

**BETWEEN:**

**L. C.**

**Applicant**

**and**

**PAFCO INSURANCE COMPANY LIMITED**

**Insurer**

**REASONS FOR DECISION**

**Before:** David Leitch

**Heard:** April 15 and 16, 2002, in Kitchener, Ontario.

**Appearances:** L. C. representing himself  
Derek E. Wilson for Pafco Insurance Company Limited

**Issues:**

The Applicant, Mr. L. C. was injured in a motor vehicle accident on August 18, 1993. He applied for and received statutory accident benefits from Pafco Insurance Company Limited (“Pafco”), payable under the *Schedule*.<sup>1</sup> Disputes arose between the parties which they were unable to resolve through mediation and Mr. C applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents On or Between June 22, 1990 and December 31, 1993*, Regulation 672 of R.R.O. 1990, as amended by Ontario Regulations 660/93 and 779/93.

The issues in dispute are:

1. Is Mr. C entitled to receive weekly income benefits pursuant to section 12(1) of the *Schedule* from August 25, 1993, one week after the accident, to August 18, 1996, 156 weeks after the accident, on the ground that, as a result of the accident, he suffered substantial inability to perform the essential tasks of his pre-accident employment?
2. Is Mr. C entitled to receive weekly income benefits pursuant to section 12(5)(b) of the *Schedule* from August 18, 1996, 156 weeks after the accident, and ongoing on the ground that the injury caused by the accident continuously prevented him from engaging in any occupation or employment for which he was/is reasonably suited by education, training or experience?
3. Is Mr. C entitled to receive weekly benefits pursuant to section 13(1) of the *Schedule* from January 23, 1996, the date to which such benefits were paid, to August 18, 1996, 156 weeks after the accident, on the ground that he continued to suffer, as a result of the accident, substantial inability to perform the essential tasks in which he normally engaged before the accident?
4. Is Mr. C entitled to receive weekly benefits pursuant to section 13(8) of the *Schedule* from August 18, 1996, 156 weeks after the accident, and ongoing on the ground that the injury caused by the accident continuously prevented him from engaging in substantially all of the activities in which he normally engaged before the accident?
5. Is Mr. C entitled to supplementary medical and rehabilitation benefits under section 6 of the *Schedule* in respect of two cervical pillows, housekeeping expenses and courses completed prior to the accident.
6. Is Mr. C liable to repay all or a portion of the fee assessed against Pafco because he commenced an arbitration that was frivolous, vexatious or an abuse of process, pursuant to section 282(11.2) of the *Insurance Act*, R.S.O. 1990, c.I.8?
7. Is either party liable to pay the other's expenses in relation to the hearing on April 15 and 16, 2002 pursuant to section 282(11) of the *Insurance Act*, R.S.O. 1990, c.I.8?

**Result:**

1. Mr. C is not entitled to benefits under section 12(1) of the *Schedule*.
2. Mr. C is not entitled to benefits under section 12(5) of the *Schedule*.

3. Mr. C is not entitled to benefits under section 13(1) of the *Schedule*.
4. Mr. C is not entitled to benefits under section 13(8) of the *Schedule*.
5. Mr. C is not entitled to benefits under section 6 of the *Schedule* in respect of housekeeping and courses completed prior to the accident. He will have 30 days from the date of this decision to present receipts to Pafco with respect to the purchase of cervical pillows, failing which his claim in respect of cervical pillows will also be dismissed. In the event Mr. C presents receipts in respect of pillow purchases within the required 30 days, I will retain jurisdiction to deal with any objection Pafco may have with respect to the authenticity of the receipts or the amount of the receipts. Mr. C will not be entitled to interest on any amount payable by Pafco for cervical pillows.
6. Pafco is not entitled to an award under section 282(11.2) of the *Insurance Act*, R.S.O. 1990, c.I.8.
7. Pafco is entitled to an award of expenses in relation to the hearing on April 15 and 16, 2002. The amount of this award, and of the previous awards in Pafco's favour, will be determined in accordance with the assessment procedure set out in the *Dispute Resolution Practice Code*.

### **Background Facts and Findings:**

On August 18, 1993, the date of the accident, Mr. L.C was 25 years old. According to a signed statement he provided to Pafco on June 14, 1994, Mr. C had played the accordion since he was eight years old and had "made a conscious choice that [his] career would be playing professionally and teaching the accordion." He stated that he had formed a band prior to the accident which played three or four times a week all over southwestern Ontario; He said "the band was essentially my business, and I would find the musicians to play as well as the bookings." He further stated that "my cut would always be a minimum of \$350.00." In the same statement, Mr. C indicated that he was a "full time university student at the University of Toronto, having just completed the third year of ...an Honours Bachelor of Arts program in the Music Faculty with a specialty in the accordion."<sup>2</sup> Dr. John Chong's report dated May 7, 2001 also stated that Mr. C had studied at the University of Toronto and "got up to Year 3."<sup>3</sup>

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<sup>2</sup>Exhibit 8, Investigations, Tab 3.

