unconscious for a period of time after the accident.

The Application for Accident Benefits for the July 7, 2006 accident, as filled out by Ms. Phillips, reflects the report given by Mr. Stewart to Ms. Phillips in the August 18, 2006 meeting. In particular, the Application indicates that Mr. Stewart had little memory for the accident, and it outlines the head injury symptoms he reported to Ms. Phillips.

The evidence indicates that Mr. Stewart had no other medical examinations or treatment after the July 7, 2006 accident, before the August 27, 2006 accident, other than his attendance at the Windsor Regional Hospital immediately following theJuly 7, 2006 accident, and his one visit to Dr. Azad on July 21, 2006.The only other fact

[32]We know from Mr. Stewart's September 14, 2006 statement (Exhibit 3, Tab 10) that he says he was first taken by the police to retrieve his motorcycle and belongings. Then he took a cab to the Windsor residence of his father and Carolynn Stewart.

evidence, as opposed to opinion evidence, concerning the aftermath of the July 7, 2006 accident, and Mr. Stewart's condition just prior to the August 27, 2006 accident comes from Carolynn Stewart.Carolynn Stewart testified that the only person other than herself who might know something about Mr. Stewart's condition between the accidents was Laura Miller.

Laura Miller testified on her examination under oath that she did not know about the July 7, 2006 accident. She only knew about the August 27, 2006 accident. She was asked, "*…you're aware that David was involved in an accident August 2006?...with another vehicle…with two girls in the car.*" She answered, "*That's correct.*" "*Are you aware of any other accidents other than that?" "…I'm only going by what he tells me. He's been in hundreds of accidents…*". "*Are you aware that he was involved in an accident July 7, 2006?" "No, I can't say. I do not recall there being any other accidents other than the one with the two girls.*"

In my opinion, this evidence from Ms. Miller fits with what we know of Mr. Stewart's behaviour following the July 7, 2006 accident. It appears, especially from adjuster Phillips' reports, that for whatever reason Mr. Stewart went to some lengths not to tell Ms. Miller about the July 7, 2006 accident.

I have previously summarized Carolynn Stewart's evidence concerning her interaction with David Stewart on the day of the July 7, 2006 accident. I have also indicated thatshe was initially confused about her interactions with Mr. Stewart on the July 7, 2006 accident date thinking that they related to August 27, 2006.

Her transcript indicates that she and David's father first became aware of the August 27, 2006 accident when Mr. Stewart telephoned the trailer in Leamington to tell them he had been involved in an accident. When she was giving this evidence However, she thought she was talking about the July 7, 2006 accident. She thought that this telephone call would have been about a week after the accident, because David at that time was calling once a week. His father was not well and he usually would call to find out how his father was doing. I will pause here to note that if David Stewart had called a week after the August 27, 2006 accident that would have been in early September. By then, as Carolynn Stewart stated, she and David Stewart's father had usually returned to Windsor.

I emphasize these points not to suggest that Carolynn Stewart was being untruthful in her evidence, but simply to emphasize my view as to the questionable reliability of Carolynn Stewart's memory for details at any specific point during 2006, let alone for the six week or so period between the accidents.

In questioning Carolynn Stewart on her recollection of telephone contact with David Stewart in the summer of 2006, at times counsel put some fairly specific suggested facts to Ms. Stewart, rather than asking the questions in a non-leading manner. I say this not to be in any way critical of counsel. I think they were doing their best to mine Carolynn Stewart's memory for the kind of specific details that would be relevant to this loss transfer proceeding.From her perspective, I think she was trying to be helpful, and hence was somewhat suggestible in her responses. As I have indicated However, I am skeptical as to the reliability of the evidence they were able to obtain from her.

The following exchange took place:

Q. The accidents are about six weeks apart. David was calling your House about once a week?

A. Calling the trailer, because we were out at the trailer.

Q. … So that would lead to the conclusion he probably called about six times between the car accidents; is that fair?

A. Very possible.

Q. …you spoke to him on the phone on How many of those occasions?

A. Maybe once or twice of those.

Q. …your husband did most of the talking to him?

A. Yes, and the conversations were short. David's conversations are never long. Five minutes.

Q. Did your husband explain to you what David said after he hung up the phone with him?

A. No, he did not?

Q. …So you didn't have that much information…

A. No.

Q. From what you did know and from what you had heard, what was your impression of How David was doing between the car accidents?

A. I did not know. I thought he was the same as before, because I was not seeing him. He did tell us a couple of times that he really hurt, his side hurt. He did not say anything about sensitivity to light at that point. That didn't come until September.

Q. …Did he seem to be having any difficulty finding the right word during the period between the two accidents?

A. Didn't talk to him enough to find out if he was having trouble.

Q. You did talk to him on at least two or three occasions? (*note that her evidence a few questions previously was one or two occasions)*

A. Yeah, but short things and the little bit he was saying he was getting out fine.

Q. Was there any slurred speech?

A. No.

Q. Was there any problems with concentration as far as you could see during those short conversations?

A. No.

Q. Did you have any sense or feeling that he was having any problems with his brain at all during that time period between the two car accidents?

A. Not till September.

With due respect to counsels' efforts, and the witness's eagerness to be helpful, even if I was confident that Carolynn Stewart's memory for this period of time in 2006 was sound, I am not persuaded that the observations of a layperson like Carolynn Stewart from one or possibly two telephone conversations of a maximum duration of five minutesare very useful in determiningthe relative impact of these two accidents on David Stewart's brain functioning.

I think the extremely limited weight that should be given to Carolynn Stewart's evidence regarding the relative impact of the July 7, 2006 and August 27, 2006 accidents on Mr. Stewart is best demonstrated in her own words from her examination under oath.

> Q. Ms. Stewart, do you have an opinion about which of these accidents might have been worse for David?
>
> A. I don't feel I can make an opinion because I wasn't at the accidents and I wasn't around him that much in betweento see the differences. I do know that there's changes, but I don't know which accident is responsible. I do know he cracked his helmet open on one of them (*the July 7, 2006 accident)*. I saw the crack in the helmet, but I am not even sure which accident that was when he was showing me the helmet.

The Motor Vehicle Accident Report ("MVAR") for the August 27, 2006 accident[33] indicates that at approximately 2:55 a.m. Sunday morning, Mr. Stewart's motorcycle was northbound on Walker Road near its intersection with Ypres. The report states that the rear wheel of Mr. Stewart's motorcycle was struck by the right front corner of a passenger vehicle traveling behind it. The MVAR indicates that Mr. Stewart was transported to the Windsor Metropolitan Hospital by ambulance.

The Ambulance Call Report[34] indicates that the emergency services arrived at approximately 3:08 a.m. They found Mr. Stewart semi-prone, conscious, and alert. They recorded that he had ringing in his ears, but noted that this was, "*as per pts normal*".

Mr. Stewart reported to the ambulance attendants that he was on his motorcycle about to turn right when he was struck from behind by a car. He denied loss of consciousness. He did not report any dizziness or blurred vision. He complained of neck pain, back pain, and pain in his right hip. He was agitated and uncooperative. He told them this was his "*70th MVC*". They recorded him as being previously healthy, "*as per patient*". His Glascow Coma Scale was recorded as 15/15.

[33]Exhibit 3, Tab 6.
[34]Exhibit 3, Tab 100.

The ambulance attendants removed his helmet and placed him on a backboard for transport to Hospital.

The Emergency Treatment Record of the Windsor Regional Hospital Records[35] record his arrival time as 3:46 a.m.[36]

The Emergency Treatment Record indicates that he was rear-ended at low speed while turning on a motorcycle. He is recorded to have been complaining of pain in his left leg, lower and upper back, and right side. He made no neurological complaints. The Triage Record contains similar information with the additional notation that there was no loss of consciousness. X-rays were performed. They revealed no fractures. The Emergency physician diagnosed para-cervical strain, and Mr. Stewart was discharged at 5:15 a.m.

On Monday, August 28, 2006, at 8:58 a.m., the day after the accident,David Stewart contacted the traffic branch of the Windsor Police Service.[37]Although the records of the Windsor Police Service describe Mr. Stewart as having been “evasive”, and not wishing to provide details of the accident, he appears to have given a fairly comprehensive account of the events. His statement as recorded by Officer Ann Hall is as follows:

> I will state that I am David Stewart. I own a Yamaha Radiant 1986. I just got it. On Saturday early morning and it was raining out. I was on Walker Rd. towards the river. I was in the turning lane, hanging a right into the gas station. I don’t know what happened. All of a sudden, smash. There was

[35]Exhibit 3, Tab 100.
[36]The Triage Record indicates his arrival time as 3:40 a.m.
[37] The record of Mr. Stewart's statement, and the other statements referred to in this part are found in Exhibit 3, Tab 8.

> ambulance and fire department. I do not know what part of the bike that got hit. I can walk. I turned. There were two girls and I was driving. The girls were driving along Walker Rd. about 2 or 3 in the morning. I was headed to my dad's to get some clothes. I noticed that the girls were driving. I do not know what kind of car it was. I started to turn and smash. I turned into a gas station on Walker Rd. to get gas and have a cigarette and go to the bathroom. I am on medication.

On Monday, August 28, 2006 at 9:14 a.m., the Windsor Police Service obtained a statement from a witness, Norma Jean Fex. Ms. Fex confirmed that she saw Mr. Stewart's motorcycle with its right turn signal on indicating an intention to turn into the gas station where she was working as a cashier. She also saw headlights traveling north in the right lane. She looked away, and heard a loud "thump". She saw the driver of the motorcycle lying in the street in the right lane. The motorcycle was on the other side of the driveway. She saw a green car occupied by two young girls stopped in the right lane. She went outside and observed one of the girls leaning over the motorcycle driver. An ambulance and the police arrived shortly after that. She saw Mr. Stewart later, and described the encounter as follows:

> I didn't talk to anyone until later the driver of the motorcycle, he had come back into the Pioneer gas station and he was limping on his right leg. He asked me if I knew where his motorcycle was. I told him it was Myers towing.

On Tuesday, August 29, 2006 Danielle Chappus, the driver of the vehicle involved in the accident with Mr. Stewart, gave a statement to the Windsor Police Service. She explained that she collided with Mr. Stewart's motorcycle because she could not see the rear light or even the license plate because he was wearing a large blue poncho which covered them. In the rain, she did not notice that he had stopped to turn into the gas station. She described the event as follows:

> I clipped a pipe on the motorcycle and part of the license plate. It was on the front passenger side of my car. His bike went to the right on the sidewalk and he was laying right beside his bike. I left my car right where I was stopped and I called 911. I made sure he was ok...The driver of the motorcycle was rude to me, he said he wasn't going to sue me. Once he told me not to call the cops. He wouldn't tell me his name.

On August 28, 2006, after contacting the Windsor Police Service, Mr. Stewart telephoned adjuster Phillips to advise her about the August 27, 2006 accident. Her Claims Note for 10:28 a.m. reads,

> "PC from insd. He was in another accident on Saturday, August 26th. He advises he was rear-ended although there may be a discrepancy of versions with the tp. He was taken to Hospital by ambulance, had xrays, hurts all over. He was at his father's House when he called because you could hear him talking with his father from time to time." She noted his dramatic comment, "He advised he is going to 'lose everything – his girlfriend, his kids, everything'."

On August 29, 2006 adjuster Phillips sent a fax[38] to Jevco advising Jevco about Mr. Stewart's August 27, 2006 accident. At that point Ms. Phillips did not have a Motor Vehicle Accident Report for the accident. She did not receive the police report for this accident until October 10, 2006, according to her Claim Note for that date. Therefore, the detailed information in her August 29, 2006 fax to Jevco about this accident must have come from Mr. Stewart.

Ms. Phillips' August 29, 2006 fax to Jevco indicates that the accidentoccurred at approximately 2:30 a.m. The accident occurred on Walker Road near Ypres, Windsor. Mr. Stewart stated that he was on Walker Road with his right turn signal on waiting to

[38]Exhibit 3, Tab 7.

turn into the Pioneer gas station when he was rear-ended. The police investigated. Mr. Stewartwas taken to Hospital and x-rays were done. His motorcycle was not drivable and was currently located at Myers Towing on Central Avenue in Windsor. The report suggests that the motorcycle may be moved on Thursday (August 31) to Chifor Racing. An address and telephone number was provided for Chifor Racing. No information was provided about the other party involved in the accident, but Mr. Stewart told Ms. Phillips that there were two witnesses to the accident.

Ms. Phillips confirmed that she would set up a second SABS claim file for the August 27, 2006 accident, as instructed by Jevco. She then made efforts to set up another meeting with Mr. Stewart. A date was set for September 14, 2006. Her Claims Note for September 13, 2006 reads in part, "*He declined to meet with me somewhere closer to his Home (or where he is staying) and is still unable to give me that address*."

On September 14, 2006, Ms. Phillips met with Mr. Stewart at the SCM Adjusters offices in Windsor.She reported to Jevco about this meeting on September 27, 2006,[39]and on October 19, 2006.[40] It would appear that one of the purposes of this meeting was to obtain Mr. Stewart's statements with respect to the July 7, 2006, and August 27, 2006 accidents, and to complete an Application for Accident Benefits with respect to the August 27, 2006 accident.

According to Ms. Phillips October 19, 2006 report which references the August 27, 2006 accident, Mr. Stewart did not have enough time on September 14, 2006 to provide a statement with respect to the August 27, 2006 accident. What was

[39]Exhibit 3, Tab 11.
[40]Exhibit 3, Tab 16.

accomplished then on September 14, 2006 was that Ms. Phillips obtained Mr. Stewart's statement with respect to the July 7, 2006 accident (enclosed to Jevco with Ms. Phillips September 27, 2006 report), and she completed with Mr. Stewart the Application for Accident Benefits with respect to the August 27, 2006 accident (enclosed to Jevco with Ms. Phillips October 19, 2006 report).

The only persons present at this meeting were Ms. Phillips and Mr. Stewart. Ms. Phillips obtained a six page handwritten statement respecting the July 7, 2006 accident that was signed by David Stewart and witnessed by Ms. Phillips. The handwritten version and a typewritten version of the statement were introduced into evidence.[41]

The statement contains some information that, in my view, Mr. Stewart must have known was inaccurate, or at least significantly incomplete. It also contains some details about the accident that do not appear in any previous account of the accident given by Mr. Stewart.Each, successive account of the accident given by Mr. Stewart appears to have been an enhancement upon a previous account. This one contained in his signed statement was the most embellished yet.

With respect to prior accidents and injuries, the statement says, "*I had not had any previous accidents except one small one about 17 years ago…I have never had any serious injuries in the past. I used to ride dirt bikes when I was younger and had some scrapes from that.*" Even a cursory review of the past medical records for Mr. Stewart confirms that these statements trivialize Mr. Stewart's pre-accident history to the point of being misleading.

[41]Exhibit 3,Tab 10.

With respect to the accident and its consequences, in his signed statement Mr. Stewart said the following:

> …a minivan that had been heading toward me started to turn left in front of me and then stopped. The minivan was stopped across my lane. I put my legs straight in front of me to try to brace myself and then I hit the minivan and was thrown back onto the pavement…I don't know if I was unconscious…I remember bouncing my face off the minivan I hit and then off the sidewalk… People told me to stop yelling but I didn't know I was yelling I had this noise in my head…It was the ambulance people who were telling me not to yell...My helmet was cracked…I had a noise in my head like a whistleblowing…At first I hadn't even known my birthday or address but eventually that came back to me…the police stopped me (outside the Hospital) because they thought I was drunk.

I would observe that this description of the July 7, 2006 accident, and it is aftermath bears little resemblance to the account given by Mr. Stewart to the emergency services personnel immediately after the accident, or at the Windsor Regional Hospital. It also stands in contrast to what Mr. Stewart reported to Ms. Phillips on August 18, 2006 when he signed the Application for Accident Benefits she filled out for him stating,"*I was hit by a car and that is all I remember*."

On September 14, 2006 Ms. Phillips also assisted Mr. Stewart with the completion of the Application for Accident Benefits respecting the August 27, 2006 accident.[42]

The Application for Accident Benefitssigned by Mr. Stewart confirms that the accident happened on Walker Road. In the section of the Application dealing with

[42]Exhibit 3, Tab 9.

accident details, it states the following, "*I was stopped facing north waiting to turn rt into Pioneer gas station and I got rear-ended by a car. Hurt left arm whole body sore.*"

On September 29, 2006 Mr. Stewart attended upon Dr. Azad. Up until this date Mr. Stewart had not received any other medical attention since the August 27, 2006 accident, apart from his attendance at the Windsor Regional Hospital. In fact, his only medical attention in almost 3 months to this point since the July 7, 2006 accident was the Hospital visits on the dates of the accidents, and his visit to Dr. Azad on July 21, 2006.

On his examination under oath Dr. Azad reviewed his note for Mr. Stewart's September 29, 2006 attendance. The start of the note was authored by a "lab tech". Dr. Azad explained that the lab tech does an initial assessment to find out what the patient's concerns are. In this case, the lab tech's note indicates that Mr. Stewart wanted to speak to the doctor about "*the accidents*". He was requesting physiotherapy and a prescription refill.

The portion of the note authored by Dr. Azad which, by description, relates to the August 27, 2006 accident, states as follows:*Hit from behind on bike. Pain in lower back, numbness in left leg, pain in upper back, neck. Doesn't remember what happened.*"

Apart from Dr. Azad's references, "*was knocked out*…", and "*ringing in both ears*" in the July 21, 2006 note, the remainder of the September 29, 2006 note is very similar to Dr. Azad's July 21, 2006note following the July 7, 2006 accident. In the September 29, 2006 note Dr. Azad found Mr. Stewart to be, "*slightlytired*". In his July 21, 2006

notehe found him to be "*tired*". A comparison of the notes with respect to the musculoskeletal examination shows very little difference in Dr. Azad's assessments.

One difference in the proposed plan for Mr. Stewart's treatment following the September 29, 2006 visit that was the focus of emphasis by Cooperators in this proceeding, is that Dr. Azad referred Mr. Stewart for a CT scan of his head. He was asked on his examination under oath why he did that and he stated because Mr. Stewart had reported he did not remember what happened in the accident.

I would make two comments regarding this referral by Dr. Azad. First, the fact that the doctor recommended a certain test be done does not mean that the patient has sustained the injury for which the test is intended to investigate. In this case, the recommended CT scan was conducted on October 16, 2006 at the Windsor Regional Hospital.[43] The clinical information indicates, "*Headaches post MVA*". The scan does not reveal any brain abnormality except for the possibility of a sinus polyp or sinusitis.

Current medical opinion holds that even if such a test did not show physical brain damage, it does not mean that a brain injury could not have been suffered in a traumatic event. The fact that Dr. Azad referred Mr. Stewart for a brain scan after the August 27, 2006 accident, and not after the July 7, 2006 accident does not prove however, that if Mr. Stewart did have a brain injury that it must have occurred in the August 27, 2006 accident, and not the July 7, 2006 accident, or some combination thereof.

[43]Exhibit 3, Tab 100.

Considering the potential brain injury symptoms of ringing in both ears, and loss of consciousness recorded by Dr. Azad following the July 7, 2006 accident, one might ask why Dr. Azad did not make a referral for head injury testing at that time.

I would observe as well that Dr. Azad did not record any complaint by Mr. Stewart of headaches in his notes for either the July 21, 2006 visit, or the September 29, 2006 visit, although this is the reason given on the CT scan reportfor conducting the test.

I would also note that by September 14, 2006, after both accidents, in his statement Mr. Stewart described the ringing/whistling noise in his head as having been there all the time at first, but by then it was "*coming and going*", even though it was a daily occurrence.

The second point I would like to make about the basis for Dr. Azad's referral of Mr. Stewart for a CT scan following the September 29, 2006 visit because he did not remember what happened, is that like Mr. Stewart's reporting of the July 7, 2006 accident, his recollection of the August 27, 2006 accident seems to have been perfectly fine in some of his other accounts.

Mr. Stewart had a detailed recollection of the events leading up to August 27, 2006 accident, the accident itself, and events afterward,when he gave his statement to the police the day after the accident[44], when he reported it to adjuster Phillips on August 29, 2006,[45] and when he signed his Application for Accident Benefits only two weeks before the September 29, 2006 visit to Dr. Azad. He then seems to have forgotten it

[44]Exhibit 3, Tab 7.
[45]Exhibit 3, Tab 7.

when he visited Dr. Azad, only to give hismost detailed account of it yet in his October 5, 2006 statement, less than a week after he had told Dr. Azad he did not remember what happened.

Mr. Stewart's inconsistent reporting pattern was similar with respect to the July 7, 2006 accident. His recollection of events immediately after that accident seemed perfectly fine. By the time of his meeting with adjuster Phillips on August 18, 2006, the only thing he could remember is that he had been hit by a car. Remarkably, by September 14, 2006, and by then after the second accident, he was able to remember very specific details that he had never mentioned before in giving his signed statement about the July 7, 2006 accident.

Dr. Azad submitted a Disability Certificate (OCF – 3) for each accident on behalf of Mr. Stewart to Jevco.According to Dr. Azad's examination under oath testimony, he completed the Disability Certificates at the same time, and hence they bear the same date of October 4, 2006.

The Disability Certificate for the July 7, 2006 accident[46]is missing the day date, but I do not think anything turns on that. It describes Mr. Stewart's injuries and sequelae from the July 7, 2006 accident as follows:

> R shoulder sprain
>
> Lower back sprain
>
> Knee sprain L
>
> L upper leg sprain

[46]Exhibit 3, Tab 12.

Concussion

The Disability Certificate for the August 27, 2006 accident describes Mr. Stewart's injuries and sequelae from the August 27, 2006 accident as follows:

Lower back sprain

Neck sprain

L upper leg sprain

Concussion

Dr. Azad testified that he completed the Disability Certificates based on a review of his clinical notes, which at that point consisted of the July 21, 2006 note following the first accident, and the September 29, 2006 note following both accidents. With respect to Dr. Azad's diagnosis that Mr. Stewart had sustained a concussion as a result of the August 27, 2006 accident, presumably he based that opinion on being told by Mr. Stewart that he could not remember what happened in the accident. Dr. Azad did not record any other symptoms that could be considered to be head injury symptoms in his September 29, 2006 clinical note.