<sup>3</sup>Exhibit 2.

Mr. C testified that the injuries he sustained in the accident prevented him from both earning \$20,000 per year playing the accordion and continuing his musical studies. Mr. C's injury was initially diagnosed by his family doctor, Dr. Ruth Adler, as a "mild whiplash"<sup>4</sup> but, as explained below, complications soon developed and have persisted.

Records obtained by Pafco confirm that Mr. C was a student at the University of Toronto during four consecutive winter sessions, the first one in 1990-91 and the last one in 1993-94. However, these records show him as a student of the Faculty of Arts and Science, not the Faculty of Music. Moreover, while many of Mr. C's course selections reflect an interest in the history and the "materials" of music, none reflects the study or the practice of musical performance on the accordion or any other instrument.<sup>5</sup> This evidence fails to substantiate Dr. Chong's belief that Mr. C had studied with Mr. Joe Marcerollo, a well-known and highly regarded accordionist, who was apparently teaching at the University of Toronto during this period. Dr. Chong acknowledged that he formed this belief based on what Mr. C told him.

Nevertheless, other evidence called by Mr. C persuades me that he was indeed a highly competent accordion player prior to the accident, one capable of playing at a professional level. He established this in a rather unorthodox, but effective, manner. He subpoenaed Mr. Walter Ostanek, another famous and accomplished accordion player,<sup>6</sup> to the hearing and then showed this witness (and everyone else at the hearing) a videotape of himself (Mr. C) playing the accordion at about age 18 or 19. It was agreed by all present, including myself and Mr. Wilson on Pafco's behalf, that the videotape showed Mr. C playing the accordion in a small band while others listened or danced. Mr. Ostanek testified that, in his opinion, Mr. C was playing at a professional level.

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<sup>4</sup>Exhibit 8, Tab 14, clinical note dated August 19, 1993.

<sup>5</sup>Exhibit 8, Employment, Tab 2.

<sup>6</sup>Exhibit 10.

**Issue 1: Weekly income benefits under section 12(1)**

Mr. Ostanek testified that the music Mr. C was playing on the videotape was Serbian. I accept Mr. Ostanek's opinion that, since "Serbians are good tippers," it might have been possible for Mr. C to have earned \$20,000 in the year 1992-93 by playing at the various restaurants and events frequented by Serbians.

Nevertheless, in order to qualify for weekly income benefits pursuant to section 12(1) of the *Schedule*, Mr. C was required to prove, on the balance of probabilities, that he was a self-employed musician, either at the time of the accident under section 12(2) paragraph 1, or for any 180 days in the 12-month period prior to the accident under section 12(3).<sup>7</sup>

There is no documentary evidence that Mr. C earned any income from self-employment in the 12 months prior to the accident. Revenue Canada records obtained by Pafco indicate that for 1992, Mr. C reported Canada Pension Plan income in the amount of \$1,329 and "other income" in the amount of \$7,150, and that for 1993, he reported T4 earnings in the amount of \$1 and "other income" in the amount of \$2,050. These records indicate neither the source of Mr. C's 1992 "other income" nor, assuming that it was income from self-employment, the dates of self-employment.

In addition to presenting no documentary evidence, such as business records or receipts, Mr. C called no witnesses to prove that he was a self-employed musician in the year before the accident. As Mr. Wilson pointed out, these witnesses could have been drawn from the other musicians in Mr. C's band or from people who hired and paid his band to play.

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<sup>7</sup>There is no indication that Mr. C was employed, on temporary lay-off or entitled to start work within one year under a legitimate offer of employment, as contemplated by section 12(2) paragraph 1.

Mr. C's own testimony was also extremely vague. He did not mention a single location where his band was hired to play in the year before the accident. Moreover, I find it unlikely that he was able to play three or four times per week all over southwestern Ontario and, at the same time, attend the University of Toronto as a full-time, winter-session student. Assuming that he did play music for money, it is likely that he was most able to do so during the spring and summer. He should, therefore, have been working around the time of the accident on August 18, 1993. Yet, while the Application for Accident Benefits form specifically asked him: "If you **were Employed** at the Time of the Accident - Do injuries sustained prevent you from performing the essential tasks of your employment? Explain", Mr. C left this portion of the Application form blank. He responded instead to the portion which asked him this question: "If you were **Not Employed** at Time of Accident - Do you suffers substantial inability to perform the essential tasks in which you would normally engage? Explain" (emphasis in the original).<sup>8</sup>

In my view, this evidence does not support a finding that Mr. C was a self-employed musician at the time of the accident or for any 180 days in the year prior to the accident. I, therefore, find that he is not entitled to benefits under section 12(1) of the *Schedule*.