Another important point to note here is that Dr. Azad stated in the Disability Certificates that he had not reviewed the records from Windsor Regional Hospital (and these would include the Ambulance Call Reports) for either accident since Mr. Stewart did not identify him as his family doctor (despite Dr. Azad indicating that he had been seeing Mr. Stewart since August 17, 1999).

Of course Dr. Azad would also not have reviewed any of the Windsor Police Service information for the accidents, the SCM Adjusters reports, or Mr. Stewart's

statements, before completing the Disability Certificates, as there would have been no reason for him to do so in his role as Mr. Stewart's family physician.

The next event in the matter is a significant one, in terms of its influence on the opinions of the medical experts who entered the picture much later. On October 5, Mr. Stewart met with adjuster Phillips. She reported to Jevco about this meeting on October 19, 2006.[47]At that time Ms. Phillips obtained a 6 page handwritten statement[48]in relation to the August 27, 2006 accident that was signed by Mr. Stewart and witnessed by adjuster Phillips.The statement also indicates that the statement was read to Mr. Stewart by Laura Miller and Cindy Phillips and that it was true and correct to the best of Mr. Stewart's knowledge and belief. Thestatement was enclosed to Jevco with Ms. Phillips' October 19, 2006 report.

The critical aspect of this meeting is the alleged participation in the meeting of Laura Miller who is described by adjuster Phillips as Mr. Stewart's "girlfriend". Some corroboration of comments in the statement made by Mr. Stewart about his problems is attributed to Ms. Miller.

Evidence introduced in this arbitration However, creates a serious issue as to whether David Stewart, Laura Miller, or either of them are telling the truth about matters in connection with David Stewart's SABS claims from these accidents. It also raises the possibility that there are persons unknown who have acted in bad faith to facilitate Mr. Stewart receiving accident benefits from Jevco. This issue is squarely raised by the evidence respecting the October 5, 2006 meeting.

[47]Exhibit 3, Tab 16.
[48]Exhibit 3, Tab 14.

I should pause here to emphasize that to resolve the question of loss transfer apportionment between Cooperators and Pafco, it is not necessary for my conclusions to make a definitive findings as to whether Mr. Stewart may have misrepresented matters to Jevco, or whether others may have assisted him in improperly obtaining SABS from Jevco. Cooperators and Pafco have accepted, for the purposes of the loss transfer arbitration, that Jevco is entitled to recover the SABS paid to Mr. Stewart based on the catastrophic impairment finding, subject only to the reasonableness of payment, and apportionment arguments outlined in the beginning of this Award.

These issues do have significance however, in considering the merit of, and the weight to be given to the evidence relevant for the determination of whether only the August 27, 2006 accident should bear the brunt of the catastrophic impairment finding, and hence most of Jevco's loss transfer indemnification, or whether the July 7, 2006, and August 27, 2006 accidents should share the burden equally.

In evaluating the significance of Mr. Stewart's October 5, 2006 statement, the first issue to be addressed is whether Ms. Miller was actually present at the meeting on October 5, 2006 with Mr. Stewart and Ms. Phillips. A consideration of this question requires me to review the relevant evidence in some detail.

Leading up to the October 5, 2006 meeting, Ms. Phillips' Claim Notes for the August 27, 2006 accident record an entry of September 27, 2006. Ms. Phillips says in her note that she was told by Mr. Stewart that he was now back "*in the county*" (I suspect this may be a typographical error and Ms. Phillips meant "country", since Mr. Stewart commonly referred to the farmhouse in Cottam where he periodically resided

with Ms. Miller as “the country”). Ms. Phillips says that Mr. Stewart stated they would have to meet out there to get statements done. He also said that “*the woman he lives with is taking Friday off and is taking him to the family doctor*.”

There is a Claim Note for October 3, 2006. Mr. Stewart indicated that he was, *“…still having trouble with transportation. He did go to the dr on Friday…His girlfriend quit 3 jobs to take care of him because now she knows how serious his injuries are. He will try to come in on Thursday, October 5 to give the s/s.*”

A Claim Note for October 4, 2006 states, in part:

> …He is afraid that he does not want to lie about anything because he might get in trouble. He started telling me that he does not know How to read very well. He went to school with perfect attendance but still cannot read well. He needed someone to read the material when he went in for his gun license, for example. He will be coming in tomorrow morning @ 9:30 to give the s/s.

A Claim Note at 10:10 a.m. for October 5, 2006 states, “*Voice mail from insd, left at 8:35 p.m. last night that he may have a problem getting here today and might start walking so he gets to our office by morning.*”

A claim note for October 5, 2006 at 10:12 a.m. states:

> …I beeped him and he returned the call. He is in Essex with his girlfriend, her son, and the dog at the vets. He advised the son skipped out of school today so now he might not be able to come in because they can’t leave the son out in the van as he does not want him to be in our meeting to hear about the accident. He wants his girlfriend to come in with him so she can help him understand what is going on so the end result of the conversation was that he will call me back and let me know when he can come in.

A Claim Note for October 5, 2006 about five Hours later at 3:18 p.m. states:

> Met with insd and his girlfriend, Laura Miller. Obtained his s/s and girlfriend shed some light on his post MVA condition. She advised he was not confused like this before the accident. She advised he is scattered, confused, cannot Hold a normal conversation. She is convinced he has a head injury that is not being addressed. The problem is he is refusing to let people help him. He is distrustful of people and he gets agitated and angry. There will be a head CT scheduled.

According to Ms. Phillips October 19, 2006 report, she met with Mr. Stewart on October 5, 2006. "*At that time he was accompanied by his girlfriend, Laura Miller, who was able to clarify some of the circumstances regarding his injuries.*" I will note at the outset that the editorial comment in Ms. Phillips report is in some respects different from the October 5, 2006 statement signed by Mr. Stewart and witnessed by Ms. Phillips.

Neither Ms. Phillips' October 19, 2006 report nor the October 5, 2006 statement of Mr. Stewart indicate where the meeting took place.I believe this question is answered by a review of the August 27, 2006 accident Claim Notesdescribed above leading up to the meeting, and a close examination of the SCM Adjusters file for the July 7, 2006 accident.[49]

The Claim Notes of October 3, 2006, October 4, 2006, and the two notes on October 5, 2006 immediately before the meeting clearly indicate that it was contemplated the meeting would take place at the SCM Adjusters offices in Windsor.

The SCM Adjusters file dealing with the July 7, 2006 accident contains an October 10, 2006 letter from Jevco asking Ms. Phillips to clarify Mr. Stewart's living

[49]Exhibit 3, Tab 104.

arrangements as Ms. Phillips' second report indicated that Mr. Stewart took care of four children in exchange for a place to live.

Ms. Phillips responded by fax to Jevco on October 16, 2006. She had not yet sent her report on the October 5, 2006 meeting to Jevco. That was not sent until October 19, 2006. In her October 16, 2006 fax Ms. Phillips indicates states the following:

> …we spoke to the insured and the girl he lives (*sic),* Laura Miller, and confirmed that they have lived together on and off for two years as friends. They are not common law and not boyfriend/girlfriend. He helps with the children because he is there and it is convenient and because he likes to. His living there is not contingent on his helping out with the children.
>
> Hope this clarifies the situation for you. It was difficult to understand what the situation was until he finally came into the office with Laura Miller(arbitrator's emphasis)and she could help explain it.

In my opinion this evidence clearly indicates that the October 5, 2006 meeting took place at the SCM Adjusters office in Windsor.

Ms. Miller was examined about whether she had participated in this October 5, 2006 meeting.Earlier in her examination she hadgiven extensive evidence that, in summary, would call into question the genuineness of much of David Stewart's presentation consequent upon either of these accidents. In questioning Ms. Miller on statements attributed to her from the October 5, 2006 meeting, counsel was testing the veracity ofher evidence since it conflicted with the conclusions of some of the medical experts.

In preamble to this questioning of Ms. Miller about the meeting, the following statement was put to Ms. Miller:

> …I can refer you to a report from an insurance adjuster from October 19 of ‘06 which says that this insurance adjuster met with David and you October 5, ‘06 at your Home, the farm…

When she stated she did not recall such a meeting, a second question containing the erroneous assumption as to the location of the meeting was put to her:

> Q. You don’t recall. Do you recall meeting with an adjuster even at your Home?

. There was no October 5, 2006 meeting at Ms. Miller’s farm in Cottam. The meeting took place in Windsor at the offices of SCM Adjusters. In fact, there is no evidence that there was a meeting at Ms. Miller’s farm in Cottam at any time throughout the involvement of SCM Adjusters in Mr. Stewart’s SABS claims. Meetings took place either at the SCM Adjusters office in Windsor, or at the Windsor home of Carolynn Stewart and David Stewart’s father.

I am stressing this point because my extensive review of the evidence in this matter, and my serious doubts as to the credibility of David Stewart, lead me to conclude that there is a distinct possibility Ms. Miller never met with adjuster Phillips and Mr. Stewart, and that someone else attended the October 5, 2006 meeting with Mr. Stewart who was represented to be Laura Miller,or whose identity it was concluded by Ms. Phillips to be Laura Miller because she was introduced as Mr. Stewart’s “girlfriend”.

In my opinion this possibility would have been made much less likely had a meeting taken place at Ms. Miller’s farm in Cottam.Given the location, and the number

of children in herhome, it would have been exceedingly difficult for a person other than Ms. Miller to have attended such a meeting at Ms. Miller's residence. Although brazen, and most certainly fraudulent, it would have been much more feasible to carry out such a deception with a meeting at the offices of the insurance adjusters.

I also stress the point because, in my opinion, the incorrect premise in the questions about the location of the meeting may have influenced Ms. Miller's responses. The essence of Ms. Miller's evidence is that she did not think she was involved in such a meeting at her farm in Cottam, but she seemed unsure whether it was possible that she had been involved, so she stated that she could not recall the meeting. Her uncertainty may have arisen because she may have thought that it would seem implausible if she denied participating in a lengthy meeting such as this that took place in her own home. Had the correct facts been put to her that the meeting took place at the offices of SCM Adjusters in Windsor, rather than her own home, she may have been more certain that she did not participate in such a meeting.

This possibility that Ms. Miller was not the person involved in the October 5, 2006 meeting with Mr. Stewart and Ms. Phillips is, in my opinion, made all the more plausible by the fact that the evidence is clear Mr. Stewart wanted Ms. Miller's involvement in these matters kept to a minimum. He certainly did not want her to know about the first accident. He was extremely reluctant to provide the address where she lived.

Ms. Miller's evidence makes it clear that she did not know anything about the July 7, 2006 accident. She was only made aware of the August 27, 2006 accident. She has no recollection of ever meeting Cindy Phillips of SCM Adjusters. She also testified

that she never met with any of Mr. Stewart's health care providers throughout this matter.

I will pause here to comment that I am at a loss to explain how the medical professionals who became involved in Mr. Stewart's treatment thought they could develop an accurate before and after picture of him by simply accepting much of what he told them about his life before the motorcycle accidents, apparently without ever considering discussing matters with the woman whom one might reasonably conclude would have the best before and after picture of Mr. Stewart.

Finally, Ms. Miller testified that Mr. Stewart had contacted her by telephone ashort time before she was scheduled to be examined under oath. Ms. Miller stated that Mr. Stewart wanted to meet with her and did not want her to say anything to the insurers until he spoke with her. Ms. Miller was of the view that, knowing Mr. Stewart as she did, he wanted to make sure that her testimony would not cause him difficulty with his SABS claims.

The questioning of Ms. Miller on this issue went as follows:

> Q. I can refer you to a report from an insurance adjuster from October 19 of '06 which says that this insurance adjuster met with David and you October 5, '06 at your Home, the farm and he (*sic)* was told that he was suffering from neck pain, shoulder pain, loss of strength in his right hand, left knee pain, increased agitation and confusion, and this was more so after the second accident then after the first accident…
>
> A. I don't recall that.
>
> Q. You don't recall. Do you recall meeting an adjuster even at yourHome?

A. I don't.

Q. Is it possible this happened?

A. I don't know.

Q. You don't know if this happened?

A. Maybe he had somebody else there. I don't know. I don't recall that. I'm sorry. Do they have a statement? Like did I write something?

Q. Not a signed statement...

Q. …We have a statement from David the same day… On the signature line for David it says that he's had the statement read back to him by Laura Miller and Cindy Phillips… Do you remember meeting with somebody… And then reading back a statement to David…

A. I don't.

Q. Would you have accommodated Dave's, as you say bullshitting when talking to an insurance company at that time or to make things go smoothly in the relationship?

A. I'm sure I would have. I don't remember meeting that lady. I can tell you he's very manipulative. I don't recall that meeting…

Q. Well, is it possible he told you to play ball with this statement that he was giving? Is that what you mean?

A. Yes.

Q. (Ms. Miller has read David Stewart's statement) …there's a portion of the statement which says, 'my girlfriend, Laura Miller, has said that I'm more confused now than since the first accident. She says I don't make sense when I talk. I get agitated and angry. She's concerned there's a significant head injury here and that it is not being medically investigated as well as it should be…

Q. Now, did you say those things?

A. No, no.

Q. You don't recall...

A. I don't recall saying that. Being a nurse, if I suspected there was significant head trauma injury to him, I would have put him in the car and taken him to the Hospital -- I work there, I have access -- and obviously that didn't happen. And in reading this, like I am reading it and I'm looking at the line that says 'I am not willing to give my address,' but then he gives my address is being his. I find that interesting as well, that if I were reading this to him, I would have picked that up.

Q. Is it possible you said these things and you just don't remember saying them?

A. I suppose anything is possible.

Q. Well, is it likely that you said these things?

A. No.

Q. And you're saying its not likely because you do not believe…he had all of these symptoms?

A. I do not believe he had any of these symptoms…

What follows is a detailed parsing of the statement where Ms. Miller points out matters that she would have questioned if she had actually been involved in the taking of the statement or the reading of the statement to Mr. Stewart. The references she took issue with included the inference that she may have asked Dr. Azad to send Mr. Stewart for an MRI on his back. She emphasized that she had never been in Dr. Azad's office, although she may have taken Mr. Stewart to some appointments with Dr. Azad. She also questioned the part of the statement where she was alleged to have suggested that Mr. Stewart use a three pronged cane, and that he was using a cane she owned. She denied both of these assertions. She also took issue with many of the other assertions

dealing with the amount of indoor and outdoorhome maintenance Mr. Stewart alleged he did before the accident, and with the suggestion that he was dropping dishes. She stated flatly that she did not believe he has ever dropped any dishes.

Perhaps most importantly, she denied more than once saying what the statement indicates that Mr. Stewart says she told him – that his thoughts are more scattered, that he is very confused and agitated, and that he was not like that before the first car accident.

Her evidence with respect to the comments in the October 5, 2006 statement suggestive of Mr. Stewart having sustained a brain injury can be summarized in this series of questions and answers:

> Q. And though you're not trained in that field as a nurse, you know what to look for for brain injury; is that fair?
>
> A. Its fair. I never seen any dilated or fixed pupils, never any vomiting, never any headaches, and those would be something that you would look for when somebody had an injury.
>
> Q. A brain injury?
>
> A. Correct.
>
> Q. He never complained to you of headaches at all?
>
> A. No.
>
> Q. Okay. Never had any word remembering or word usage problems? No?
>
> A. No, not to my knowledge.

The following series of questions and answers summarizes Ms. Miller's evidence on whether she could be taken to have endorsed the content of the statement that has been attributed to her:

> A. Could I have been here (at her home for the statement taking)? I can't say. I don't recall this. And I clearly would have questioned some of this.
>
> Q. So you would not have supported the story –
>
> A. I would not have supported the story at all. And nowhere does it say, nor is my signature on here.
>
> Q. It does, however, say that the statement was read back to you (*sic)* –
>
> A. It does say that.
>
> Q. – and that you confirmed it.
>
> A. It says 'and correct to the best of <u>his</u> (arbitrator's emphasis) knowledge and belief'.

The nature of Ms. Miller's evidence raises the obvious question, if she is not telling the truth, what is her motive for lying?

Counsel were thorough in their examination of Ms. Miller on this issue as well. One of the most common motives for such testimony is a desire for retribution because of perceived wrongs perpetrated by the target of the testimony. In this case, the proposition was put to Ms. Miller that she was the "*jilted ex-girlfriend*" who was angry with Mr. Stewart, the clear implication being that she was saying the things that she said to get back at him or make things difficult for him.

Ms. Miller, by implication, denied this motivation for the nature of her testimony. She offered to provide names of others who would corroborate what she was saying, and did in fact provide other names. Their evidence is not before me in this proceeding.

Although I did not have the advantage of seeing Ms. Miller testify in person, I have read her transcript as critically as possible, several times, and I have to say that the totality of her evidence does not persuade me that it is simply the vengeful fabrication of the "*jilted ex-girlfriend*".

To the contrary, Ms. Miller's description of Mr. Stewart was not the rant of a rejected lover. She gave extensive evidence describing their relationship in the beginning as what I will describe as more promising. As time went onhowever, the persistence of Mr. Stewart's disagreeable behaviours caused her to become resigned to the fact that she did not thinkhisproblems could be resolved sufficiently for their relationship to prosper.

As she put it, "*He had a likeable part and I think as a nurse you thought, you know, 'Geez, maybe I could fix this guy', but you can't*."

For quite some time it appears that their relationship was not a romantic one, but rather a situation where they were simply friends. Ms. Miller's evidence makes it clear that as time went along she decided that she wanted Mr. Stewart out of her life, and she was not interested in maintaining even a friendship.

By the end of 2006, or early 2007, she had made the decision to terminate any involvement with Mr. Stewart.Rather than wanting to go out of her way to get at Mr.

Stewart, her evidence suggests that once she had made the break she was doing her best to avoid any involvement with him even though he was still pursuing her.

Ms. Miller's evidence that she, and not Mr. Stewart, decided to terminate the relationship is corroborated by comments made by Mr. Stewart himself to adjuster Phillips that she recorded in her Claim Notes.

What then can be made of Ms. Miller's testimony insofar as it impacts upon the issues that I have to decide? As I have indicated, is not necessary for me to resolve the question of whether there was some sort of deception involved with respect to the October 5, 2006 meeting that generated Mr. Stewart's October 5, 2006 statement. Suffice it to say that I have my suspicions that this could well have been the case, but I make no finding that on a balance of probabilities this is what occurred.

I am not satisfied however, that the comments attributed to Laura Miller in the October 5, 2006 statement of Mr. Stewart are an accurate description of Ms. Miller's perceptions of Mr. Stewart before and after these 2006 accidents. Where her examination under oath evidence appears to conflict with comments made by Mr. Stewart in his statement that he attributes to her, I prefer her examination under oath evidence over Mr. Stewart's comments in his statement.

I also do not believe that there is anything one can take from Laura Miller's evidence that would support the conclusion she saw differences in Mr. Stewart's behaviour and condition after the August 27, 2006 accident, which she did not notice after the July 7, 2006 accident.

One of the main reasons this cannot be so is that Ms. Miller testified she did not even know of Mr. Stewart's July 7, 2006 accident. How could she distinguish between two accidents, having knowledge of only one?

I believe her evidence on this point. Plus, if she wanted to construct a fabricated version of events on her examination under oath, How is the story enhanced by untruthfully denying knowledge of the July 7, 2006 accident, but admitting knowledge of the August 27, 2006 accident? If the purpose was to make Mr. Stewart out to be a fraud, why limit it to just one accident, when it would be even more effective to say that he was misrepresenting the situation with respect to both accidents?

I will turn now to analyze the content of Mr. Stewart's October 5, 2006 statement about the August 27, 2006 accident. The first thing that strikes me about it is that, like his September 14, 2006 statement about the July 7, 2006 accident, it contains a tremendous amount of detail for someone who is being investigated for a head injury because his doctor was told that he, "*doesn't remember what happened*".

Like his September 14, 2006 statement, there are details in this statement that only he would know, and have not been raised in any previous account of the accident. His memory for the accident details seems to have become crystal clear, even significantly improved from before, less than a week after his visit to Dr. Azad. He states:

> The weather was raining. The roads were wet. There wasn't much traffic. I was heading north on Walker Road in the curb lane. The Pioneer gas station is on the east side of the road, that is on my right. I had been driving close to the dividing line for my lane and I moved over closer to the right side

> of my lane so I could make my turn. I had my blinkers on and I was using my arm signal. I was going really slow before I turned because it was raining… All I know is there was a bang and I was lying in the rain…I had passed a car on Walker Road a couple of blocks before that had 2 girls in it. I could see they were talking and I figured they might have come from the bar so I didn't want to be near them which is why I passed them.

With respect to the aftermath of the accident, Mr. Stewart's recollection seems equally detailed, also with enhancements from previous versions.

> I remember when I was lying on the ground that people came up to me. I know not to move my neck so I had just kept perfectly still. I was pretty stunned. It was a hard hit. I had been wearing a helmet and I still had it on. I was laying partly on my back and partly on my side. There were fire trucks and ambulance. They were asking me where my license plate was because I guess it wasn't on the motorcycle. I did keep asking them where my bracelet was because I didn't want to lose it especially since things went missing after my first accident…(after being released from hospital) I walked back to where the accident happened to see if my bike was there and it was gone. There were pieces of the car that hit me on the ground…

It is thetiming of the recollection of such details that I find troublesome with respect to Mr. Stewart's credibility. Rather than deteriorating as the medical theory has it, his memory seems to improve with time after both accidents, at least on certain occasions when he is telling the story, and depending on the audience.

In giving a formal statement to the insurance adjuster, henow remembers that he had his blinkers and hewas signaling a turn with his right hand. By this time he had spoken to the police and was aware that the other driver said his poncho was obscuring his turn signal. Could it be that his diminished cognitive powers were still adequate

enough that he could figure out he needed to ensure that it was known he also used hand signals to indicate his intention to turn so that he would not attract fault for the accident?

It is equally convenient that on the same arm that he now remembers he was using to signal his turn, he was wearing his bracelet (a very expensive gold one it turns out), now reported as lost in the accident. Further, he also now remembers that immediately after the accident he repeatedly asked the emergency personnel on scene about the whereabouts of his bracelet.

No mention whatsoever is made in any previous account of the accident about any of these things. The November 13, 2006 report of SCM Adjusters to Jevco[50]contains even more detail on the bracelet issue than Mr. Stewart's October 5, 2006 statement:

> He also inquired about payment for his damaged raincoat and the loss of a gold bracelet from the 2nd motor vehicle accident. The gold bracelet he valued at $1,800.00 and advised that he does have proof of this item. He does not know how it was lost, but he advised that his hand would have been up in the air when he was making his hand signal to turn right, and the bracelet of course was a little bit loose and, possibly, it must have caught on something and became lost.

I have to say I find it especially difficult to believe that he would recall these details only several weeks after the accident, especially the details concerning the loss of a very expensive bracelet that he claims to have asked about several times at the

[50]Exhibit 3,Tab 105.

scene of the accident, but then apparently said nothing to anyone about for approximately six weeks.

The superior recollection for detail Mr. Stewart displayed in giving his September 14, 2006, and October 5, 2006 statements many weeks after the accidents certainly does not fit the theory that he sustained a brain injury in one or both of these accidents, causingan immediate, then steady worsening of his memory and cognitive abilities. I tend to agree with Ms. Miller, that Mr. Stewart is very manipulative, and quite capable of remembering things when it could be to his advantage to remember them.

I will now address in detail the hearsay statements attributed to Laura Miller in the October 5, 2006 statement made by Mr. Stewart

I will begin by saying that, in my opinion, thesestatements allegedly made by Laura Miller, upon which great reliance was later placed by medical experts, were not recorded properlyby SCM Adjusters.Hearsay is often unreliable, and it is not the best evidence. For that reason, barring exceptional circumstances, as a matter of legal principle it is inadmissible in court as evidence to prove the truth of what is being said. This case is a good illustration of the reason for that principle.

In a case involving a possible brain injury from trauma, it is very likely that medical professionals will rely upon information and observations obtained from persons familiar with the claimant, to assess possible changes in his personality and behaviour. Significant medical decisions often depend upon the reliability of the information, let alone legal decisions. To avoid misinterpretation, such comments and observations need to be very carefully and clearly documented. In this case, SCM

Adjusters should at a minimum have obtained a separate statement signed by Laura Miller confirming in her own words her observations and impressions. Unfortunately that was not done, and the subsequent events culminating in this loss transfer arbitration highlight the dangers of relying upon such evidence when it has not been properly documented.

There are three specific parts to Mr. Stewart's October 5, 2006 statement which, through hearsay statements of David Stewart, attribute comments, or opinions to Laura Miller. The first is on page 2. The relevant portion of the statement reads as follows:

> My girlfriend, Laura Miller, has said that I am more confused now than since the first accident. She says that I do not make sense when I talk. I get agitated and angry. She is concerned that there is a significant head injury here that is not being medically investigated, as well as it should be.

The hearsay problem has been exacerbated by the ambiguous sentenceconstruction of the statement. This has resulted in a significant misunderstanding of this statement, which has been compounded by repetition in medical documents.

This part of the statement attributed to Ms. Miller has been misinterpreted by persons reading it subsequently to mean that Ms. Miller's opinion was that Mr. Stewart's problems were more noticeable and significant after the second accident, than they were after the first accident.

Although the sentence may be capable of that interpretation because of the way it is constructed, a careful analysis of the evidence indicates that this is not what was intended by adjuster Phillips in recording her understanding of what was being said.

What she intended to convey was thatMr. Stewart's problems with confusion, agitation, irascibility, and suspicioneither started or worsened after the first accident, July 7, 2006, and have continued since that accident, with the August 27, 2006 accident further complicating matters. The sentence was not meant to be a comparison between the consequences produced by the first accident, and the consequences produced by the second accident.

A careful reading of the Observations/Impressions section on page 8 of Ms. Phillips' October 19, 2006 report demonstrates my point. There Ms. Phillips summarizes her own impressions of Mr. Stewart based on her several contacts with him since the July 7, 2006 accident, as well as impressions she attributed to Laura Miller. She stated the following:

> We have had a great deal of contact with the claimant since early July 2006 from the first accident, and the contact has continued since the 2nd accident.
>
> We can advise that his thoughts do seem to be scattered, and that he appears to be frustrated, distrustful and paranoid of people. Since our first contact with the claimant was after his first accident, we had no way of knowing whether this was a pre-existing condition or whether this was something post-accident. We did ask the claimant if he experienced these problems prior to the accident, and he advised us that he had not. When we met with the claimantand Laura Miller, on October 5, 2006, she confirmed his behaviour was not like this <u>prior to the first motorcycle accident</u> (arbitrator's emphasis).

Of course the interpretation of Mr. Stewart's October 5, 2006 statement has been made more complicated by Ms. Miller's testimony on her examination under oath,

because she refutes virtually all of what has been attributed to her as far as comments about Mr. Stewart's condition is concerned.

In my view, in writing her Observations/Impressions summary of the situation in her October 19, 2006 report, adjuster Phillips clearly was under the impression that she had met with Laura Miller, and that Laura Miller was by that time aware of both the July 7, 2006, and August 27, 2006 accidents. Both of those impressions, but certainly the second one, may have been incorrect. I also think Ms. Phillips was imprecise in her use of the term "*post-accident*", and "*prior to the accident*", in this paragraph of her reportwhen she really meant "post-accidents", and, "*prior to the accidents".*

Nevertheless, in my opinion Ms. Phillips was attempting to convey her assessment, and her understanding of Ms. Miller's assessment of Mr. Stewart's condition after both motorcycle accidents, as it compared to the way he was before the first accident of July 7, 2006.

Even if Ms. Miller's recollection is faulty, and shedid attend a meeting with Mr. Stewart and adjuster Phillips, where she "played ball" in connection with the statement Mr. Stewart was giving to adjuster Phillips, this would be the only reasonable way to interpret the comments attributed to her. Ms. Miller testified that she knew about only one of the accidents. There would be no reason for Ms. Miller to lie about that.

Therefore, for that reason alone Ms. Miller could not have intended to draw a comparison between the accidents in the October 5, 2006 statement comments that were attributed to her because she did not know about both accidents.

The second comment in Mr. Stewart's October 5, 2006 statement is unfortunately, also ambiguously constructed. There was a good deal of questioning about this on Ms. Miller's examination under oath, and the ambiguity of the sentence structure was the subject of some debate between counsel.

The reference reads as follows:

> The first time I had medical care since this accident (August 27, 2006) was last Friday, September 29, 2006 when I went to my family doctor, Dr. Jason Azad. My girlfriend asked if he would refer me for an MRI for the lumbar area but he didn't do that. He is referring me for a head CT scan. He also gave me a referral for physiotherapy…

Counsel for Cooperators, in questioning Ms. Miller, assumed that Ms. Miller had attended in Dr. Azad's office with Mr. Stewart on this occasion and had asked Dr. Azad about referring Mr. Stewart for an MRI. One could draw this inference from the way that the paragraph has been worded. As was pointed out by counsel for JevcoHowever, the statement does not specifically say that Ms. Miller was in Dr. Azad's office or that she asked Dr. Azad about referring Mr. Stewart for an MRI. The wording of the paragraph is equally capable of the interpretation that Ms. Miller did not attend with Mr. Stewart in Dr. Azad's office, and that she had asked Mr. Stewart whether Dr. Azad would refer Mr. Stewart for an MRI.

This reference is perhaps not as directly important for the issue of trying to distinguish Mr. Stewart's cognitive condition between the accidents, but depending on how it is interpreted, one could be left with the impression that Ms. Miller was more actively involved in Mr. Stewart's medical situation than she was. It must be remembered that it Ms. Miller's evidence was that she never attended at any time with

Mr. Stewart in Dr. Azad's office, nor did she ever speak with Dr. Azad. She did acknowledge that she drove Mr. Stewart to Dr. Azad's clinic on occasion.

The third reference in the October 5, 2006 statement that is specifically attributed to Ms. Miller reads as follows:

> Since the first accident, I have used a cane for support since there were a few times where my back froze up and I fell. I am just using a cane my girlfriend had but my girlfriend, who is a nurse, thinks I should have a 3 prong cane because it would give me extra support.

Since this is a statement given by Mr. Stewart, and signed by him, one must, I think, attribute what is being said in the statement to him. This would mean that it is Mr. Stewart, and not Ms. Miller, who is stating that it is Ms. Miller's view that he should have a 3 prong cane. I say this not forgetting the context that adjuster Phillips was under the impression that she was meeting with Ms. Miller when this statement was being taken so presumably even if these were not her words, one would think she was endorsing what was being said.

I have reviewed in detail the issue of whether it was Ms. Miller who was even involved in this meeting. In any case, Ms. Miller denies under oath owning a cane, or making any suggestion that it was her view Mr. Stewart should be using a cane.

Another problem with Ms. Phillips' statement taking procedure is that she has either erroneously attributed statements to Ms. Miller from the October 5, 2006 meeting that she did not make, or Ms. Phillips has not properly recorded what was said in Mr. Stewart's statement.

Here I am referring to Ms. Phillips October 19, 2006 report at page 7 where she summarizes Mr. Stewart's "*Post-Accident*" daily activity/domestic situation by stating:

> Laura Miller advised that since this 2nd accident, the claimant does very little except rest in bed and gets up only to eat. He is having trouble while eating and he is having trouble using eating utensils with his right hand as it is sore and sometimes he drops things.

The October 5, 2006 statement signed by Mr. Stewart does not say that Laura Miller has either made these statements, or endorses them. According to the statement, these comments are Mr. Stewart's own version of events. The statement reads:

Right now, I am not able to do anything except lay in bed and get up to eat. I am even having trouble eating, that is using utensils because my hands, right hand is sore. I dropped dishes because I sometimes cannot control my hand.

Laura Miller's name is not mentioned in the statement in connection with these comments.This creates doubt with respect to the reliability of the statement, and also with respect to the accuracy of Ms. Phillips summary of the October 5, 2006 meeting. It further illustrates my point about the problems that can develop when better verification, such as a separate, signed statement, is not obtained from the person to whom comments are attributed which later become very important in an expert's evaluation of a claimant's condition.

As a final comment about Mr. Stewart's October 5, 2006 statement, I would like to note that his description of his condition chronologically following upon the August 27, 2006 accident, is virtually identical to his description of his condition following the July 7, 2006 accident. I will refer to selected excerpts from the statements to illustrate the point.

> (*From the September 14, 2006 statement regarding the July 7, 2006 accident*) The problems I have from this accident is the ringing/whistling noise

in my head. At first I had this all the time, now it comes and goes but I have it every day. My right leg and right knee hurt. My right shoulder hurts. The back of my neck all the way down my back hurts and especially the middle of my back and on the left middle of my back gets a sharp pain and I cannot move. My left leg feels like it is asleep. When I have it in certain positions it goes numb. My left knee hurts. Sometimes in the morning I cannot get out of bed… I was wanting to use a cane that belongs to my girlfriend just for support when my back freezes up. A few times when this happened I fell over and couldn't get up… Since the accident I am taking painkillers every day. The doctor at the Hospital gave me a prescription for Tylenol #3's… I do the cooking, cleaning. We live on a farm and I am supposed to take care of the farm but I can't do that now. I sometimes have trouble taking care of myself when I am in pain. I sometimes have to have someone help me get out of bed in the morning because I can't get moving (although not in this statement I note that Ms. Phillips records in her August 22, 2006 report that Mr. Stewart told her he was 'in so much pain that he needed help getting out of bed and he was relying on his father to help him. He advised his father does not move very fast and he almost wet the bed').

(*From the October 5, 2006 statement regarding the August 27, 2006 accident*) I have lower back pain which causes my back to freeze up so I can't move. I still have the numb left leg. I had these both from the first accident. From this 2nd accident, it is neck pain that goes up the back of my head and I hear a clicking noise. Sometimes I can't move my head in any direction and other times I can. Since the accident, the doctor gave me Naproxen and Tylenol #3. Since the first accident, I have used a cane for support since there were a few times where my back froze up and I fell… Since the accident I also have left knee pain… I did minor Housekeeping like cleaning up after the morning activities and taking care of my own stuff.. Right now, I am not able to do anything except lay in bed and get up to eat… I have to be helped out of bed in the morning and I am sometimes incontinent of urine and feces because I can't get out of bed…

It is certainly difficult, even accepting Mr. Stewart's own assessment of the extent of his disability following each of these accidents at face value, to see any real difference between the consequences of the accidents for Mr. Stewart.

Between taking Mr. Stewart's statement on October 5, 2006, and Mr. Stewart's next visit to Dr. Azad on January 5, 2007, SCM Adjusters continued their handling of the claim. Mr. Stewart commenced physiotherapy treatment at the AIM clinic.

After initially being asked to close their file, SCM Adjusters were asked to continue their contacts with Mr. Stewart. Jevco was considering arranging a section 42 assessment to address Housekeeping exposure and Mr. Stewart's request for a new bed.

Once again, another one of the many inconsistencies that I find troublesome in this case arises out of Mr. Stewart's new bed request.An entry in the SCM Adjusters Claim Notes for October 16, 2006 indicates that Mr. Stewart called at 1:35 p.m. on that date. The note would appear to suggest that at that time Ms. Phillips also spoke to Laura Miller, and Ms. Phillips recorded the following:

> Clarified his living arrangements with Laura Miller. She advised they have lived together off and on for 2 years, they are not common law and they are not boyfriend/girlfriend, just friends. He helps with the kids because it is convenient because he is there and he likes to but is living there is not contingent on his help it. He is not required to be responsible for the children.

The SCM Adjusters Claims Note for December 1, 2006 states, in part:

> He (David Stewart) wanted to ask what he should do because he needs a new bed or mattress because he can't sleep at night because he has to

> keep his knee bent and this bothers Laura and it is making problems for them…

Perhaps this is a minor point insofar as the proper apportionment of loss transfer indemnification for catastrophic benefits is concerned. Certainly the inconsistency does not seem to have occurred to adjuster Phillips. To mehowever, it is just another example of David Stewart's questionable credibility.

It is noteworthy that the SCM Adjusters report January 22, 2007[51] reporting on developments in the claim reiterates the common theme that Mr. Stewart did not want to meet with Ms. Phillips at Ms. Miller's farm in the country. His explanation for that had now become that he did not want the children asking questions about the "strange lady", taking information back to their father, so that he would find out about Mr. Stewart's accident, which somehow would result in causing problems for Ms. Miller. The cynical view of the real reason for Mr. Stewart's reluctance to have Ms. Phillips attend at Ms. Miller's home in the country would be that a face-to-face meeting between Ms. Phillips and Ms. Miller would result in Ms. Phillips discovering that it was not really Laura Miller she met on October 5, 2006.

On December 15, 2006 Mr. Stewart attended at the Hotel-Dieu Grace Hospital. It introduces the possibility of another head injury to complicate the assessment of Mr. Stewart's presentation. It also renews the pre-accidents, "denial of drug seeking" theme. He presented at the emergency department with various neurological and musculoskeletal complaints he attributed to both of his July and August, 2006 accidents, and from falling downstairs a few days ago. The note reads as follows: "*Reports falling*

[51]Exhibit 3, Tab 20.

downstairs a few days ago r/t knee gave out. Wants MRI and neurosurg.referral. Continually saying 'I'm not a druggie'."

On January 5, 2007 Mr. Stewart attended upon Dr. Azad. Dr. Azad was examined about this visit. Once again he interpreted his handwritten note. His evidence as to what the note stateswas as follows:

> Neck pain on and off. No headache now. Ringing in ears. No "N", which is nausea, and no "V", which is vomiting. Slight memory loss.Occasional lower back pain. Occasionally radiates in left leg. Looks slightly tired…

In the assessment portion of his note Dr. Azad stated "*neck/back pain*".

Dr. Azad indicated that he was referring Mr. Stewart to the Neuro Brain Injury Clinic at Windsor Western Hospital. Dr. Azad did not record any other observations that he may have made of Mr. Stewart. He did not go into any more detail about what symptoms he thought might be attributable to which accident or even to both of them.

There is a note in the SCM Adjusters Claim Notes for January 2, 2007 recording a phone message from Mr. Stewart to Ms. Phillips. It indicates that he had moved to a one level apartment so that he did not have to watch his girlfriend's children or negotiate stairs. Ms. Miller testified, and even told Ms. Phillips, that he was not required to watch her children. On her examination under oath she testified that she never observed Mr. Stewart having trouble with stairs.

I am of the view that the real reason for Mr. Stewart's move was that it was about this time that Ms. Miller had decided she really did not want anything more to do with Mr. Stewart, and whatever relationship they did have was quickly coming to an end.

The evidence indicates that on January 8, 2007 Mr. Stewart had an initial intake interview with the Windsor Regional Hospital Acquired Brain Injury Consultation Team ("WRH Acquired Brain Injury Team"). This is confirmed in their initial report dated August 10, 2007.[52]The report was actually generated following this initial intake interview, and an assessment conducted April 30, 2007.

They obtained information from Mr. Stewart, and significantly, from Carolynn Stewart.In their Client Profile, and History of Present Illness/Injury sections, the WRH Acquired Brain Injury Team states:

> Mr. David Stewart is a 38-year-old male who was reportedly involved intwo motor vehicle collisions (arbitrator's emphasis) about a year ago and is complaining of physical, cognitive and emotional changes.
>
> At the initial intake on January 8, 2007 he stated that his injuries occurred around July and August 2006. However a Hospital record from Hotel-Dieu Grace Hospital indicated that he presented to the Emergency Room on May 23, 2005 following an incident in which he fell off his motorcycle. He reported right arm pain and stated that he had a brief loss of consciousness.
>
> ...During the consultation meeting on April 27, 2007 Mr. Stewart was unable to provide any concrete timeframe relating to these injuries. He said that the first collision involved a head-on collision with a vehicle and he was rear ended in the second crash. He could not recall the dates of these occurrences or the extent of the injuries he sustained.

The WRH Acquired Brain Injury Team conducted a telephone interview with Carolynn Stewart on May 11, 2007. In my opinion, unlike other medical examiners in this case, Ms. Lee, on behalf of the Acquired Brain Injury Team, appears to have correctly interpreted what Carolynn Stewart was saying about Mr. Stewart's condition.

[52]Exhibit 3, Tab 29.

Ms. Lee records that Carolynn Stewart's description of David Stewart related to his situation before either accident occurred, and then to observations she made after both accidents had occurred. There is no suggestion that Carolynn Stewart was offering any observations of David Stewart after the July 7, 2006 accident, but before the August 27, 2006 accident.

The following excerpts are from the August 10, 2007 report of WRH Acquired Brain Injury Team.

> A telephone interview was conducted with David's stepmother, Carolynn, on May 11, 2007. Caroline stated that David had a history of anger management problem (*sic)* prior to his injury. His father, reported an episode that he became physically aggressive and turned a knife to his mother when he was a teenager. Carolynn said that he did not cope well after he broke up with a girlfriend about 10 years ago and he "talked stupid" then. At the time she described him as somewhat delusional but not suicidal. After that episode he seemed to be able to function well enough although he developed anger issues.
>
> His father stated that David was incarcerated wants but he was unsure of the nature of the offense.
>
> David began seeing Dr. Rai, a psychiatrist in February 1998 and was diagnosed with anxiety disorder and personality disorder.
>
> Despite his pre-injury issues, Carolynn felt that David's behaviours have changed <u>since his car accidents</u> (arbitrator's emphasis)…She stated that he no longer trusts anyone but herself. Moreover, he is more anxious now and he may behave inappropriately, in that he is unable to stop acting out when he is involved in a conflict situation.
>
> His frustration tolerance has been further reduced, he dislikes being interrupted and he is more argumentative now.

> Carolynn also feels that he has been more withdrawn socially since his injuries (arbitrator's emphasis). He stays in the basement and eats his meals there when he visits in her House. She did not notice any crying spells.
>
> …At the time of the injuries (arbitrator's emphasis) he lived with his girlfriend and her children in Ruthven. According to Carolynn, David was "doing everything" including caring for the children prior to his injuries (arbitrator's emphasis).

For the purposes of the issue that I must decide, there is a significant point to be made about this report by the WRH Acquired a Brain Injury Team. It records the first time detailed information was obtained from Carolynn Stewart by medical experts concerning David Stewart. The reportclearly attributes Carolynn Stewart's observations about the differences in Mr. Stewart's behaviour as relating to both the July 7, 2006, and August 27, 2006 accidents.

In my opinion a significant misunderstanding occurred in subsequent assessments of Mr. Stewart whencomparative information Carolynn Stewart provided to medical experts was misinterpreted to refer to the "before" picture as being Mr. Stewart's condition right up until the time of the second motorcycle accident, and the "after" picture being his condition following only the second motorcycle accident. This is the interpretation, incorrect in my opinion, of Dr. Richard Guscott, in his April 27, 2009 report.[53]As I will discuss later, Dr. William Gnam, the psychiatrist who participated in the CAT Assessment, similarly misconstrues Carolynn Stewart's observations, perhaps even more so than Dr. Guscott.

[53]Exhibit 3, Tab 47.

Just prior to his assessment by the WRH Acquired Brain Injury Team on April 30, 2007, Mr. Stewart made a visit to Dr. Azad on April 27, 2007. Only four visits to Dr. Azad for which there are handwritten clinical notes are in evidence before me. He was examined about these visits in his examination under oath, with respect to his opinion as to whether any distinction can be drawn between the July 7, 2006, and August 27, 2006 accidents.

Without repeating the entire clinical note for April 27, 2007, suffice it to say that it deals entirely with musculoskeletal complaints. There is no mention of head injury indicators, such as loss of consciousness, headaches, vomiting, dizziness, ringing in the ears, confusion, irascibility, personality changes, mood differences, word finding difficulties, slurring of speech, memory problems, and so forth.

In the assessment portion of his note, Dr. Azad recorded, "*L knee/ back pain*."