## **Issue 2: Weekly income benefits under section 12(5)(b)**

Section 12(5) of the *Schedule* reads as follows:

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

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<sup>8</sup>Exhibit 8, OIC, Tab 1.

In my view, this section only alters the test for *continuing* eligibility to section 12(1) benefits in excess of 156 weeks; it does not apply to an insured person who has not first met one of the tests for eligibility to weekly income benefits, as stipulated by sections 12(2) and 12(3). This was confirmed by a Director's Delegate in the case of *Antunes*<sup>9</sup> where he said:

...section 12 provides for a single benefit. Subsection (5) is one of seven subsections that when taken as a whole, define who can qualify for a benefit, what level of disability is necessary to establish entitlement, and the amount of the benefit. Subsection (5) provides ...[that] no benefit is payable for any period in excess of 156 weeks, unless in addition to meeting all the other requirements, the insured can also establish that they are continuously disabled from engaging in any suitable occupation. These criteria are superimposed upon the criteria set out in subsections (1), (2) and (3).

Since I have determined that Mr. C did not meet any of the tests for eligibility to section 12(1) benefits in the first 156 weeks, it follows that he cannot rely upon section 12(5) to establish his eligibility to weekly income benefits from August 18, 1996, 156 weeks after the accident, and ongoing. I, therefore, find that Mr. C is not entitled to benefits under section 12(5) of the *Schedule*.

### **Evidence and Findings common to issues 3 and 4: Weekly “no income” benefits under section 13**

Having not established his entitlement to receive weekly income benefits under section 12, it was open to Mr. C to claim weekly “no income” benefits under section 13. In keeping with his Application for Benefits, Pafco paid benefits under section 13 from August 25, 1993, one week after the accident, to January 23, 1996. Since Pafco claims no repayment of these benefits, I am first required to determine Mr. C's eligibility to benefits under section 13(1) from January 23, 1996 to August 18, 1996, the remaining portion of the 156 week period following the accident. For this seven month period, the question is whether Mr. C suffered a substantial inability to perform the essential tasks in which he normally engaged before the accident. For the period after August 18, 1996, Mr. C's entitlement to

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<sup>9</sup>*Antunes and Allstate Insurance Company of Canada* (FSCO A99-000160, January 14, 2000)

section 13 benefits is determined in accordance with subsection 13(8)(b). For this period, I am required to determine whether the injury sustained in the accident continuously prevented him from engaging in substantially all of the activities in which he normally engaged before the accident.

***Essential tasks and activities in which Mr. C normally engaged before the accident***

Mr. C's statement of June 14, 1994 identified the following list of pre-accident activities: personal hygiene, driving, physical relations, which I understand to mean sexual relations, working out in the gym, playing soccer, pursuing university studies and playing the accordion.

As was stated by the Director of Arbitrations in the case of *Whitney and Cooperators General Insurance Company*<sup>10</sup>

...when adjudicators determine an insured person's eligibility for weekly benefits [under section 13(1)], they must characterize the person's "essential tasks", as distinct from the "activities" he or she might engage in. General principles have been developed in arbitration cases defining the words "essential tasks", with which I agree. These include that to some extent, the inquiry may be subjective as it involves an individualized inquiry into the person's circumstances in comparing his or her activities before and after the accident, subject to the objective parameters of the section's wording. Not every activity is a task, and not every task is an essential one. Tasks have been described as involving "an element of commitment, a sense of purpose or responsibility to oneself, one's community or dependents", while the qualifying word "essential" also means the task is to be basic, necessary or fundamental.

Applying this standard, I find that the following are properly characterized as both essential tasks and activities in which Mr. C normally engaged before the accident: taking care of his personal hygiene, driving, engaging in sexual relations and exercise, pursuing university studies and playing the accordion. There may be cases where a distinction must be drawn between the "essential tasks" contemplated by section 13(1) and the "activities" contemplated by section 13(8)(b). However, in this case, I find that the items I have listed satisfy the requirements of both sections.