In the treatment plan there is similarly no mention of further head injury investigations that Dr. Azad thought should be performed as a result of anything he noticed on this examination. Dr. Azad speaks of medication renewal, braces for Mr. Stewart's extremities, and a note for moving.

In addition to the WRH Acquired Brain Injury Clinic, Mr. Stewart was referred to Brainworks, a private brain injury rehabilitation company in London, Ontario.

Brainworks' initial report to Ms. Phillips at SCM Adjusters dated June 6, 2007[54] is an example of the lack of precision that seems to have plagued the handling of this file throughout. In saying this I am not in any way intending to disparage the qualifications

[54] Exhibit 3,Tab 25.

or expertise of the professionals who were involved. I have already discussed the different focus of medical and legal professionals in these matters.

Hence, it may not matter much to the medical professionals, but it is of critical importance (and frustration) to the legal professionals, when, for example, comments like these are made in a report such as the June 6, 2007 report of Brain Works:

> ... It certainly appears that Mr. Stewart is experiencing symptoms consistent with brain injury… Mr. Stewart has stated, "I used to be able to talk normally (before the accident) (arbitrator's emphasis) but now I get all flustered and it takes me a long time to say what I want"…
>
> Mr. Stewart has also complained of ringing in his ears post MVC; (arbitrator's emphasis) describing it as "it feels like you feel after hearing a loud whistle but all the time". Mr. Stewart also described experiencing a great deal of pain, particularly in his left leg and left knee, most often while walking. He also described loss of function particularly fine – motor control of both his hands and fingers, which he again advises occurredpost MVC (arbitrator's emphasis)…
>
> Mr. Stewart reports that his life changed markedly in the summer of 2006 when he was involved in two motor vehicle collisions(arbitrator's emphasis) within six weeks of one another…

The inconsistent references to one or more accidents leaves it unclear whether the medical expert is saying that the problems were caused by one of two accidents, or a combination of the two accidents. It does not help when they use short forms such as "post MVC". Does this mean collisions plural, or collision singular?

Perhaps the authors of this report had not even considered the causation between the accidentsquestion since it did not matter for their purposes whether the problems were caused by one, two, or several accidents. As a result, maybe they were

just not being careful in their references to accident/accidents.One can see the problem this creates however, in interpreting such reports.

The next report of some significance to this matter is the July 6, 2007 report of Brainworks. This report continues the imprecise description of Mr. Stewart's problems emerging "*Post MVC*". Brainworks was certainly aware, as evidenced in their first report, that Mr. Stewart had been involved in at least two motor vehicle accidents about six weeks apart.

This report also introduces a significant reliance on Dr. Azad's observations about the consequences of these accidents for Mr. Stewart. It does not appear to have been considered that at least as of June, 2007, Dr. Azad hadvirtually no documented support for such observations at all, let alone a basis to reliably attribute such observations to one accident or another.

The opening paragraphs of the report Brainworks states:

> We now have confirmation from his family physician that there has been a marked exacerbation of pre-morbid psychiatric symptoms post MVC along with the emergence of clear cognitive impairment post MVC.

According to the report, Brainworks had Dr. Azad's clinical notes and records but of these, stated "*(some very difficult to decipher due to illegibility)*." The report indicates that one of the authors of the report, either Rehabilitation Therapist, Dennis Radman, or Psychological Associate, Arden McGregor, had a telephone consultation with Dr. Azad on June 27, 2007. There are no notes of this conversation as part of the Brainworks evidence. There is also nothing in Dr. Azad's clinical records indicating that he recorded the conversation.

The Brainworks July 6, 2007 report summarizes this conversation with Dr. Azad as follows:

> Post MVC, Dr. Azad outlined orthopedic/physical sequelae as well as significant changes in Mr. Stewart's behaviour and cognitive functioning since the most recent date of loss. He particularly noted impairments in the areas of memory, attention, expressive speech and processing of information. Dr. Azad corroborated the concerns and observations we have already described with respect to his behaviour/cognitive status. As indicated above, we consider this to be a most critical finding in terms of determining the insurer's responsibility for rehabilitation.

I have reviewed in unfortunately laborious detail, Dr. Azad's clinical notes and records relevant to this matter. Theyappear to contain exactly four handwritten notesafter the accidents up to June 27, 2007,which presumably would be everything that Dr. Azad would have had on paper to assist him when he spoke to Brainworks.

There was one visit on July 21, 2006 after the first accident of July 7, 2006. That note references the possible head injury symptoms of"*ringing in both ears*", and "*was knocked out for short period of time.*"

The second visit was after both accidents, on September 29, 2006. The only reference in that note that could be construed as a symptom of head injury was, "*doesn't remember what happened*". I have already dealt at length with the unreliability of that statement.

The third visit was January 5, 2007. Dr. Azad recorded the ringing in ears symptom, and the additional potential head injury symptom of slight memory loss. Mr.

Stewart did not have any headache (not that Dr. Azad had recorded any complaints about them to this point after either accident).

The final visitwas April 27, 2007. Dr. Azad's clinical note for this visit contains absolutely no references to any symptom which could be considered to be indicative of a brain injury, personality changes, or changes in behaviour. It records musculoskeletal complaints, and nothing else.

Dr. Azad has no notes of any other visits by Mr. Stewart between April 27, 2007 and his telephone conversation with Brainworks on June 27, 2007.

A review of Dr. Azad's examination under oath testimony confirms, in my opinion, that like Carolynn Stewart,his recollection of events was nowhere near precise enough, even in June, 2007, to distinguish features of Mr. Stewart's condition that he could attribute only to the August 27, 2006 accident, but not to the July 7, 2006 accident. His clinical notes would certainly not help him with that exercise. At best, like Carolynn Stewart, he was contrasting his impression of Mr. Stewart after both of these accidents. He was not trying to distinguish Mr. Stewart's condition in the six or seven week period following the first accident, from his condition after the August 27, 2006 accident.The following is an excerpt of his evidence on this issue:

> A. I guess the main thing that I noticed was that he had trouble with his speech. His speech was not clear at times, which had never been an issue prior to <u>the accidents</u> (arbitrator's emphasis), and at times he was struggling for words. Like he knew what he wanted to say but couldn't say it and he was getting frustrated with that.
>
> Q. Are you able to say from your notes or your memory when you first started noticing these symptoms?

A. I think I started to notice that after the second accident from what I remember and it seemed to be progressively getting worse. So when I saw him at that April 27 visit, like he was, like his speech and his thinking was definitely different than even when I saw him right after the accident (*inexplicably,Dr. Azad does not record such important observations)*.

Q. Sorry, you said his speech and his thinking?

A. Maybe I should say speech and memory.

Q. Okay. Had you noticed any worsening in his condition between the January 2007 and the April 2007 accident, or visits, I should say?

A. That I don't remember (*Dr. Azad's notes would suggest that Mr. Stewart's condition was improving between these dates)*.

Q. You don't have a photographic memory for events of six years ago?

A. Afraid not.

With respect to this last question and answer, I would go further and say it is beyond reasonable to conclude that a busy family physician such as Dr. Azad could at any time give a clear and detailed account of the nature and timing of changes in the psychiatric and cognitive condition of one of his patients without the aid of clinical notes and records providing such detail. It is highly unlikely that his memory could be so good.

Although Dr. Azad's record keeping could certainly use improvement, like Carolynn Stewart, I do think he was trying to be helpful in his evidence. He was not attempting to deceive anyone. I think the best that could be made of Dr. Azad's evidence however, is that he can recall deterioration in Mr. Stewart's condition occurring in a chronological sense after both motorcycle accidents. I do not thinkhowever, that any reasonable interpretation of his notes, or of his evidence could support the conclusion Mr. Stewart's psychiatric and cognitive problems were caused by the second

motorcycle accident, but not by the first motorcycle accident. I will conclude on this point with the following excerpt from Dr. Azad's testimony:

> Q. And then as between the two accidents, are you able to distinguish between those, or is it the combined effect of pre-existing condition and to motor vehicle accident and any progression over time?
>
> A. I can't really say that I saw much of a difference between the accidents in that and it just started after the second accident a little bit more and it sort of became more prominent as time went on over the next subsequent months.

Apparently Brainwork's critical concern to establish a cause and effect relationship sufficient to state in their report that an insurer should be paying for Mr. Stewart's rehabilitation did not extend to carefully examining with Dr. Azad when specific symptoms were noted, or whether just one accident, or both had caused the symptoms.

In Brainwork's defense, they certainly did not have all of the information in evidence before me available to them when they were interpreting Dr. Azad's comments from a telephone conversation. In fact, Brainworks had very little information and documentation available to them. They did not have the report of the WRH Acquired Brain Injury Team as it was not completed until August 10, 2007. Therefore, they would not have had the benefit of the Acquired Brain Injury Team's correct, in my opinion, interpretation of Carolynn Stewart's observations.

Brainworkswas under the misapprehension that Mr. Stewart was receiving treatment in the Acquired Brain Injury unit of the Hotel-Dieu Grace Hospital, and had made unsuccessful attempts to contact the treatment provider there. Of course they

were never going to be able to contact the treatment provider at the Hotel-Dieu Grace Hospital because Mr. Stewart was receiving this treatment at the Windsor Regional Hospital.

Brainworks prefaces their comments about the origin of Mr. Stewart's problems as follows:

> Due to minimal documentation available for review, delayed, then limited consent, along with significantly impaired ability to communicate his history clearly and specifically, we still do not have a thorough, verified, understanding of Mr. Stewart's clinical history.

Dr. Azad delivered a further Disability Certificate (OCF – 3) dated October 19, 2007. It references the date of his most recent examination as September 28, 2007. There is no clinical note for this date in Dr. Azad's records as they have been put into evidence, and he did not testify about this Certificate on his examination under oath.

The typewritten date for the accident in the top right corner of the Certificate shows July 7, 2006. I hesitate to speculate on this but I suspect that this form was sent to Dr. Azad for completion with that date already filled in. He has completed the balance of the form in handwriting.

Even though the form is dated for the July 7, 2006 accident, Dr. Azad appears to have intended his comments to refer to both accidents. He hascombined the details of the two accidents from what he recorded in his previous clinical notes, and in the previous Disability Certificates he completed.

For example, the "*Accident Description*" section appears to read as follows:

"*1st& 2nd Accident - Van pulled out in front of David*

Loss of Memory about the accident – Severe Pain in left side, Back and neck, hip.leg numb, sore knee."

The description of the accident involving the van pulling out relates to the July 7, 2006 accident. The loss of memory comment about the accident probably relates to Dr. Azad's September 29, 2007 note about the August 27, 2006 accident where he states, "*Doesn't remember the accident*". Dr. Azad has not distinguished these points in the Certificate.

In the "*Relevant Dates*" Section of the Certificate, Dr. Azad has inserted July 7, 2006 in the box for "*Date symptoms first appeared*". In the margin he has written, "*estimate of date of accident*."

In the section of the form relating to Non-Earner Benefits, Dr. Azad has noted the Onset of Disability as July 7, 2006, and explains "– *has ongoing post-concussion syndrome*".

In the section of the form of dealing with Anticipated Duration of disability, Dr. Azad has written, "*safety/memory issues since concussion*."

Dr. Azad indicates that Mr. Stewart is, "*Awaiting appointment with a neurologist & rehabilitation physician.*"

In my opinion, the manner in which Dr. Azad has completed this Certificate reinforces the point that I made earlier. Dr. Azad could not distinguish between the

consequences produced by the two accidents. In fact, he was indicating in this Certificate that both accidents produced the post-concussion syndrome cognitive problems for Mr. Stewart, and that further head injury investigation was necessary as a result of both accidents.

An Occupational Therapy in Home and Form 1 Assessment of Attendant Care Needs was conducted over three dates in June, July, and October, 2007 by Kathleen Murphy of Parkwood Hospital, St. Joseph's Health Care, in London, Ontario. The assessment was conducted at the request of Mr. Stewart's case manager. The report regarding the assessment was completed October 29, 2007.[55]

I will deal with the recommendations portion of this assessment in more detail when I come to address the issue of whether Jevcofailed to act reasonably in the payment of Attendant Care benefits.

The report identifies that Mr. Stewart was involved in two accidents, July 7, 2006 and August 27, 2006. It was known that Mr. Stewart attended Hospital following the accidents, but Ms. Murphy did not have the Hospital records.

The report contains what are, in light of Laura Miller's evidence, questionable conclusions about Mr. Stewart's daily functioning before the accidents. Ms. Murphy essentially recites the content of Mr. Stewart's September 14, 2006, and October 5, 2006, statements wherein he reports fairly significant amounts of care giving and home maintenance activities prior to the accidents.

[55]Exhibit 3, Tab 32.

Apparently Ms. Murphy did not think it necessary to question the accuracy of this reporting of significant activity levels before the accidents despite the fact that she states, "*Mr. Stewart was not employed at the time of the accidents*." While she acknowledgedMr. Stewart was receiving ODSP benefits, a review of the records would have revealed that he had been declared permanently unemployable many years before the accidents because of a combination of physical and psychiatric problems. One might conclude that this would have warranted more detailed inquiries into his activity level pre-accidents, perhaps, for example, with Laura Miller.

In discussing the Mr. Stewart's psychosocial concerns expressed by Mr. Stewart, she notes that he is concerned about the "*Loss of closeness and support from his children*", "*Frustration with his present living situation and how poor the quality of his life has become*", and about "*Not being able to read to his children – fear/embarrassment that his children will see him as disabled*."

One might ask whether Ms. Murphy had turned her mind to the question of whether the accidents had anything to do with Mr. Stewart's domestic situation. By this time, as her report indicates, Ms. Murphy had access to the complete accident benefit files. She would have known from a review of those files that Ms. Miller had described her relationship before the accident with Mr. Stewart as "just friends". Whatever relationship they had, had ended many months earlier. Before that, they were not living common-law, and they were not boyfriend – girlfriend. Mr. Stewart was not the father of any of her children, and during the times he stayed with her he was under no obligation to take care of the children.

If Ms. Murphy, or anyone else involved with Mr. Stewart for that matter, had taken the time to ask Ms. Miller about some of these things, I suspect they might have got an entirely different version of events. Instead, Ms. Murphy says this in her report:

> Mr. Stewart apparently moved from his residence at the time of the accident to an apartment in a House in Cottam in January 2007. It is not clear what precipitated the move from this CottamHome.

How could it be clear if the question was never asked, apparently not even of Mr. Stewart, let alone Ms. Miller?

The real problem with this report insofar as the issue of apportionment between the accidents is concerned, is that Ms. Murphy's reporting, in my view, reinforces the misleading interpretation of the situation started by Brainworks.

Ms. Murphy repeats in her report the Brainworksflawed interpretation of Dr. Azad's observations:

> It appears the most comprehensive information has come forward by Dennis Radman, RT from Brainworks… I quote in Mr. Radman's report of July 6, page 2 "following these collisions (July 10, 2006 and August 27, 2006) Mr. Stewart's psychiatric symptoms were apparently markedly exacerbated and he began to demonstrate evidence of cognitive impairment. According to Dr. Azad, Family Physician, he noted the significant changes after the second MVC."

Once again paraphrasing the Brainworks July 6, 2007 report Ms. Murphy writes:

> Post MVC, Dr. Azad outlined orthopedic/physical sequale as well as significant changes in Mr. Stewart's behaviour and cognitive functioning since the recent date of loss (August 27, 2006). He particularly noted impairments in

> the area of memory, attention, expressive speech and processing of information.

Ms. Murphy then goes on to set out an extensive list of complaints and symptoms.

Conspicuous by its absence is any reference to the WRH Acquired Brain Injury Team August 10, 2007 Report, which contains the information from Carolynn Stewart, and correctly attributes herobservations about Mr. Stewart's problems to both accidents.

In my opinion, the manner in which this report was written only served to compound the misapprehension of the evidence started by Brainworksbecause it gives the clear impression that it was only the August 27, 2006 accident that caused significant changes in Mr. Stewart's behaviour and cognitive functioning.

At the request of Jevco, Claim Ability Management conducted an Occupational Therapy In – Home/Functional Assessment SABS Section #42 Assessment. The assessment was conducted November 29, 2007, and a report December 7, 2007[56]was authored by Occupational Therapist Kristen Hoh. Like the Parkwood Hospital assessment to which I have just referred, I will comment further on the Attendant Care portion of this report when I come to analyze the reasonableness of payment issue.

In my opinion, Ms. Hoh did a much better job of trying to determine what happened in each accident, and identifying the complaints or symptoms Mr. Stewart developed from each accident, respectively. In this respect, her summary of the situation is much more precise than that of the Ms. Murphy, or Brainworks.

[56]Exhibit 3, Tab 35.

Ms. Hoh records that Mr. Stewart was able to describe the events of the accidents in, "*significant detail*". He also gave her a comprehensive list of his symptoms following each accident.

She records that Mr. Stewart told her that the ringing in the ears symptom started after the July 7, 2006 accident. This does accord with the previous reporting of Mr. Stewart and Dr. Azad's records.

I note that she was told by Mr. Stewart that one of the effects of the August 27, 2006 accident was "*increased ringing in the ears*". This is the first time I can find any reference to Mr. Stewart indicating that this symptom increased after the second accident. The only reference to this symptom in the previous medical records relating to the second accident is in the ambulance call report which indicates that Mr. Stewart had ringing in the ears, but that this was normal for him. In other words, it was the same as it was following the July 7, 2006 accident. In his September 14, 2006 statement relating to the July 7, 2006 accident, but given approximately 2 weeks after the August 27, 2006 accident, he indicates that he experienced the ringing/whistling noise in his head all the time at first (post July 7, 2006), but by then (two weeks after the second accident) it was intermittent.

Mr. Stewart also told Ms. Hoh, "*…that he hit his head on both occasions*." There is evidence in Mr. Stewart's report to Dr. Azad after the first accident that he hit his head (…*was knocked out for a short period of time…)*. In his September 14, 2006 statementabout the July 7, 2006 accident he said that he bounced his face off the minivan, and then off the sidewalk.Until this statement to Ms. Hoh, there is no evidence

in any record or statement about the August 27, 2006 accident where Mr. Stewart reports hitting his head in that accident.

Mr. Stewart was to commence therapy withBrainworks. Their second report of April 10, 2008 indicates that there was a long delay after their report in the summer of 2007, and the commencement of the therapy. There was also a significant break during March, 2008 because of a death in Mr. Stewart's family. The report notes thatMr. Stewart was also spending more time with his father who was in and out of Hospital and having surgery.

I want to link this up with some evidence given by Carolynn Stewart on her examination under oath. It will be recalled that counsel were trying to determinehow frequently Ms. Stewart was seeing David Stewart in 2006, to determine whether her evidence would be useful in distinguishing between the accidents. The following exchange occurred:

> Q. And was that diagnosis (the cancer diagnosis) in the early part of 2007 as well?
>
> A. it might have been 2007. I keep thinking 2008. But he was in the Hospital for nine months, in and out. I know it was in January that when they had me call in his two kids; they did not think he was going to make it.
>
> Q. Would that have been January 2008?
>
> A. Either '08 or '09, one or the other. It was right after the surgery was done in, I believe, October of the one year and this was January. He still had not left the Hospital. <u>And that's when I started seeing David a little bit more</u> (arbitrator's emphasis).

A reading of Carolynn Stewart's entire transcript leads me to conclude that it is quite possible the observations she describes of Mr. Stewart complaining about sensitivity to light, having speech difficulty, and problems with the stairs relate not to the fall of 2006, but instead to the mid to latter part of 2008 at the earliest when, as she says, she began to see David more often because of his father's illness. This would be one way to explain her vague and frequently contradictory evidence about her contact with David Stewart in 2006.

This report repeatsfrom Brainworks' first report another common theme adopted through repetition in many subsequent medical reports. Emphasis is placed on such things as Mr. Stewart's "*frustration with his reading*". The example given is that, "*he used to be able to read to his kids without any difficulty and now 'he sounds dumb*'."

The evidence indicates that by this point Mr. Stewart had not had any contact with Ms. Miller or her children for approximately a year. He did not have any contact with his own biological child. It is not clear to me whether the therapists understood this, or even asked about it. In any case, one must ask, what children would Mr. Stewart be reading to for him to notice a problem with reading?

I make the same comment with respect to the "*sense of loss*" list that Mr. Radman sets out in his report that "*permeates every session and nearly every activity*" for Mr. Stewart.

- Making love again
- Taking care of kids
- Wrestling and having fun with kids
- I'm embarrassed in front of the kids

- Can’t contribute and work

It could be that Mr. Stewart was simply voicing a desire to have what he would consider a normal life. Based on Ms. Miller’s evidence however, his description gives an entirely different picture of the relationship than she would have provided had she been asked.

The impression generally given by these and subsequent reports is that this is what life was like for Mr. Stewart immediately before he had his motorcycle accidents, and the accidents are the cause of these losses that he has suffered. The comments also seem to assume that there is some type of post-accidents, altered life that was continuing between Mr. Stewart, Ms. Miller, and the children. This is just not factually correct.

I repeat the point I made earlier - that the change in Mr. Stewart’s domestic status was not caused by the motorcycle accidents. Any relationship he had with Ms. Miller and her children had effectively ended by the beginning of 2007 for reasons that, according to Ms. Miller, had nothing to do with the accidents. The medical professionals appear to have simply assumed that the change in his domestic life occurred as a result of the motorcycle accidents. This assumption appears to have been made without discussing the matter with Laura Miller, the person with whom they have assumed Mr. Stewart was involved in this type of relationship.

Kathleen Murphy of Parkwood Hospital authored a report June 2, 2008 indicating that she saw Mr. Stewart only twice in January, 2008, and then not again until April 2008. She made various recommendations including the referral of Mr. Stewart to a

speech language pathologist, and the purchase of a television satellite dish because he was "*very limited in his leisure pursuits since the accident and since he does not have his driver's license to go out*."

Brainworks completed a report dated August 6, 2008. It reiterates the "sense of loss" matters that I have commented upon. The report is almost a verbatim repeat on these issues from what was stated in their previous reports.

Mr. Stewart did see a speech pathologist. Lisa Jadd, a Speech-Language PatHologistat Cognitive & Communication Services Inc.She assessed Mr. Stewart over three sessions in September, and October 2008. She authored a report dated October 10, 2008. In the preamble to the report she makes reference to both the July 7, 2006, and the August 27, 2006 motor vehicle accidents as being the basis for the referral. Ms. Jadd does a reasonably thorough review of various pre-accidents and post-accidents documentation that had been provided to her. Amongst other things she recommended eight sessions of cognitive and communication intervention.

NRCS Inc. conducted a Section 42 Insurer Examination in-Home Occupational Therapy Assessment Report. Their report is dated December 28, 2008.[57]The purpose of this was to review a October 14, 2008 Treatment Plan submitted by Penny Primeau, for 60 sessions of rehabilitation therapy, and Occupational Therapist's Kathleen Murphy's Treatment Plan of November 20, 2008.

[57]Exhibit 3, Tab 45.

The report references both accidents in the "*Date of Loss*" section in the beginning of the report. Assessor Julianna D'Aloisio asked Mr. Stewart about both accidents. She said:

> Mr. Stewart reported that he was involved in two motor vehicle accidents occurring on July 7, 2006 and August 27, 2006. When explaining the details of the accidents to the assessor Mr. Stewart often became confused as to which accident he was speaking of, stating "I want to be exact" and was observed to use two stacks of "post its" which he used as the vehicles to demonstrate the results of the accident.

In her review of the medical records, and in summarizing Mr. Stewart's symptoms, Ms. D'Aloisio certainly seems to have the understanding that Mr. Stewart's cognitive and psychiatric problems were as a result of both the accidents, not just one of them.

This brings me to a discussion of the involvement in this matter of Dr. Richard Guscott. His report[58] was the basis for the subsequent Application for Determination of Catastrophic Impairment.[59]Dr.Guscott,is a Hamilton psychiatrist to whom Mr. Stewart was referred by his lawyer, Rein Lomax of the Lomax Law firm in London, Ontario, for a medical – legal examination.

Dr. Guscottnotes the dates of both accidents in the heading of his report, and states in the preamble of his report that what he has been asked to do is the following:

> …to determine the nature of any psychiatric or psychological injuries (David Stewart) may have sustained as a result of motor vehicle accidents on July 7, 2006 and August 27, 2006... if indicated, to give an opinion as to the

[58]Exhibit 3, Tab 47.
[59]Exhibit 3, Tab 53.

> nature of any resulting impairments, their permanence, and severity, and the long-term prognosis…to give an opinion, if indicated, as to the effects of any such impairments on activities of daily living, social functioning, task completion, and employment… To make treatment recommendations and recommendations regarding further investigations, as indicated.

I have not seen the letter of instruction that the Lomax firm sent to Dr. Guscott, and his report does not make it clear whether he was specifically asked to compare the effects of the accidents. Dr. Guscott's summary of his task assignment does seem broad enough however, to indicate that he was to evaluate, and offer an opinion on the effects of each accident on Mr. Stewart.

Dr. Guscott acknowledges the receipt of a "…*Two Volume Medical Brief.The itemized content of which can be made available on request.*" in the "*Documentation Reviewed*" section of his report.

In the "*Review of the Medical Brief*" section of his report Dr. Guscott does not make any reference to the ambulance call reports, hospital records, statements from Mr. Stewart, Dr. Azad's clinical notes and records, SCM Adjusters reports, or any other document that was prepared immediately following or reasonably contemporaneous to the accidents. It would appear that he concentrated on reports which provided only a second hand interpretation of some of these documents to the extent that there was any reference to them at all. I have already indicated my concerns with the reliability of some of these subsequent reports.

In the "*Opinion and Recommendations*" portion of his report Dr. Guscott does refer to the ambulance call report for the July 7, 2006 accident. I will have more to say

on this when I comment on Dr. Guscott's analysis, or more accurately, the lack thereof, in comparing the consequences of the accidents.

Mr. Stewart was accompanied by Carolynn Stewart for this two-hour interview. Dr. Guscott obtained a history from Mr. Stewart that was, even on his own assessment, not very complete.

Dr. Guscott reports receiving information from Carolynn Stewart that David Stewart had one biological child, and "*He had a girlfriend who he was with for a number of years who had four children and whom he considered his own. The relationship ended after the motor vehicle accidents*." I would point out here that Dr. Guscott, throughout his report, seems to have adopted the same assumptions of Mr. Stewart's relationship with Ms. Miller that some of the other medical professionals have done. The tone of his report is such that he appears to have concluded because Mr. Stewart's relationship with Ms. Miller ended after the accidents, its termination was caused by the accidents. Unfortunately, in my view, he employs the same flawed reasoning of "chronological causation" in his opinion concerning the relative impact of the two accidents on Mr. Stewart.

The history obtained from Mr. Stewart is inaccurate and incomplete several respects. The following are just a few examples:

"*He denied any drug or alcohol problems prior to the accidents*".

"*The first accident occurred on July 7, 2006. He stated that a female came up a one-way street and hit him. He could not provide further details of the accident*."

> The second accident occurred on August 27, 2006. Mr. Stewart could not remember the date of the accident. He stated that people 'smashed his motorcycle from behind'. He remembered being taken to the Metropolitan Hospital which is now known as the Windsor Regional Hospital. He remembers being sent Home. He stated that then he 'went to find the pieces'. By this he meant that he went to find the pieces of his helmet or his motorcycle. He was rather vague on this matter. He then stated that he then wandered for a period of time.

It may well be that by this time, because of his problems, Mr. Stewart could not properly recall the events,and was unable to clearly tell the story, but if one is going to offer an opinion on the relative impact of these two accidents, in my view it is incumbent upon the person offering the opinion to verify the accuracy of information received which is directly relevant to this issue.

I am not certain how much Dr. Guscott relied upon Mr. Stewart's own account of his history before the accidents, and his version of events after the accidents. As the entire record amply demonstrates, David Stewart's recollection of events has varied substantially over time.

It does seem clear however, that Dr. Guscott did not review at all, or spent very little time considering the documentation to which I have referred that isvery important to the issue of distinguishing between the accidents.

Dr. Guscott has a section in his report entitled "*Corroborative History from Mrs. Carolynn Stewart.*" He records what Carolynn Stewart said as follows:

> Mr. Stewart reported that prior to the accidentMr. Stewart was very independent. He often went off on his bike for months on end on trips. He cooked all of his own meals. He did well in his chef course and won a contest

> in cooking. He loved to be in groups of people and loved to socialize. He helped at the family Home with painting around the House. He worked in various restaurants while taking his chef course, however he did not get all of his Hours for his chef certification. She stated that he had a tremendous amount of energy.
>
> She describes him since the second motor vehicle accident as very forgetful. He does not remember his daughter's name. He sometimes does not remember her (Mrs. Stewart) name. He forgets when he has eaten. She gave the example of one occasion when he was at her House where he finished a meal and then one and a half Hours later asked what they were going to eat for supper. When reminded that he had already eaten he did not believe that he had eaten and had another meal…

Dr. Guscott goes on to describe in detail similar events demonstrating Mr. Stewart's problems all of which relate to 2009, and 2010. One event was two weeks before his examination of Mr. Stewart.

It is in interpreting the information received from Carolynn Stewart where, in my opinion, Dr. Guscott makes his critical mistake. Without asking specific questions on the issue, he infers from the information he received from Carolynn Stewart that she was describing significant changes in Mr. Stewart's condition which she noticed following the August 27, 2006 accident, but that she had not noticed following the July 7, 2006 accident. This is the only way to explain his conclusion that the August 27, 2006 accident was the cause of Mr. Stewart's problems, and the July 7, 2006 accident played a minimal role.

First of all, I would point out that based on Dr. Guscott's own recording of what he was told by Carolynn Stewart, there is no evidence that she ever told him her comparison was meant to include the 6 or 7 week time period after the July 7, 2006

accident, until immediately before the August 27, 2006 accident. In fact, Dr. Guscott should have realized from the content of what Carolynn Stewart was telling him that in her “before” scenario she was speaking of a time that long preceded either of the 2006 accidents.

For example, Dr. Guscott goes on at length about Carolynn Stewart’s account of Mr. Stewart working in various restaurants, taking a chef course, winning a cooking contest, painting, helping at the family Home, and socializing. Certainly none of this was going on between the accidents. That should have been apparent to Dr. Guscott from a review of the documents which (I have to make an assumption here) had been provided to him.

A review of the WRH Acquired Brain Injury Team report of August 10, 2007, for example, would have provided a clear indication that the information provided by Carolynn Stewart was intended to reflect her observations of Mr. Stewart in relation to injuries he sustained as a result of both the accidents, not just the August 27, 2006 accident.

A proper consideration of all of the evidence, especially Carolynn Stewart’s examination under oath (which admittedly was not available to Dr. Guscott),confirms that her account to Dr. Guscott was not describing Mr. Stewart’s life after the July 7, 2006 accident, but before the August 27, 2006 accident. She was describing a time in Mr. Stewart’s life before (quite possibly long before) either accident occurred. Even a cursory review of the medical records, and the ODSP file would have confirmed this.

In his report Dr. Guscott applies no timeframe to what he has recorded Carolynn Stewart describing as David Stewart's"before" picture.Before basing his opinion about the relative impact of the accidents on assumptions that he made from Carolynn Stewart's observations, Dr. Guscott did not ask what I would consider to be pertinent questions – the kinds of questions she was asked on her examination under oath – to determine what contact she had with David Stewart between the July 7, 2006, and August 27, 2006 accidents.

One might say that to offer an opinion on the diagnosis of Mr. Stewart's problems, a prognosis, and recommendations for treatment, asking such questions may not be necessary.I would agree. If one is going to offer an opinion on which of the two accidents caused Mr. Stewart's problems however, in my view such questions are essential.

Dr. Guscott was provided with a list prepared by Carolynn Stewart that he has appended as "*Schedule B*" to his report. The list is entitled, "*Differences in David since his accident*(arbitrator's emphasis)". Dr. Guscott refers to this list in his report by saying, "*Mrs. Stewart also provided me with a written description of the differences in Mr. Stewart after the motor vehicle accident. It is attached as Schedule "B"*.

Once again, in coming to his conclusion that the August 27, 2006 accident is responsible for Mr. Stewart's significant problems, and not be July 7, 2006 accident, it appears that Dr. Guscott simply assumed that in her list Carolynn Stewart was commenting on differences she noticed after the August 27, 2006 accident, but that she had not noticed after the July 7, 2006 accident.

Although it is unfortunate that Carolynn Stewart was not careful in entitling her list so that it referred to the “accidents”, as opposed to the “accident”, the assumption that it refers to a before and after picture of only the August 27, 2006 accident is not justified solely from a reference to the title, or the content of the list. It is not clear which accident the list refers to, or whether Carolynn Stewart was describing, with an imprecise reference to the “accident”, as we have seen donein many of the medical reports, Mr. Stewart’s situation before either accident occurred, and after both accidents.

In my opinion, Dr. Guscott has just assumed that she meant the August 27, 2006 accident in her list because of the influence of “chronological causation” reasoning applied to Carolynn Stewart’s comment that the timing of her observations was after the second accident.

Indeed, Carolynn Stewart’s examination under oath evidence confirms that her “before” observations preceded both accidents.

Carolynn Stewart gave the following evidence on her examination under oath:

> Q. ...Do you remember seeing a psychiatrist arranged by David’s lawyer?
>
> Q. And that psychiatrist prepared a report in support of an application for catastrophic determination –
>
> A. Yes…
>
> A. …He allowed me to come in the room because David, there again, wasn’t going to cooperate.

Q. …Dr. Guscott…attached to his report a list that I think is prepared by you… In terms of…differences in David…since his accident?

A. Yes, that was prepared by me.

Q. In terms of the heading of that, you've just said "Differences in David since his accident", singular...

A. Either accident. I'm thinking plural when I did it. I was asked to prepare a list…

Q. … You mean to say it would be more fair to say that represents his condition April 2006, when you would have last seen him before going to Leamington…

A. That would be the before part.

Q. Yes. And then the after part would be when you were preparing the list?

A. Yes.

Q. … So this list is intended to be a comparison of before the summer of 2006 and then after being at the…time you prepared the report?

A. Yeah.

Q. Did he (Dr. Guscott) talk to you about that list and what you intended by before and after?

A. I don't remember.

Dr. Guscott states in the *Opinion and Recommendations* section of his report (repeated, in part, in the *Executive Summary*) as follows:

Mr. David Stewart is a 40-year-old single gentleman who was on the Ontario Disability Support Program at the time he was involved in motor vehicle accidents on July 7, 2006 and August 27, 2006. As a result of the motor vehicle accident of August 27, 2006 he sustained the following injuries:

1. Physical Injuries well described in the Medical Brief.

2. Chronic Pain Disorder due to both medical and psychological factors.

3. Major Depressive Disorder.

4. Acquired Brain Injury.

5. Personality Change secondary to Acquired Brain Injury/Labile Subtype...

…It is my opinion that this accident (July 7, 2006) played a minimal role in the development of his ongoing difficulties.

I would defer to Dr. Guscott's medical expertise if his conclusion was limited to his stated diagnosis of Mr. Stewart's condition being as a result of both of the accidents. I do not agree however, with his conclusion that Mr. Stewart sustained the listed injuries only as a result of the August 27, 2006 accident, and that the July 7, 2006 accident played only a "minimal role" in the development of his difficulties. In my view his analysis on this issue is deficient, and inaccurate, leading to an incorrect conclusion.

The only commentary that Dr. Guscott includes in his report that could be described as analysis in addressing the comparative impact on Mr. Stewart from the accidents is a paragraph in the *Opinion and Recommendations* section of his report starting at page 18. It reads almost as an afterthought. One questions whether it occurred to Dr. Guscott at this point in dictating his report that he needed to say something about the July 7, 2006 accidentin arriving at his causation formulation, because of its similarity to the August 27, 2006 accident, and since it preceded the August 27, 2006 accident by only six weeks.

Dr. Guscott'scomments on the July 7, 2006 accident as follows:

> Mr. Stewart's physical injuries have been described in the Medical Brief. I will not comment on them further in this report. It should be noted that Mr. Stewart was involved in an accident prior to the August 27, 2006-accident. He was involved in an accident on July 7, 2006. The ambulance call report from that date indicated that Mr. Stewart was riding his motorcycle and collided with a minivan. This caused him to fall off of his bike. He was wearing a helmut (*sic)*. There was no loss of consciousness. There was no difficulty with ambulation prior to the ambulance arriving. He did complain of back pain. The ambulance call report noted that the pain described was minimal. The emergency treatment record from Windsor Regional Hospital from that date indicated that Mr. Stewart suffered a lumbar/back sprain and strain in the accident. It is my opinion that this accident played a minimal role in the development of his ongoing difficulties. However, it is unclear whether his low back pain from the first accident was present at the time of the second accident.

These perfunctory comments amount to no analysis at all. They show a complete lack of consideration ofimportant evidence relevant to the origin of Mr. Stewart's physical injuries and cognitive symptoms. One can only conclude that Dr. Guscott did not have a complete record available to him, or that he simply did not conduct a careful review of the record to create a proper foundation for an opinion in the matter.

I would hope that my extensive analysis of the evidence earlier in this Award would render obvious the inadequacy of Dr. Guscott's cursory review of only the ambulance call report and hospital records for the July 7, 2006 for his conclusion that the July 7, 2006 accident played a minimal role in Mr. Stewart's problems.

I am not going to repeat all of my previous analysis here. A careful examination of just some of the records contemporaneous with the accident, including Mr. Stewart's

own accounts, reveals several indicators that Mr. Stewart could have sustained a brain injury in the July 7, 2006 accident sufficient to produce the Acquired Brain Injury symptoms from which Dr. Guscott concludes Mr. Stewart is suffering.

In my opinion the proper conclusion from the evidence is that the first accident could have been every bit as responsible as the second accident for the problems Dr. Guscott concludes were secondary to an “Acquired Brain Injury”. In fact,it is arguable that the symptoms of Acquired Brain Injury were more evident immediately after the July 7, 2006 accident, than immediately after the August 27, 2006 accident.

The documents indicate that Mr. Stewart said he remembers “bouncing” his face off both the van and the sidewalk in the first accident. He developed the ringing in his ears/loud whistling noise in his head following the first accident. He cracked his helmet in the first accident. He complained of headaches, and dizziness to Carolynn Stewart after the first accident. His behaviour after discharge from Hospital following the first accident indicated a significant amount of confusion. The evidence suggests that already by then he was having difficulty remembering names, because, according to him, when he showed up at the Stewart residence in Windsor he either did not know who Carolynn Stewart was, or did not know her name.When he saw Dr. Azad on July 21, 2006 following the first accident, he told him that he had been knocked out for a period of time, and that he had ringing in both ears. On the occasions he met with adjuster Phillips before the second accident, she thought he was confused, his thoughts were scattered, he was frustrated, agitated, distrustful and paranoid of people.

A review of his accounts of his physical injuries indicates that there were every bit as painful and debilitating after the first accident, as they were after the second accident.

By contrast, Mr. Stewart did not state that he was unconscious following the second accident, in fact he denied it to the emergency services personnel. He did noteven say that he struck his head (until he said it to Ms. Hoh over a year later).The ambulance call report and hospital records from the second accident are equally, if not more benign than those from the first accident. They do not give any indication that Mr. Stewart had sustained a head injury or was displaying symptoms of a head injury.

Other than saying he did not remember the accident, which he remembered in detail the day after the accident, and again on August 29, 2006, there is no indication of anything in Dr. Azad's clinical notes and records for September 29, 2006, his first visit following the second accident,that would indicate a head injury, or an exacerbation of pre-existing psychiatric problems.On his January 5, 2007 visit to Dr. Azad Mr. Stewart was complaining ringing in his ears and unspecified, slight memory loss. He had reported ringing in both ears to Dr. Azad on July 21, 2006 after the first accident, and headaches to Carolynn Stewart the day of the first accident, but did not specifically mention either symptom in his September 29, 2006 visit to Dr. Azad.In respect of his April 27, 2007 visit, Dr. Azad does not record any symptoms whatsoever indicative of a head injury or which would fit the theory that Mr. Stewart had been on a steady, downward slide only after his August 27, 2006 accident, but not before.

To summarize my comments on Dr. Guscott's part in this matter, Dr. Guscott has attributed Mr. Stewart's problems to the August 27, 2006 accident, and discounted the impact of the July 7, 2006 accident, based in part on his mistaken assumption about the meaning of informationprovided to him by Carolynn Stewart. He appears to have reached this conclusion on the basis that he thought Carolynn Stewart's had observed changes in Mr. Stewart's condition after the August 27, 2006 accident, but not after the July 7, 2006 accident.

To some extent, Dr. Guscott could be excused for coming to this conclusion since it does not appear that Carolynn Stewart was clear about the time frame of the observations in her narrative, and her list. She may have compounded the problem too, by making reference to only "*the accident*" in the heading of her list.

Most of the responsibility for this misunderstanding however, must rest with Dr. Guscott. As the medical professional it was his job to do acomplete analysis of the available information, and documents, which his conclusions about the July 7, 2006 accident indicate he did not do. Had he been more thorough in his analysis, at the very least, I think, questions would have been raised in his mind as to whether his understanding of the anecdotal evidence was accurate.

Based on his diagnosis of Mr. Stewart's problems, I think had he done this, he would likely have concluded that Mr. Stewart's problems were as a result of a combination of both the July 7, 2006, and August 27, 2006 accidents, as opposed to concluding that the July 7, 2006 accident played only a "*minimal role*" in Mr. Stewart's problems.

An Application for Determination of Catastrophic Impairment (OCF -19) was sent by facsimile to Jevco on behalf of Mr. Stewart, dated September 8, 2009.[60] It appears to have been received by Jevco on September 23, 2009 (nothing turns on the exact date of receipt).Carolynn Stewart, who was by that time Mr. Stewart's substitute decision-maker, signed the application on his behalf. Dr. Guscott was the Health Practitioner supporting the Application. His April 27, 2009 report was attached to the Application.

This Application continues the imprecision surrounding the references to the July 7, 2006 and August 27, 2006 accidentswhich has appeared in much of the medical documentation throughout this matter.

The typewritten "*Date of Accident*" with respect to the OCF – 19 is July 7, 2007.The reference to 2007 is simply a typographical error. I would conclude that the date intended to be inserted into the form is July 7, 2006. Of course this is the date of the first accident, not the second accident. Both Carolynn Stewart and Dr. Guscott signed the form bearing the July 7, 2007.

I will pause here to state that I do not think it is determinative of the issue that a certain date or dates have been inserted in this, or other forms and documents along the way.It certainly may have some evidentiary value indicating what was in the mind of the author of the document respecting the accident or accidents to be considered in the document, or the task to be undertaken. I would not draw the conclusion however, that because a certain date or dates is shown in a box in a document, or in the "RE" line of a report, that this is conclusive evidence of whether one or both accidents contributed to

[60]Exhibit 3, Tab 53.

Mr. Stewart's condition. Whatever the document is, the content has to be carefully analyzed to determine what opinion is being expressed by the author, and whether the evidence as a whole supports that opinion.

Jevco assigned Benchmark Rehabilitation Inc. to conduct the catastrophic impairment assessment of Mr. Stewart. The evidence indicates that this assignment was made on or about February 18, 2010, and confirmed on February 19, 2010.[61]Jevco faxed a February 19, 2010 letter to Benchmark enclosing various documents for the assessment. Jevco cites the "*Date of Loss*" in its letter as August 27, 2006.

Although there was no direct evidence on the point, I believe that it is a reasonable inference to draw from the evidence that Jevco had received and reviewed Dr. Guscott's report between the April 27, 2009 report date, and receiving the OCF – 19 on September 23, 2009. That might explain why Jevco made reference to only the August 27, 2006 accident in its letter to Benchmark giving the catastrophic impairment assessment assignment.

Benchmark Rehabilitation Inc. confirmed the assignment from Jevco to conduct the catastrophic impairment assessment in a letter dated February 18, 2010.[62] In Benchmark's letter, they refer to the "*Date of Loss*" as, August 27, 2006.

Thedates in these "RE" lines do have some significance in these circumstances, since it would have been reasonable for the Benchmark assessors to conclude that they were being asked to determine whether Mr. Stewart met the test of catastrophic

[61]Reference, Exhibit 7.
[62]Exhibit 7.

impairment in connection with only the August 27, 2006 accident. Indeed, Dr. Platnick's summary supports this conclusion. He stated:

> Mr. David Stewart, 40 years old, was involved in the subject motor vehicle accident while riding his motorcycle on August 27, 2006…
>
> … It is presumed that Dr. Guscott has erroneously indicated the date of loss on the OCF – 19 as July 7, 2007 as in his report based on his examination of April 27, 2009 acknowledges the date of loss as August 27, 2006.

In fact, in the beginning of his report Dr. Guscott refers to both accidents. In the "RE" line of his report he states, "*Date of MVC(s)" July 7, 2006 and August 27, 2006*".

What I think Dr. Platnick means however, is that Dr. Guscott concluded that the August 27, 2006 accident was responsible for Mr. Stewart's problems, and that the July 7, 2006 accident was not. Therefore, the catastrophic examiners considered, as they were directed to do, whether Mr. Stewart met the catastrophic impairment test as a result of the August 27, 2006 accident. I conclude this to be a reasonable inference, because after making the statement I have quoted above, Dr. Platnick follows it with a summary of Dr. Guscott's report of April 27, 2009. Dr. Platnick concludes with this comment:

> In relation to Mr. Stewart's motor vehicle accident of July 7, 2006, Dr. Guscott indicated, "It is my opinion that this accident played a minimal role in the development of his ongoing difficulties…

Pafco has raised an argument in its submissions that is open to me to find Jevco fell below the standard required of a first party loss transfer insurer in handling Mr. Stewart's SABS claim by making the catastrophic impairment assessment referral to

Benchmark citing the August 27, 2006 accident as the only accident with respect to which Mr. Stewart should be assessed for possible catastrophic impairment.

Pafco argues that it ought to have been clear to Jevco that there was an issue as to the extent to which both accidents contributed to Mr. Stewart's condition, notwithstanding the opinion obtained by Mr. Stewart's lawyer expressed in the medical legal report of Dr. Guscott.

Jevco knew that there were two, second party loss transfer insurers involved from whom it was seeking indemnification. In fairness to both insurers, Jevco ought to have made it clear in its retainer letter that Benchmark should consider both accidents in determining whether Mr. Stewart was catastrophically impaired. By citing only the August 27, 2006 accident in its referral letter, Jevco negligently influenced the outcome of the assessment and thus impaired Pafco's position as a second party, loss transfer insurer.

Without specifying exactly the quantum of the sanction to be applied, Pafco submitted that I could find Jevco at least partially disentitled to recover loss transfer indemnification if I held that they had fallen below the applicable standard in the manner discussed.

The case law has established that the first party loss transfer insurer must act reasonably and responsibly in handling the SABS claim.[63]

[63] *Jevco Insurance Company v. Coachman Insurance Company*, Arbitrator Robert S. Montgomery, July 17, 1996; *Jevco Insurance Company v. Prudential of America Insurance Company*, Arbitrator E. A. Ayers, January 31, 1997.

The duty of the first party loss transfer insurer to act reasonably and properly in handling the SABS claim must be considered in the context that the first party insurer owes a duty to the SABS claimant to act in good faith. Decisions with respect to the handling of the claim must be made in timely fashion and in compliance with the time limits set out in the SABS.[64]

Arbitrators have held that in deciding whether the first party loss transfer insurer has acted reasonably in handling the SABS claim, regard should be had to the following:[65]

1) Did the first party insurer act in bad faith?

2) Did the first party insurer grossly mishandle the processing of the SABS claim?

3) Did the first party insurer make payments that were not covered under the applicable SABS schedule?

4) Did the first party insurer so negligently handle the claim that SABS payments were made greatly in excess of those to which the claimant would have been entitled from a first party insurer acting reasonably.

The second party insurer is entitled to question the reasonableness of the first party insurer's handling of the matter and the reasonableness of the payments made.[66]

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[64]*Dominion of Canada General Insurance Company v. Royal & Sun Alliance Insurance Company of Canada*, Arbitrator Stephen Malach, August 20, 2001.
[65]*Progressive Casualty Insurance Company v. Markel Insurance Company of Canada*, Arbitrator Stephen Malach, May 13, 1997; *Commercial Union Insurance Company of Canada v. Boreal Property & Casualty Company*, Arbitrator Philippa Samworth, December 21, 1998.
[66]*Dominion v. Royal & Sun Alliance*, note 24.

Dialogue between the first and second party insurers while the claim is being handled by the first party insurer is to be encouraged, but it is not mandatory.[67] The second party insurer is not however, entitled to "second-guess" the decisions made by the first party insurer. The second party insurer is not to intervene in or interfere with the claims handling decisions of the first party insurer. It cannot control the claims handling decisions made by the first party insurer.[68]

The second party insurer has the onus of proving that the first party insurer failed to meet the reasonable standard as detailed above. The onus of proof is very high.[69] The adjudicator should not evaluate the decisions made by the first party insurer with the full benefit of hindsight and ask whether better decisions could have been made. To be impugned, the decisions must reflect bad faith, gross mishandling, or negligence to the point where amounts greatly in excess of what would have been reasonable were paid. The question of whether the first party insurer acted reasonably must be answered based on what the first party insurer knew or ought to have known about the claim at the time the decisions questioned were being made.[70]

On this issue I conclude that Pafco has not proven Jevco either acted in bad faith or so grossly mishandled the claim that there should be a finding of partial disentitlement to loss transfer indemnification.

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[67] *Jevco Insurance v. AXA Insurance*, Arbitrator Stephen Malach, March 9, 2004; *Jevco Insurance Company v. Guardian Insurance Company of Canada*, Justice Jennings, November 20, 2000, unreported.
[68] *Dominion v. Royal & Sun Alliance*, note 24; *Jevco v. Guardian*, Jennings J., Note 27.
[69] *Dominion v. Royal & Sun Alliance*, note 24; *Primmum Insurance Company v. Aviva Canada Inc.*, Arbitrator Guy Jones, March, 2008
[70] *Jevco Insurance Company v. Gore Mutual Insurance Company*, Arbitrator Shari Novick, February, 2013.

In coming to this conclusion, I do not endorse Jevco's handling of the catastrophic impairment referral. I think Jevco's failure to direct the catastrophic impairment assessors to consider both the July 7, 2006, and the August 27, 2006 accidents was a very poor decision, and is in large measure responsible for the dispute over the apportionment of benefits which has required arbitration to resolve.

I agree with Pafco's submission, that Jevcoshould have directed Benchmark to consider whether Mr. Stewart was catastrophically impaired from the July 7, 2006 accident, the August 27, 2006 accident, or a combination of the two accidents.Its failure to do so contributed significantly to creating the basis for this expensive litigation.

In considering the claims handling standard to be met however, it must be recognized that Jevco's decision to have the catastrophic impairment assessment focus on only the August 27, 2006 accident was not without any foundation. It is a reasonable inference from the evidence that Jevco relied upon the conclusion of a medical expert, Dr. Guscott, for its decision to make reference to only the August 27, 2006 accident in its catastrophic impairment referral letter. It should also be remembered that there were other medical reports which had been written that have interpreted the evidence to indicate Mr. Stewart's problems arose from the August 27, 2006 accident. It is not as if Jevco made its decision in the absence of any evidence, or contrary to all of the evidence.

Considering the very high standard of proof necessary to make a finding of bad faith or gross mishandling, although Jevco made a poor decision that has resulted in the

consequences I have outlined,, I do not think it amounted to bad faith or gross mishandling.

I am also influenced in my conclusion by the fact that Pafco and Cooperators agree that it was reasonable for catastrophic impairment level benefits to be paid. Therefore, (subject to the Attendant Care payment issue) their dispute is not with the quantum of benefits paid, but the allocation of those benefits. There has been no irreversible prejudice to Pafco as a result of Jevco's decision to refer Mr. Stewart for a catastrophic impairment assessment citing only the August 27, 2006 accident. Pafco has not made any loss transfer indemnification payments since April, 2010. The proper allocation of the total benefits paid is going to be determined in this proceeding, so again, Jevco's handling of the matter could not be said to have been so negligent or so unreasonable that there has been irreversible prejudice to Pafco.

Therefore, I find that Jevco's loss transfer indemnification should not be partially reduced on the basis that Jevco acted in bad faith or grossly mishandled the claim in connection with the catastrophic impairment referral.

The catastrophic impairment assessment included the following examinations:

Neuropsychology, March 4 and 5, 2010 – Dr. D. Kurzman

Occupational Therapy, March 23, 2010 – Ms. K. Charlebois

Neurology, April 7, 2010 – Dr. J. Marotta

Psychiatry, April 9, 2010 – Dr. W. Gnam

Orthopedic Surgery, April 17, 2010 – Dr. B. Paitich

The Catastrophic Impairment Determination report is dated June 14, 2010.[71]The Executive Summary was authored by Dr. H. Platnick. The *Preamble* section of the report confirms the dates of the examinations and outlines the documentation provided to the examiners by both Jevco and Mr. Stewart's lawyers.

Dr. Platnick'sbegins his summary by referring to the August 27, 2006 accident as the "*subject motor vehicle accident*". Certainly it was the subject motor vehicle accident according to the referral letter received from Jevco, and the title page of the CAT Assessment.

In my view, a careful reading of the individual catastrophic impairment assessment reports indicates that although the examiners appreciated they should consider Mr. Stewart's complete history going back as far as the available records allowed, they understood that their task was to decide whether Mr. Stewart was catastrophically impaired as a result of the August 27, 2006 accident. They were not asked for, and hence they did not offer an opinion on whether the July 7, 2006 accident resulted in Mr. Stewart being catastrophically impaired.

The framing of the question was important. As Pafco has submitted, the way the catastrophic impairment assessors have formulated their conclusion that the August 27, 2006 accident resulted in the catastrophic impairment of Mr. Stewart does not rule out the conclusion that the July 7, 2006 accident was a concurrent cause of Mr. Stewart's catastrophic impairment.

[71]Exhibit 3, Tab 63.

For the purposes of the issue that I must decide, in my opinion only three of the five opinions from the catastrophic impairment assessment are relevant. They are the opinions of Dr. Kurzman, the psychologist, Dr. Marotta, the neurologist, and Dr. Gnam, the psychiatrist.

The Occupational Therapist, Ms. Charlebois, quite properly, does not offer a medical diagnosis to be factored into the assessment. Her report focuses entirely upon the issues concerning Mr. Stewart's functioning, and not upon causation. She treats the matter is if she is dealing entirely with the August 27, 2006 accident, as directed in the instructions provided to the assessors.

Dr. Paitich, the orthopedic assessor, concludes that Mr. Stewart does not have any orthopedic impairment that should be factored into an impairment rating. Interestingly, in his conclusions he focuses on both the July 7, 2006, and the August 27, 2006 accidents. He also does not appear to have been particularly impressed with Mr. Stewart. Reading between the lines, it was my impression that Dr. Paitich had doubts about the validity of Mr. Stewart's presentationbut, from a medical point of view, thought it best to leave comments on that issue to his psychological and psychiatric colleagues. He states:

> ...At this point in time I do not feel this man's ongoing symptomology is causally related to pathology arising from the collision which occurred August 27, 2006 and in fact it is unlikely this man's stated symptomology is causally related to his motor vehicle accident of July 7, 2006. There is no indication he sustained any anatomic or physiologic abnormality as a consequence of these collisions that would explain his ongoing symptomology. This man's presentation was nothing short of bizarre. He was found to have a factitious

> gait pattern and there was evidence of functional overlay during the physical examination.
>
> There is no question this man has a history of chronic axial skeletal pain prior to his collisions. Further demonstrating this man's bizarre nature is the fact that he was found to wear a diaper over his shorts and his underwear. I do not feel this man has any orthopedic pathology at this time that would explain his ongoing stated symptomology.

The first report relevant to the issue before me is the neuropsychology examination of Dr. Kurzman. He indicates that he reviewed the medical file and conducted an interview lasting approximately an hour and a half. Neurocognitive testing was also performed.

Dr. Kurzman conducts what, in my opinion, is the most thorough review yet by any medical examiner of Mr. Stewart's medical records, relevant documentation found in the police records, and Mr. Stewart's SABS files.

In reviewing Mr. Stewart's history prior to either of the accidents, he notes that Mr. Stewart was diagnosed by a psychiatrist, Dr. Fernando, as far back as 1997,as having schizophrenia and severe anxiety disorder. He notes the many times that Dr. Azad had filled prescriptions for medication for Mr. Stewart. He refers to a 2002 record from Hotel-Dieu Grace Hospital where Mr. Stewart was noted to be delusional and paranoid. Mr. Stewart had approximately 7 psychiatric admissions since 1997. Dr. Kurzman reviews many of the records to which I have referred indicating the multiple accidents and head injuries Mr. Stewart appears to have sustained before either of the accidents under consideration in this case.

I think it is important that Dr. Kurzman reviewed in some detail Mr. Stewart's statements given to SCM Adjusters regarding the two accidents. He notes Dr. Azad's diagnosis that Mr. Stewart had a concussion syndrome from both the July 7, 2006 and August 27, 2006 accident. He also attributes to both accidents, correctly in my view, the exacerbation of Mr. Stewart's musculoskeletal complaints from before either accident.

He does make an underlined reference to the comment in Mr. Stewart's October 5, 2006 statement about the August 27, 2006 accident, stating that, *"… His girlfriend told him that he was more confused than since the first accident and that he did not make sense when he talked.*" Based on the rest of his report, it does not appear to me that Dr. Kurzman interpreted the wording of this sentence in the same way that some of the other medical examiners had done. The essence of his report indicates that he thought this was corroboration of Mr. Stewart's problemsbefore either accidentbeing exacerbated by the both accidents.

Dr. Kurzman refers to an October 12, 2006 report by Ms. K. Ambrose, a physiotherapist at AIM Essex Rehab. That report is not in the evidence before me, but Dr. Kurzman notes that Ms. Ambrose described "*confusion apparent*, *and not related to the MVAs but developing afterwards*." He does not elaborate further on this report or whether he thought the comment had any significance.

Dr. Kurzman reviews in detail the August 10, 2007 WRH Acquired Brain Injury Team report. He makes an underlined reference to the information provided to them by Carolynn Stewart that I cited previously, which states in part, "*Despite Mr. Stewart's pre-injury issues his stepmother felt that his behaviours had changed since the car*

accidents in 2006". His detailed consideration of this report makes it clear that he understood both Mr. Stewart and Carolynn Stewart to be describing to the WRH Acquired Brain Injury Team Mr. Stewart's condition before either of the accidents, and then after both of the accidents.

Dr. Kurzman reviews the pre-accident descriptions of Mr. Stewart's domestic life. In commenting on what Mr. Stewart told the WRH Acquired Brain Injury Team, he does not seem to have made any assumptions about the state of affairs before the accidents, as some of the other assessors, including his colleague, Dr. Gnam, have done. He states, "*Mr. Stewart informed Ms. Lee that he had ended his relationship with his girlfriend after the MVAs although no explanation was provided*."

He also makes it clear in his review of the medical documentation that whatever relationship was lost with Ms. Miller, Mr. Stewart attributed it to a combination of the accidents, not specifically to the August 27, 2006 accident. Dr. Kurzman references a September 9, 2009 Psycho-Social Assessment by Ms. J. Bowen-Good, a social worker at the Parkwood Hospital, St. Joseph's Health Care Centre, in London, which is not in evidence before me, but which furthers my point. Dr. Kurzman summarized this part of the report stating, "*Mr. Stewart stated that he understood the need to talk about his feelings related to the loss of relationships and role function since sustaining his injuries in the MVAs of July and August, 2006*."

Mr. Stewart's history to Dr. Kurzman was reflective of the fact (evidenced by many medical reports in the case as time progressed) that he was becoming more incoherent, and his behaviour more strange.Dr. Kurzman'ssummary of what Mr. Stewart

told him demonstrates however, that even Mr. Stewart himself continued to describe his problems as arising from both accidents, not solely be August 27, 2006 accident.

I feel I must comment on some of the neuropsychological testing done on Mr. Stewart. Under the heading, "*Validity of Neuropsychological Test Results:*", and later, under the heading, "*Clinical Formulation*", Dr. Kurzman states as follows:

> Several tests of response bias and effort were administered. Response Bias refers to an individual's purposeful effort and/or one's attempt to perform worse than one's true abilities for secondary gain.
>
> Mr. Stewart's performance on tests of effort were variable with some scores falling within normal limits while other scores being much lower than would have been expected…His performance on tests of effort and symptom magnification was much lower than the performance obtained in patients with mild or severe head injuries…As such, the tests obtained below must be interpreted with caution. It is important to recognize that poor effort, and even the existence of malingering does not exclude the possibility that bona fide symptoms might exist.

I suppose it would be it would be equally appropriate to observe that the possibility bona fide symptoms exist does not necessarily exclude purposeful effort to perform worse than one's true abilities for secondary gain, *i.e.* malingering.

Under his *Clinical Formulation* heading, Dr. Kurzman begins with the following statement:

> Mr. David Stewart is a 41-year-old right-handed man who was involved in two motorcycle accidents within a short time each other; the first occurred on July 7, 2006 while the subject motor vehicle accident occurred on August 27, 2006… Mr. Stewart's medical history is notable for what appears to be a complex psychiatric history. It is noted that Mr. Stewart possibly had

schizophrenia, a severe anxiety disorder, a personality disorder, and poor mental functioning…

Dr. Kurzman's heading of *Diagnosis* follows his clinical formulation.He now appears to focus solely on the August 27, 2006 accident, because that is what the examiners were directed to do. He begins under this heading as follows: "*The purpose of the current assessment was to determine whether Mr. Stewart meets the criteria for consideration of catastrophic categorization.*" It seems to me that this sentence could have included the words, "*as a result of the August 27, 2006 accident.*"

I have reproduced below Dr. Kurzman's conclusion, supplemented by my own comments which are italicized and in parentheses:

> Overall, based on the information available to me, Mr. Stewart sustained no more than a minor to mild head injury in the motorcycle accident of August 27, 2006 *(Dr. Kurzman's own summary, not to mention the other evidence which I reviewed in detail supports the conclusion that Mr. Stewart sustained at least a minor or mild head injury in the July 7, 2006 accident)*. In general, a good to full recovery would be expected within a short period of time. However, his pre-existing psychiatric history as well as his history of previous motorcycle accidents including injuries to the face and broken bones places him at risk from significant cognitive compromise following a subsequent injury. It is my opinion that the <u>accident</u> (arbitrator's emphasis), at least to some degree, contributed to Mr. Stewart's current difficulties with cognitive and behavioral functions. Mr. Stewart displays significant cognitive compromise that is likely to a large extent reflective of long-standing areas of weakness. However, Mr. Stewart can be described as having a "vulnerable brain" and the injury sustained in the <u>accident</u> (arbitrator's emphasis) served to alter the trajectory of an already vulnerable brain and the injury exacerbated pre-existing difficulties and cognitive weaknesses. As such, Mr. Stewart was at risk for further cognitive compromise as a result of a head injury due to having what can be described as a "vulnerable brain". (*Based on the structure of Dr.*

> *Kurzman's report, in my opinion if thecatastrophic impairment assessors had been directed to give a catastrophic impairment opinion for both the July 7, 2006, and the August 27, 2006 accidents, the underlined references to "accident" in this passage would in all probability have said, "accidents"*).

I believe I am supported in that opinion by Dr. Kurzman's itemized statement of Mr. Stewart's diagnosis. Immediately following the analysis quoted above, Dr. Kurzman states:

> Mr. Stewart meets the criteria for the following diagnoses:
>
> - Cognitive Disorder NOS (exacerbated by the motor vehicle accidents).
> - Generalized Anxiety Disorder (exacerbated by the motor vehicle accidents).
> - Pain Disorder Associated with Psychological Factors and a General Medical Condition (exacerbated by the motor vehicle accidents).
> - Personality Disorder (pre-existing).

Dr. Kurzman concludes by stating he concurred with Dr. Gnam's mental and behavioral impairment rating for Mr. Stewart. Dr. Gnam opined that Mr. Stewart was catastrophically impaired, with a Marked Impairment (Class IV) in all four categories of criterion G for rating catastrophic impairments, and a Whole Person Impairment rating of between 57% and 61%.

The report of Dr. Marotta, the neurologist, reads in much the same way as Dr. Kurzman's report does. Dr. Marotta is not nearly as thorough in his written review of the documentary evidence as was Dr. Kurzman, but I think it is plain from the structure of his report and his opinion, that Mr. Stewart's problems emanate from head injuries sustained in both the July 7, 2006, and August 27, 2006 accidents, if not others as well.

I believe my view is supported by the statements made by Dr. Marotta in the *Formulation* section of his report. He writes:

> This now 41-year-old gentleman was injured in August and July 2006, the result of motorcycle auto collisions. His bike was struck and he was thrown off his bike on both occasions and fell onto the road. He was wearing a helmet on each occasion. He was seen in emergency departments, as noted above shortly after each accident; he was investigated; he had a number of x-rays and was subsequently discharged hours after admission on each occasion, after undergoing considerable investigation. Dr. Desai records multiple accidents in his note…
>
> Currently, his main neurological complaints are dizziness, continuous tinnitus, headache, irritability and generalized pains…
>
> From the history of head injuries, one would draw the conclusion that he suffered concussions on at least two occasions if not more. In the body of the reports there is a suggestion that there may have been more than the two reported episodes.
>
> Emotional and behavioral characteristics and changes that have been described above may be considered to be due to specific manifestations such as frontal or temporal tumors or hydrocephalus or cortical atrophy, none of which pertains here. It can also be due to multiple concussions. This is referred to as the **post-concussive state or the posttraumatic syndrome (PCS)**.
>
> Definition of PCS is as follows, it is a complex disorder in which a combination of postconcussive symptoms such as headaches and dizziness last four weeks and sometimes months after the injury. It may also last indefinitely. It is noted there is no universally accepted definition of PCS but most of the literature defines the syndrome as the development of at least 3 of the following symptoms: headache, dizziness, fatigue, irritability impaired memory and concentration, insomnia and lower tolerance for noise and light…

> …There is no good correlation between severity of injury and persisting post concussive syndrome symptoms (PPCS)…In this case, the symptoms have persisted since 2006…
>
> The pathology of PCS is reported to be diffuse axonal injury. No proven therapy is available.

Dr. Gnam interviewed Mr. Stewart for 55 minutes. He conducted a separate interview with Carolynn Stewart for 45 minutes, at which Mr. Stewart was not present. In my opinion Dr. Gnam's review of the medical documentation and his formulation of Mr. Stewart's history wereneither as thorough nor as accurate as the reviews done by Dr. Kurzman, or Dr. Marotta.

In my opinion, Dr. Gnam was prone to making the same kind of overreaching assumptions that some of the other medical examiners have made, particularly with respect to his understanding of Mr. Stewart's domestic situation before either of the accidents occurred.

Dr. Gnam makes the same mistake as Dr. Guscottin assumptions about the information he received in his interview with Carolynn Stewart. Like Dr. Guscott, without any basis for doing so, Dr. Gnamassumed that the energetic "before" picture of Mr. Stewart outlined by Carolynn Stewart existed right up until the time of the August 27, 2006 accident, and only declined thereafter.He even makes statements that are implicitly, and explicitly factually incorrect in elaborating on this assumption.

In spite of this, as will be seen from my comments which follow, I do not believe that Dr. Gnam's opinion rules out the proposition that the July 7, 2006 accident

contributed in at least equal measure to Mr. Stewart's problems as the August 27, 2006 accident.

In his *Identifying Data* section in the beginning of the report Dr. Gnam states:

> Ms. Stewart (Carolynn) explained that prior to the motor vehicle accident Mr. Stewart resided in a common-law relationship with a woman who had several children of her own. However, Mr. Stewart now has no contact with that family after the relationship ended following the motor vehicle accident.

Based on the way Dr. Gnam describes this relationship throughout his report, it appears that he assumed the cause of the relationship ending was the "motor vehicle accident", even though he asked no questions to confirm that, nor did he have any independent evidence to support that conclusion.

In the same section Dr. Gnam makes a statement that, when considered together with comments he makes later in his report, indicates to me he had totally misapprehended the evidence concerning Mr. Stewart's activity level immediately prior to the August 27, 2006 accident. He says:

> Mr. Stewart reported, corroborated by history provided by his mother-in-law, that prior to the motor vehicle accident he worked without pay as a volunteer chef in various restaurants, attempting to accumulate enough Hours to qualify as a chef… Mr. Stewart reported, corroborated by his mother-in-law, that since the motor vehicle accident he has not worked for pay in any capacity, and has performed no volunteer work.

As I have stated earlier in my analysis of this matter, the evidence demonstrates that Mr. Stewart had not been engaged in any of these types of activities for quite some

time before even the first accident of July 7, 2006, let alone in between that accident and the August 27, 2006 accident.

Comments made by Dr. Gnam under the heading, *History of Presenting Health Problems*, further illustrate my point that Dr. Gnam misunderstood the evidence:

> File documentation and the report of Ms. Carolynn Stewart indicates that Mr. Stewart before the August 27, 2006 MVA was capable of independent travel by motorcycle, and that he lived in a common-law relationship with a female partner, looked after her children, participated in cooking and household and outdoor chores, and worked on a voluntary basis as a cook in various restaurants. Mr. Stewart described that within several months following the accident Mr. Stewart became incapable of managing his Household activities, and that their relationship with his female partner ended and he became socially isolated and incapable of traveling independently…

Even a cursory review of the file would indicate that this is not an accurate description of Mr. Stewart's situation for quite some time prior to even the first accident in July, 2006, and certainly not in between the first accident, and the August 27, 2006 accident.

Dr. Gnam is also dismissive in his treatment of the July 7, 2006 accident. He states:

> …File documentation indicates that Mr. Stewart likely sustained soft-tissue injuries to his neck, lower back, and upper left arm related to an earlier motorcycle accident on July 7, 2006.

It is unclear to me why, given his ultimate conclusion, Dr. Gnamfelt the need to try to diminish the importance of the July 7, 2006 accident. Perhaps it was the unstated influence of Dr. Guscott's report. In any event, Dr. Gnam's comment about the July 7,

2006 accident betrays the same lack of analysis that Dr. Guscottdemonstrated in dealing with the July 7, 2006 accident. This excerpt also suggests to me that Dr. Gnam may not have reviewed the reports of Dr. Kurzman, and Dr. Marotta, his colleagues in CAT Assessment. Had he done so, I suspect he would not have found it so easy to describe the July 7, 2006 accident as one that caused only minor soft tissue injuries.

Under the heading, *Activities of Daily Living*, Dr. Gnam states:

> Mr. Stewart explained that before the August 27, 2006 motor vehicle accident he lived entirely independently, without the support or oversight (*sic)*, managed his own money, performed his own scheduling, and lived in a long-term romantic relationship with women (*sic)* on a farm, and participated in the care of her children.

Dr. Gnam'shas now elevated Mr. Stewart's relationship with Ms. Miller to the status of a "*long-term romantic relationship*". He later describes it as a, "*common-law marital relationship*."

In summarizing what he was told by Carolynn Stewart, his references always are to the, "MVA", or, "the accident". It is evident that in these references he is referring to only the August 27, 2006 accident. I have already analyzed at length the error in this assumption in dealing with Dr. Guscott's report, and some of the other medical evidence. I will not repeat the point here.

In his section entitled *Review of Documentation*, Dr. Gnam, in my opinion, has omitted important information in some of the documents, and has incorrectly described other documents.

For example, in summarizing Dr. Azad's July 21, 2006 clinical note he entirely omits Dr. Azad's reference to "*ringing in both ears*". This is an important symptom, given the nature of Mr. Stewart's problems. It may be that Dr. Gnam could not read Dr. Azad's note, but it is referred to in other documentation. It is an important omission to make, because Dr. Gnam makes mention of it in connection with the ambulance call report for the August 27, 2006 accident, where Mr. Stewart reported ringing in his ears which he described as normal for him.

He erroneously describes the ambulance call report and Hospital records relating to the first accident as relating to July 6, 2006, and appears to believe that Mr. Stewart was discharged from the emergency department on July 7, 2006.

In reviewing Mr. Stewart's September 14, 2006 statement regarding July 7, 2006 accident Dr. Gnam states that Mr. Stewart was traveling at a low speed, was unable to stop, and put his legs straight in front of him to brace himself. He then says, "*He said he hit the minivan and was thrown to the pavement*". He fails to mention that the statement goes on to say, "*I remember bouncing my face off the minivan I hit and then off the sidewalk*". This indicates two fairly significant impacts to Mr. Stewart's head that Dr. Gnam appears to have either not adverted to, or for some reason did not think significant enough to describe in accurate detail.

Dr. Gnam's comment about the WRH Acquired Brain Injury Team August 10, 2007 report is somewhat difficult to understand in the view of his ultimate opinion. He says:

> This initial intake report does not provide specific information or argument to establish that Mr. Stewart suffered a traumatic brain injury in any of the recent accidents. Moreover, the specific pre-accident psychiatric diagnosis is not established. “Anxiety Disorder and Personality Disorder” are not sufficient to explain the degree of functional impairment observed by the team or the history of prolonged absence from the labour market and long-term disability.

Dr. Gnam makes reference to the October 30, 2008 report of Dr. Robert Lan, an ear nose and throat physician. That document was not in evidence before me. Dr. Gnam’s summary of the report states:

> Mr. Stewart reported two significant motor vehicle accidents occurring in July and August 2006 and reported poor memory and inability to recall the accidents. Mr. Stewart reported difficulty hearing and that he perceived a noise of a different character in each ear. The evaluator noted that Mr. Stewart presented with his wife who provided most of the history.

Given the mystery surrounding the October 5, 2006 meeting involving SCM Adjusters, this reference to Mr. Stewart’s “wife” is rather intriguing. Mr. Stewart’s relationship with Laura Miller had ended almost 2 years before this visit to Dr. Lan. It seems highly unlikely the person identified as Mr. Stewart’s wife at this meeting was Laura Miller. The identity of the person will have to remain an unsolved puzzle. One wonders as wellwhether Dr. Gnam was operating under the mistaken assumption that Mr. Stewart’s pre-accident “*long-term romantic relationship*” was still ongoing as of October 30, 2008.

It is also evident from this excerpt from Dr. Lan’s report that Mr. Stewart’s problems with noises in his head, difficulty hearing, and memory problems began with the first accident in July, 2006.

Dr. Gnam reviews Dr. Guscott's April 27, 2009 report. Interestingly, despite Dr. Gnam's similar, perfunctory analysis of the July 7, 2006 accident, in discussing the report, Dr. Gnam does not seem to appreciate the distinction between the accidents that Dr. Guscott made in his report.

In the opening comments of Dr. Gnam'ssummary of Dr. Guscott's opinion he states:

> Dr. Guscott described that Mr. Stewart was a 40-year-old man who was on Ontario Disability Support Program at the time he was involved in motor vehicle accidents of July 7, and August 27, 2006. Dr. Guscott summarized his evaluation by concluding that Mr. Stewart suffered physical injuries, chronic pain disorder, major depressive disorder, acquired brain injury, and personality change secondary to acquired brain injury, labile subtype.

In fact, Dr. Guscott prefaced this conclusion with the statement, "*As a result of the motor vehicle accident of August 27, 2006 (Mr. Stewart) sustained the following injuries*:…"

Dr. Gnam makes another explanatory comment which, given his conclusions, is difficult to understand. His comment follows a quotation of Dr. Guscott's opinion. He states:

> Dr. Guscott's report does not provide a cogent and plausible explanation for why Mr. Stewart was disabled from working according to a psychiatric disorder before the accident. His conclusion that Mr. Stewart sustained a traumatic brain injury in the <u>subject MVAs</u> (arbitrator's emphasis) does not appear to be based on convincing evidence from file documentation.

The comment is also confusing because Dr. Guscott's opinion is actually that Mr. Stewart sustained an Acquired Brain Injury from the August 27, 2006 accident, and only

minor soft tissue injuries in the July 7, 2006 accident. Dr. Gnam appears to be suggesting that Dr. Guscott attributed the Acquired Brain Injury to both accidents.

With this comment, and his remarks about the WRH Acquired Brain Injury Team August 10, 2007 report, Dr. Gnam appears to be saying that he finds it questionable whether Mr. Stewart had sustained a brain injury as a result of either of the July 7, 2006 or August 27, 2006 accidents. He goes on to conclude however, that the consequence of a very mild brain injury sustained in the August 27, 2006 accident offers the best explanation for Mr. Stewart's observed deterioration.

If that what Dr. Gnam meant by this comment, his opinion is at odds with the opinions expressed by Dr. Kurzman, and Dr. Marotta.The essence of the opinions of Dr. Kurzman, and Dr. Marotta is that Mr. Stewart is suffering from the effects of severe post-concussion syndrome. This syndrome has been caused by both the July 7, 2006, and August 27, 2006 accidents. Mr. Stewart was also predisposed to having such problems because his brain was "vulnerable" from his psychiatric condition preceding the accidents, and the many head injuries he had in his past.

In the *Summary, Formulation, and Opinion* section of his report, Dr. Gnamat first seems to want to continue to go out of his way to discount the possibility that Mr. Stewart sustained a mild traumatic brain injury in either of the July or August, 2006 accidents.

For example, in his comments about the July 7, 2006 accident he stresses that the emergency personnel had recorded there was no apparent loss of consciousness and that Mr. Stewart's GCS score was 15/15. He then makes a statement which I

believe is not only factually erroneous, but it shows a lack of appreciation for the evidence, when he says:

> The Emergency Department record indicates that Mr. Stewart's helmet was damaged implying that in the accident he likely did strike his head.However, the discharge diagnosis recorded by the evaluating physician emphasized low back strain, and no specific mention of post-concussive symptoms was recorded.

There is no evidence in the hospital record for July 7, 2006 that Mr. Stewart's helmet was damaged. Mr. Stewart said later in his statement to adjuster Phillips that his helmet had a crack in it from this accident. More importantly however, Dr. Gnam's comment suggests that there is some doubt about whether Mr. Stewart struck his head in the accident, or sustained post-concussive symptoms from the accident.

There is ample evidence of post-concussive symptoms arising from the July 7, 2006 accident from Dr. Azad's clinical notes and records, from adjuster Phillips, and from Carolynn Stewart. Mr. Stewart himself describes not one, but two impacts to his head, and post-concussive symptoms.

Like Dr. Guscotthowever, Dr. Gnam restricts his analysis of the impact of the July 7, 2006 accident to only the ambulance call report and the Windsor Regional Hospital records. The difference of opinion he appears to have with Dr. Guscott is that Dr. Gnam appears doubtful as to whether Mr. Stewart suffered a brain injury in either accident.

In another statement about the July 7, 2006 accident, Dr. Gnam makes a factual error. He says, "*It is noteworthy that following the July 7, 2006 motorcycle accident Mr.*

Stewart was able to resume riding his motorcycle and apparently resumed his normal activities."

Mr. Stewart did not resume his normal activities following the July 7, 2006 accident. The briefest of reviews of the statements from that time given by Mr. Stewart, and the reports of others confirm this. Dr. Gnam seems to have assumed Mr. Stewart was functioning normally after the July 7, 2006 accident based on his erroneous interpretation of information received from Carolynn Stewart, and the statement attributed to Laura Miller in Mr. Stewart's October 5, 2006 statement.

Dr. Gnam also appears to think it noteworthy that Mr. Stewart resumed riding his motorcycle after the July 7, 2006 accident. Although not specifically stated, the inference from the context is that Dr. Gnam thought Mr. Stewart did not ride his motorcycle after the August 27, 2006 accident. We know not just from the examination under oath evidence of Carolynn Stewart, which would not have been available to Dr. Gnam, but from other medical documentation which was available to Dr. Gnam, that Mr. Stewart continued to ride a motorcycle after the August 27, 2006 accident until sometime in the early part of 2007 when his license was suspended.

Even though Dr. Gnam appears to want to minimize the significance of any brain injury sustained by Mr. Stewart in either of the accidents, his conclusion certainly brings back into play both of the accidents in terms of their impact on Mr. Stewart's presentation and functioning. In the end, he appears to agree with the conclusions of at least Dr. Kurzman, that it is likely Mr. Stewart has a Marked Impairment as a result of a Cognitive Disorder Not Otherwise Specified, and a Pain Disorder.

In the Summary, Formulation, and Opinion section of his report he states as follows:

> In summary, Mr. Stewart is a 40-year-old male who has a complicated presentation and a definite pre-accident history of serious mental illness. Complicating factors with respect to the current assessment include uncertainty about the exact pre-accident psychiatric diagnosis, the pre-accident history of numerous motorcycle accidents, and the influence of the earlier motorcycle accident that occurred in July 2006. These factors significantly complicate the adjudication of the causal impact of the subject motorcycle accident of August 27, 2006…
>
> …His capacity as a historian was extremely limited. He did endorse significant depressive symptoms, and denied psychotic symptoms, but the reliability of his self-reported symptoms remains unclear...Mr. Stewart's mental status does suggest that he suffers from a Psychotic Disorder, but the precise nature of that disorder cannot be determined with available information. In my opinion Mr. Stewart's thought disorder makes assessing his cognition very difficult, but <u>there is strong file documentation evidence of a decrement in Mr. Stewart's cognitive function following the two MVAs in 2006</u> (arbitrator's emphasis). Consistent with the opinion of Dr. David Kurzman, neuropsychologist, and member of the current team, the diagnosis of Cognitive Disorder Not Otherwise Specified can be confirmed.

Dr. Gnam goes on to focus, as directed by the instructions to the catastrophic impairment assessors, specifically on the connection between the August 27, 2006 accident and the conclusion of catastrophic impairment. He makes the following comments under the heading, *Causation*:

> In my opinion the most significant evidence indicating that the MVA of August 27, 2006 made a material contribution to Mr. Stewart's mental impairment is the close temporal association between the MVA and the decrement in functioning that followed.

> …It is possible that Mr. Stewart, due to schizophrenia or the history of other MVAs, was predisposed to develop serious sequelae to very mild traumatic brain injury, which could have plausibly occurred in the August 27, 2006 accident…
>
> …In the absence of a competing explanation for Mr. Stewart's deterioration, I conclude that the evidence is persuasive that the MVA of August 27, 2007 (*sic*) made a material contribution to Mr. Stewart's current mental disorders and related mental impairments.

In my opinion, Dr. Gnam's reasoning, and his conclusions in this passageare equally applicable to the July 7, 2006 accident. Had the assessors been asked to offer an opinion on the connection between the July 7, 2006 accident, and the catastrophic impairment of Mr. Stewart, in my view it is likely that Dr. Gnam would have (or should have – based on his own reasoning) made the same connection as he did for the August 27, 2006 accident.

To summarize on this issue, it is my opinion that the evidence before me in this case, including the CAT Assessment, supports the conclusion that the July 7, 2006, and the August 27, 2006 accidents both caused Mr. Stewart's condition that has been determined to be one of catastrophic impairment.

I must now deal with the submissions made by the parties on the issue of the legal causation standard to be applied in determining Cooperators' and Pafco'sloss transfer indemnification responsibility.

Cooperators submits that the correct test to be applied is the "but for" test confirmed in the decision of the Supreme Court of Canada in *Resurfice Corp. v.*

Hanke.[72] An adjudicator should not resort to the "material contribution" test absent the special circumstances stipulated in *Resurfice*. Cooperators submits that if the "but for" test is applied in this case, the evidence is not sufficient to conclude that but for the July 7, 2006 accident, Mr. Stewart would not be catastrophically impaired.

The salient parts of the court's decision in *Resurfice* read as follows:

> …the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred…
>
> …The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present…
>
> …in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involved two requirements.
>
> First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. Impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach.

[72][2007] 1 S.C.R. 333 ("*Resurfice*").

As was recognized by the Supreme Court of Canada in *Athey v. Leonati*[73], the "but for" does not mean that there can only be one cause of an injury. In discussing this the court stated:

> It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury…As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

In *Athey,* the court referred to its judgment inIn*Snell v. Farrell*[74], to further explain the causation test:

> …this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision...it is essentially a practical question of fact which can be best answered by ordinary common sense.

The exercise of determining liability to pay damages on the part of a defendant because the defendant is found to have caused the plaintiffs injury on the basis of either the "but for" test or the "material contribution" test must be carefully distinguished from what follows after causation is proven – assessing the damages which the defendant must pay.

The defendant need onlypay for damages consequent upon an injury for which the defendant has been found to be a cause. If the plaintiff sustained losses or

[73][1996] 3 S.C.R. 458 ("*Athey"*).
[74][1990] 2 S.C.R. 311 ("*Snell").*

damages as a result of an injury that is not caused by the defendant, the defendant is not responsible for that injury or those damages. As the Supreme Court stated in *Athey*:

> …The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position <u>better</u> than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.

Having summarized the law of causation, it is important to note that these are principles that derive from tort cases. Pafco submitted that to the extent tort principles of causation can be applied to SABS cases, the proper test to be applied is the material contribution test.Pafco cites the Ontario Court of Appeal decision in *Monks v. ING Insurance Company of Canada*[75] in support of this submission.Pafco submits that both the July 7, 2006, and August 27, 2006 accidents materially contributed to Mr. Stewart being catastrophically impaired.

One of the many issues in *Monks*involved the question of whether the trial judge had applied the correct causation test in determining that Ms. Monk's third accident (for which ING was her insurer) had resulted in her catastrophic impairment. The trial judge applied the material contribution test for causation in determining that although two prior accidents played a role in Ms. Monk's condition, the third accident was a material contributing cause to that condition, and therefore legally responsible for the payment of SABS.

[75]2008 ONCA 269 ("*Monks*").

In affirming the correctness of the trial judge's application of the material contribution test, the Court of Appeal stated as follows:

> …the trial judge's application of the material contribution test conforms with a long line of arbitral decisions in which this test has been utilized to resolve causation issues in accident benefits disputes, including in cases where the benefits claimant suffered from a pre-existing condition prior to the accident in question.[76] Before this court, ING offers no authority to support its assertion that the material contribution test does not apply to statutory accident benefits cases.
>
> In any event, I agree with Ms. Monks' submission that the evidence of Dr. Lesiuk could have grounded the application of the "but for" causation test as well as the material contribution test and that, if the former test had been applied, the outcome would have been the same…
>
> …where – as here – a benefits claimant's impairment is shown on the "but for" or material contribution causation tests to have resulted from an accident in respect of which the claimant is insured, the insurers liability for accident benefits is engaged in accordance with the provisions of the SABS.

Cooperators argues, based on the second quoted paragraph above, that the Court of Appeal held the evidence in the case satisfied the "but for" test, so its comments on the applicability of the material contribution test were effectively*obiter dicta*. Even if Cooperators is correct in that submission, I think a fair reading of the Court of Appeal's reasoning on this issue makes it clear that it was endorsing the use of the material contribution test for SABS cases.

Although it is arguable whether the Court Of Appeal's comments are technically *obiter dicta*as far as the material contribution test is concerned, I believe they must be

[76] The Court of Appeal cites several FSCO decisions in a footnote at page 19 of its decision.

accorded significant deference and weight. In my opinion, the context of the Court of Appeal's comments on the material contribution test confirms that the Court's view is that it should apply in SABS cases.

Therefore, I conclude that the proper legal causation test to apply in deciding whether one or both of these accidents was a cause of Mr. Stewart's condition of catastrophic impairment is the material contribution test. In my opinion, the evidence in this case establishes that both the July 7, 2006, and August 27, 2006 accidents materially contributed to Mr. Stewart's condition of catastrophic impairment.

If I am found to be in error on the applicability of the material contribution test to SABS cases, it is my view that the evidence in this case is also sufficient to satisfy the "but for" test with respect to both accidents. I find the evidence demonstrates a substantial connection between both accidents, and Mr. Stewart's condition. Therefore, but for the July 7, 2006 accident, or the August 27, 2006 accident, Mr. Stewart would not be catastrophically impaired.

In coming to my conclusion on how the law should be applied in this case, I have found the reasoning of FSCO Directors Delegate David Evans in *Arunasalam v. State Farm Mutual Automobile Insurance Company*[77] to be very helpful.

Arbitrator Evans points out the differences in the scope of an arbitrator's authority to apportion responsibility to pay SABS in a SABS case, to a judge's authority to apportion damages in a tort case. He states:

[77] Appeal P09-00025 and P09-00025C, March 2, 2011 ("*Arunasalam*")

> ...unlike judges within the tort system, arbitrators do not have the flexibility to apportion damages between two or more contributing causes, or to adjust the amount of benefits to reflect the extent to which a car accident may have contributed to an injury.

In referring to the FSCO arbitration decision in *Worku v. Cooperators General Insurance Company*,[78]Arbitrator Evans noted that a SABS claimant is entitled to receive SABS until disabilities that arise from an accident have abated to the extent that the claimant no longer meets the disability test. He states:

> …*Athey* (was a) tort (case), and the basic tort principle of returning a plaintiff to an "original position" does not apply in SABS cases. Either a person receives (SABS) or does not, unless the SABS itself sets out an apportionment (for example in an IRB case) based on post-accident income…

The *Arunasalam* and *Worku* cases dealt with situations where it was necessary to consider disabilities that a SABS claimant suffered from a car accident, in the context of subsequent disabilities that arose from non-car accident causes. Mr. Stewart's situation is similar in that many causes for his condition which pre-dated the accidents under considerationhave been identified by the medical examiners, particularly by the catastrophic impairment assessors.

In my opinion, Arbitrator Evans' description ofhow a FSCO arbitrator must decide a claimant's entitlement to SABS in a multi-cause case, also applies to how a private arbitrator must resolve the apportionment of a first party insurer's loss transfer indemnification between two second party insurers.

[78]OIC A-002172, August 29, 1996 (*"Worku")*.

The arbitrator must look at a particular accident, and decide whether, by itself, it has materially contributed to the impairment of the SABS claimant. In this case, the question to be asked is whether either the July 7, 2006 accident, by itself, or the August 27, 2006 accident, by itself, materially contributed to David Stewart's condition of catastrophic impairment.

It is irrelevant whether there are other causes for that impairment. Once the particular accident is found to have been a material contributor to the condition, the claimant is entitled to reasonable and necessary SABS benefits from the insurer for that accident, as long as he continues to satisfy the applicable impairment test.

The latter part of this statement does not really apply in this case, since the quantum of benefits paid is not disputed (subject to the Attendant Care issue). The parties have agreed that Jevco's decision to pay SABS benefits at catastrophic levels was appropriate.

In my opinion the reasoning of Arbitrator Evans in*Arunasalam* is supportive of the approach taken by Arbitrator McMahon in the earlier case of *Allstate Insurance Company of Canada v. Progressive Casualty Insurance Company of Canada and FarajSaliba*.[79]It should be noted that this case was also referred to with approval by the Court of Appeal in *Monks*.[80]

This case involved two motor vehicle accidents, about three months apart. Allstate insured the claimant, Mr. Saliba, with respect to the first accident. Progressive insured Mr. Salibawith respect to the second accident. Like the case before me, the

[79] Appeal P00-00052, July 19, 2002. ("*Allstate v. Progressive and Saliba*")
[80] See Note 76.

issue between the insurers was how the responsibility to pay medical and rehabilitation benefits, and Attendant Care benefits, should be divided between them. Again, like this case, the evidence indicated that there was substantial overlapping responsibility.

The format of *Allstate v. Progressive and Saliba* was of course different in the sense that it was not a loss transfer case. Mr. Saliba was applying for SABS directly to the two insurers who were disputing the apportionment of responsibility for the payment of the SABS. The essential question of how to ultimately divide responsibility for the payment of SABS between the insurers was the samehowever, as it is in this case.

Arbitrator McMahon begins his analysis by stating what he refers to as a couple of "*basic principles*".

> First, each accident triggers the right to apply for a "fresh set of benefits." Second, each accident materially contributed to the condition that (gave rise to the SABS entitlement*)*…Notwithstanding the fact that Mr. Saliba may apply to each Insurer for a fresh set of benefits, he cannot be compensated twice for the same expense.

With respect to the "second" point, I have found that both accidents materially contributed to Mr. Stewart's condition of catastrophic impairment.

Progressive argued that Allstate, as the insurer from the first accident, should respond first, to the extent of its SABS limits, to Mr. Saliba's claims. Allstate submitted that this would not be a fair way of apportioning responsibility to pay SABS. It had no greater duty to respond merely because it was on risk at the time of the first accident.

Arbitrator McMahon agreed with Allstate's submission, and then discussed possible options for determining an appropriate method to apportion responsibility to

pay SABS. He discussed the doctrine of equitable contribution among insurers which applies to insurance policies covering the same risk, but which contain identical clauses excluding responsibility to pay. The exclusion clauses effectively nullify each other, and the insurers pay in equal shares.

He found the case law on this principle to be helpful, by analogy, but noted that the SABSpriority rules "*supplants this doctrine*". He also noted however, that the priority rules did not resolve the problem presented by the situation he was dealing with because each insurer had an equal obligation to respond to the SABS claim.

Arbitrator McMahon's solution is set out in the following paragraph from his Appeal Order:

> I conclude that there is no directly applicable common law principle, nor is there a provision in the SABS, that resolves the question of how to ensure full indemnity while avoiding double recovery. In the circumstances, I agree with Allstate's submission that the only appropriate solution is to order the Insurers to indemnify Mr. Saliba in equal measure.

In my opinion, this is the appropriate solution for the case before me. Subject to my later comments about the overall quantum of loss transfer indemnification to which I find Jevco entitled, in my view the loss transfer indemnification responsibility of Cooperators, and Pafco should be equal.

Based on the evidence before me, no SABS payments for Medical and Rehabilitation Benefits or Attendant Care were made by Jevco in the approximate six week period between the July 7, 2006 accident, and the August 27, 2006 accident.The

Attendant Care payments in particular were made in lump sumsstartingabout 2 ½ years after the Attendant Careclaim was advanced.

It is not possiblefor me to attributea distinct amount to the first accident by looking at any payments which might have been made only after the first accident, but before the second accident. There is nothing persuasive in the evidence before me that would justify allocating a particular Medical and Rehabilitation expense, or Attendant Care payment to one accident or the other. To the contrary, it seems to me the evidence very strongly indicates that the insurance adjusters, service providers, and several medical experts approached the matter on the basis that the July 7, 2006, and August 27, 2006 accidents were jointly responsible for Mr. Stewart's condition.

Jevco made its own allocation of payments. This was done mainly for the purposes of loss transfer indemnification claims. No evidence was led to explain the difference in the allocation up until the time of the catastrophic impairment finding. After the catastrophic impairment finding, Jevco chose to allocate the SABS payments to only the August 27, 2006 accident. I have already stated my view that the manner in which Jevco elected to allocate the payments is not binding on me, and it is not determinative of the issue as to how loss transfer indemnification should be apportioned.

As Jevco submitted at the arbitration hearing, it was primarily concerned with getting its money back, and it did not matter to Jevco whether it is reimbursement came from Cooperators, from Pafco, or from both of them. I give no weight to the manner in which Jevco chose to allocate its SABS payments to Mr. Stewart between the accidents.

This leaves the reasonableness of payment issue for the lump sum Attendant Care payments made by Jevco.

Ms. Alexander testified that before the CAT Assessment, Attendant Care was not paid monthly by Jevco; instead, there were two lump sum payments made. The first payment was made January 19, 2010. The background to this payment was that Mr. Stewart's representative had commenced FSCO arbitration proceedings with respect to the Attendant Care benefit. A settlement was negotiated at a FSCO mediation.

Jevco's first lump sum payment settled the Attendant Care benefits claim up to the two year anniversary for both accidents (July 7, 2008, and August 27, 2008, respectively). An amount of $31,840.00 was paid to settle the claim for the July 7, 2006 accident. A SABS release was signed by Carolynn Stewart on behalf of her stepson, David Stewart.[81] An amount of $8,440.00 was paid to settle the claim for the August 27, 2006 accident. A SABS release was signed by Carolynn Stewart in respect of this payment.[82]

The second lump sum Attendant Care payment totaled $62,615.00. Jevco made the payment based on an OCF 9 dated June 8, 2010.[83] The payment covered Mr. Stewart's Attendant Care claim for the approximate 21 month period between August 28, 2008, and May 31, 2010.

[81]Exhibit 3, Tab 58.
[82]Exhibit 3, Tab 59.
[83]Exhibit 8.

An Assessment of Attendant Care Needs (Form 1) was completed by occupational therapist Kathleen Murphy, dated October 4, 2007. Ms. Murphy assessed the monthly Attendant Care benefit at $2,981.67.[84]

Cooperators and Pafco take issue with the quantum of the Attendant Care payments. Their first submission is that Jevco was not obliged to pay Attendant Care for Mr. Stewart prior to the receipt by Jevco of a Form 1. The first Form 1 was not submitted to Jevco until October 29, 2007. They argue that Jevco paid approximately $25,000.00 over an approximate 15 ½ month period between July, 2006, and October, 2007 that it was technically not obliged to pay.

Their second argument is that the monthly rate Jevco accepted to pay Attendant Care was too high. They point out that a second Form 1 was obtained by Jevco following an analysis of Mr. Stewart's Attendant Care needs by Occupational Therapist Kristen Hoh. This Form 1 was dated November 29, 2007.[85] It assessed the monthly Attendant Care benefit at $1,855.95. This Form 1 followed the $2,981.67 Form 1 by slightly less than two months. Cooperators and Pafco submit that Jevco could have based its Attendant Care payments on the more current Form 1, or at least negotiated with Mr. Stewart's representative for a compromise between the rates prescribed by the October, and November, 2007 Form 1s.

They submit that the $1,855.95 Form 1 is more accurate in its assessment of Mr. Stewart's Attendant Care needs. In support of this argument they cite the fact that the October 2007 assessor, Ms. Murphy, reassessed Mr. Stewart's Attendant Care needs in

[84]Exhibit 3, Tab 32.
[85]Exhibit 3 Tab 33.

August, 2010[86] and determined those needs to be almost identical to Ms. Hoh's November 2007 assessment. Ms. Murphy's August 2010 assessment determined the Attendant Care needs to be $1,843.74 per month. In her August, 2010 assessment, Ms. Murphy evaluated the amount of supervisory care required by Mr. Stewart to be four hours per day, an amount identical to that arrived at by Ms. Hoh in her November, 2007 assessment.This does not fit with the theory, relied upon in part by Jevco for paying the higher rate – that Mr. Stewart was steadily deteriorating and in need of more care.

A further argument was advanced by Cooperators and Pafco that Jevco could have had reference to the July 9, 2008 OCF 6 Application for Expenses[87] submitted on behalf of Mr. Stewart in determining the appropriate rate for monthly Attendant Care. This OCF 6 sought Attendant Care expenses for care provided by Carolynn Stewart from August 2006 to July 2008 (excluding November 7 to 19, 2007). The total claimed for the period was $22,200.00. Calculated monthly this works out to just over $1,000.00 per month.

As it happens, Jevco paid this Application for Expenses in the amount of $22,200.00. Cooperators and Pafco properly pointed out that this payment essentially duplicated the same period of time that the January 10, 2008 lump sum payments of $31,840.00, and $8,440.00 were intended to cover. Jevco acknowledged this overpayment at the hearing and reduced its overall claim for loss transfer indemnification as set forth in Exhibit 11 by the $22,200.00 amount.

[86]Exhibit 3, Tab 69.
[87]Exhibit 14.

Cooperators and Pafco submitted that Jevco had also overpaid Attendant Care benefits for at least two months in the summer of 2006. They argue that the evidence shows that Carolynn Stewart, the person providing David Stewart's Attendant Care, was not in the City of Windsor during two months of the summer of 2006, and so she could not have provided any care to Mr. Stewart during this time. In their submission the overpayment comes to $3,710.00, assuming that a monthly rate of $1,855.00 would have been appropriate.

Jevco responded that it made a "corporate decision" to settle Mr. Stewart's claim for Attendant Care based on the $2,981.67 monthly amount for several reasons. Arbitration had been commenced in November, 2009, and a hearing was pending. Mr. Stewart's representative was taking the position that a monthly Attendant Care benefit of $2,981.67 was the proper amount. By the time of the second lump sum payment a catastrophic impairment assessment of Mr. Stewart had been completed, and the report was pending. In Jevco's judgment the medical reports suggested that he seemed to be deteriorating. Consideration was also given to the Divisional Court's decision in *Belair v. McMichael*[88]to pay the Attendant Care retroactively and in the higher amount, even though the evidence indicated that Mr. Stewart had not and was not actually paying the value of $2,981.67 in monthly Attendant Care.

In *Belair v. McMichael*the SABS claimant developed a cocaine habit after the accident. Assessment of his Attendant Care needs in 2002 found that he required 24-Hour, seven day per week Attendant Care. The insurer assessed the claimant, determined he was not catastrophically impaired and refused to pay benefits based on

[88] (2007) 86 O.R. (3d) 68

24-Hour, seven day per week care. At arbitration in 2005 the arbitrator determined the claimant was catastrophically impaired and ordered the insurer to pay the benefits in accordance with the 2002 assessment. On appeal, the insurer argued that the benefit was not “incurred” in accordance with section 16 of the SABS because the claimant did not receive Attendant Care between 2002 and 2005.

The court held that it was not necessary for the SABS claimant to find a way of funding his treatment without the involvement of the insurer for the expense to have been “incurred”. It was sufficient for the insured to establish entitlement to the treatment for it to be deemed incurred. Even if recovery of the value of treatment not received could be construed as a windfall to the claimant, it would equally be a windfall to the insurer since the insurer had not paid for the treatment when it should have paid. Since the insurer has the statutory obligation to pay, the section ought not to be interpreted in such a way as to encourage insurers to refuse or delay treatment, especially in the case of impecunious claimants who could not otherwise afford treatment.

The question of whether Jevco overpaid the Attendant Care portion of Mr. Stewart’s claim also raises the issue of the standard of care to be met by the first party insurer in a loss transfer case in handling the SABS claim.

I must evaluate the decisions made by Jevco with respect to the payments for Attendant Care in the context of the principles I have outlined from the case law.

Based on my analysis of the payments, the payment the basis for which I do have difficulty accepting is thesecond lump sum payment of $62,615.00for the

approximate 21 month period between the end of August, 2008, and the end of May, 2010.

By my calculations, the first lump sum settlement payment for Attendant Care up to the two year anniversary dates of the accidents did not contemplate a monthly payment at the $2,981.67 monthly rate assessed by Ms. Murphy in October, 2007. Had this been the case, the value of two years' worth of retroactive Attendant Care benefits would have amounted to about $71,560.00 ($2,981.67 per month for 24 months).

The total settlement paid by Jevco for this period of time amounted to only $40,280.00 ($31,840.00 allocated to the first accident, and $8,440.00 allocated to the second accident). This is just over 56% of the amount it would have been had the rate calculated by Ms. Murphy been the basis for the payment. This is an effective rate lower than even that assessed by Ms. Hoh.

There is no evidence before me as to how the settlement figures for the January, 2010 lump sum payment were arrived at, and counsel did not discuss it in their submissions.

The major complaint Cooperators and Pafco seem to have with the first, retroactive lump-sum payment is that Jevco arguably was not required to make a payment going back further than October, 2007, when the first Form 1 was completed.

The fact that Jevco elected to attribute some of the first lump sum Attendant Care payment to a period before October 2007 does not, in my view, constitute gross mishandling or bad faith. I would view it instead as complying with the spirit, if not with the specific requirements of the *Belair v. McMichael* decision. In any event, as I pointed

out, by my calculations it was only 56% of the amount that it would have been had the higher rate recommended by Ms. Murphy been used as the basis for the two-year payment.

I would not reduce Jevco's loss transfer indemnification entitlement for any amount in respect of the lump sum payment made in January, 2010, for the period of time up to the two year anniversary dates of the accidents.

I also do not find merit in the Cooperators/Pafco argument that Attendant Care was overpaid for two months in the summer of 2006 during a time when the presumed caregiver, Carolynn Stewart, was not in Windsor, and appears to have had little contact with Mr. Stewart.

Once again, I am of the view that the *Belair v. McMichael* decision is an answer to this submission. It does not have to be shown that Mr. Stewart actually received and paid for care during this time for him to be entitled to its value. It only needs to be established that there was a need for care during this time to deem it an "incurred" expense.

I would not make any reduction in Jevco's loss transfer indemnification entitlement for these two months in the summer of 2006.

I do have concernshowever, about the basis for Jevco's payment of the $62,615.00 amount for the 21 or so months between the end of August 2008, and the end of May, 2010.

As I have indicated, my calculations indicated that Jevco could not have settled the Attendant Care claim for the first two years based on the $2,981.67 monthly amount assessed by Ms. Murphy, so it does not make sense to me that Jevco should have suddenly just accepted that amount as reasonable to make the second lump sum payment.

There was no arbitration hearing pending as a basis for the second lump sum payment, because the arbitration was settled with the first lump sum payment. In any case, I do not accept that this would have been a legitimate reason to simply accept the amount claimed by Mr. Stewart as appropriate for Attendant Care, without any attempt to negotiate the monthly rate. Jevco had evidence available to it in the form of Occupational Therapist Hoh's report, prepared only a month after Ms. Murphy's report, which would have given it legitimate grounds to negotiate with Mr. Stewart's representatives on the monthly rate for Attendant Care.

It should also have been considered by Jevco that Mr. Stewart's representatives would have been receptive to negotiating on the monthly Attendant Care rate because in July, 2008 they had submitted an Application for Expenses with respect to Attendant Care seeking a total amount that would have been based on a monthly rate of barely $1,000.00. This was long after Ms. Murphy's October, 2007 assessment suggesting that $2,981.67 per month was an appropriate amount.

There was a suggestion that this decision was based on the theory that Mr. Stewart was deteriorating, and that the CAT Assessment had concluded he was catastrophically impaired. In my view these reasons are not sufficient to justify what

Cooperators counsel aptly described as Jevco "rolling over" and paying what Mr. Stewart's representatives asked for as a monthly Attendant Care rate. There was little evidence at this point that Mr. Stewart was deteriorating so badly that no negotiation on the monthly Attendant Care rate suggested by Ms. Murphy was possible. Neither Dr. Guscott's report, nor the CAT Assessment, specifically addressed the Attendant Care issue, so the suggestion that they could justify Jevco's acquiescence to the demanded monthly Attendant Care rate is unsatisfactory, in my opinion.

The decision of private Arbitrator Stephen Malach in *Jevco v. AXA Insurance*[89]is an example of a case where a first party insurer's claim for loss transfer indemnification in respect of Attendant Care benefits paid was reduced because it failed to properly negotiate with the claimant's representative on the monthlyAttendant Care rate to be allowed. The first party insurer, which happened to be Jevco, ended up simply accepting the demand made by the SABS claimant's representative with respect to the monthly Attendant Care rate, even though Jevco had evidence available to it that would have enabled it to possibly negotiate a more favourable rate.

If anything, the facts were stronger for Jevco's position in arbitrator Malach's case than in this one. There was evidence of extensive discussions on the issue of the proper rate for Attendant Care between Jevco and the claimant's representative. In spite of this however, arbitrator Malach still found that Jevco did not satisfy the requirement to reasonably and properly handle the claim as a first party loss transfer insurer because it did not negotiate effectively with the claimant's representative.

[89] March 9, 2004.

I have found that Jevcodid not breach the claim handling standard for a first party loss transfer insurer by identifying only August 27, 2006 as the “subject date of loss” in its referral of the matter to Benchmark partly because Cooperators and Pafco do not dispute the outcome the CAT Assessment, only the apportionment of the higher payment of SABS required by results of the Assessment, which can be effectively addressed in this arbitration.

Jevco’s acquiescence however, in paying the higher Attendant Care monthly rate has resulted in a payment of SABS that ought not to have been paid. It is not just an issue of apportionment. In my opinion, the absence of any attempt whatsoever to negotiate the monthly Attendant Care ratebefore making the second lump sum payment is indicative of indifference on Jevco’s part that does fall below the reasonable claims handling standard because it has resulted in the payment of a significantly larger amount for Attendant Care up to the end of May, 2010, than should have been paid.

In my view, for these reasons Jevco ought not to recover complete loss transfer indemnification for the Attendant Care benefits it paid. I would reduce Jevco’s allowable claim for the second lump sum Attendant Care payment of $62,615.00, by $23,660.00. I arrive at this reduction because, for the reasons I have outlined, had Jevco handled this aspect of the claim reasonably and properly, it is probable that Jevco could have negotiated a monthly Attendant Care rate approximating the $1,855.00 amount which Occupational Therapist Hoh deemed appropriate. That would have resulted in a secondlump sum payment for Attendant Care of $38,955.00. The difference between what was paid, and this amount, is $23,660.00.

Conclusion

1.Jevco is entitled to loss transfer indemnification from Pafco, and Cooperators.

2. Jevco is entitled to recover**$642,845.90** for loss transfer indemnification from Pafco, and Cooperators. Pafco is responsible to pay **$321,422.95**of the loss transfer indemnification amount. Cooperatorsis responsible to pay **$321,422.95** of the loss transfer indemnification amount.

3. Jevco is entitled to recover interest on the loss transfer indemnification amount in accordance with the *Courts of Justice Act*, calculated from the date of the issuance of its various Requests for Loss Transfer Indemnification submitted to Pafco, and Cooperators. Should the parties not be able to agree on the interest calculation, I will receive the parties' submissions, and make a determination of the amount of interest allowable.

4. Before making an Order with respect to costs, I think it appropriate in this case that I receive submissions from the parties. I invite them to contact my Coordinator to arrange a time for a telephone conference call to discuss this issue further.

Dated at Toronto, August 7, 2014

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Scott W. Densem, Arbitrator