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<sup>10</sup>(OIC appeal P-001005, July 10, 1996) at p.4

My finding with respect to accordion playing is based largely on the videotape evidence. I acknowledge the significant lapse in time between the recording of the videotape, when Mr. C was 18 or 19, and the happening of the accident, when he was 25. I have also taken into consideration Mr. C's failure to prove that he was pursuing performance-related university studies or that he was a self-employed musician under section 12. I nevertheless accept Mr. C's statement that it was his pre-accident ambition to become a professional accordion player and teacher. He may not have realized that ambition before the accident, and he may have never realized that ambition even without the accident. Still, the videotape clearly establishes his musical ability and supports, in a general way, his statement that it was his ambition to become a professional musician. He may not have been studying with a master teacher or making a living from music before the accident but, given his demonstrated ability, I find it unlikely that he had abandoned playing the accordion or his ambition to become a professional musician.

***The non-medical evidence:***

Mr. C's testimony at the hearing consisted of a description of his current symptoms, an explanation of his ongoing problems playing the accordion and a chronological listing of some of the treatment he has received since the accident. Current symptoms included pain in the low back, middle back, neck, legs, knees, calves, arms and hands, stiffness, dizziness, blurred vision, headaches, depression, mood swings, forgetfulness, problems sleeping at night, problems reading, loss of energy, fatigue, itchiness, digestive problems, nausea, ringing in the ears, sensitivity to light, sounds and odours, congestion, constipation and pain during urination. Mr. C testified that he tries to play the accordion "through the pain" in his neck and back but has to stop after about 15 minutes. He maintained that he played music in all categories, not just Serbian music, but that he can no longer achieve the required sound or technique. He stated that his accordion weighs about 50 lbs.

On cross-examination, Mr. C admitted that he had not tried to go to school in the fall of 1995, that he has not looked for work and that he has not stopped sleeping during the day as a way of reducing his problems sleeping at night.

Mr. Ostanek testified that accordions generally weigh between 25 to 32 lbs. However, he confirmed that in order to play Serbian music, the accordion must be equipped with tone chambers and this increases its weight to at least 28 to 30 lbs. He was shown a picture of Mr. C's accordion and agreed that it was one of the heaviest accordions made, weighing between 35 to 37 lbs. According to Mr. Ostanek, Serbian music could not be reproduced on a MIDI accordion.

Finally, transcripts from the University of Toronto indicate that Mr. C's academic performance in the year after the accident, 1993-94, was slightly better than his performance in the three years before the accident. In each of the previous three years, he had either failed or obtained marginal grades in some courses. In 1993-94, he obtained what the university characterized as adequate grades in all courses.

***The medical evidence:***

**Dr. Adler's** records confirm that she has been Mr. C's family physician since he was six years old and that he experienced no serious health problems prior to the accident in August 1993.<sup>11</sup>

On August 18, 1993, Mr. C was the driver of a stopped vehicle when it was hit from behind. He was transported to a hospital told emergency staff that he had hit his head against the seat rest and had experienced a "short episode of LOC [loss of consciousness] at the scene."<sup>12</sup> Radiological examination of the left humerus and shoulder and cervical spine were normal.<sup>13</sup>

As mentioned, Dr. Adler initially diagnosed Mr. C's injuries as a "mild whiplash." She referred him for physiotherapy treatment in Kitchener which he commenced on August 24, 1993 and ended on

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<sup>11</sup>Exhibit 8, Medicals, Tab 14.

<sup>12</sup>Exhibit 8, Medicals, Tab 2.

<sup>13</sup>The x-ray report concerning the left humerus and shoulder is in the hospital records, Exhibit 8, Medicals, Tab 2. The x-ray report concerning the cervical spine is in Dr. Adler's clinical notes and records, Exhibit 8, Medicals, Tab 14.

September 9, 1993.<sup>14</sup> On September 14, 1993, Dr. Adler upgraded her diagnosis to “acute cervical whiplash injury” and recommended that Mr. C continue physiotherapy treatment in Toronto where, she noted, he was about “to attempt to return to university classes.”<sup>15</sup>

According to the records of the **University of Toronto Health Service**, Mr. C first attended there on November 11, 1993. His health concern at that day was unrelated to the accident but it is relevant to note that the attending consultant wrote: “sexually active.” Mr. C attended this facility again the next day, November 12, 1993, complaining of accident-related back and neck pain. On that date, the attending consultant listed the following symptoms:

- ! feels uptight, nervous, waking up in night
- ! feels weak, unable to go to gym, etc.
- ! trouble concentrating on reading
- ! can’t concentrate on playing the accordion, can’t hold it — heavy
- ! feels depressed, feels empty, not suicidal

According to this consultation note, Mr. C was either referred or was to be referred, to “psych. services downstairs” but there is no indication in the U of T Health Service records that he actually received this kind of treatment.<sup>16</sup> Mr. C was also referred for physiotherapy treatment.

The next consultation note of the U of T Health Service, dated February 10, 1994, indicates that he had been receiving physiotherapy treatment twice a week with no improvement.<sup>17</sup> The attending consultant on this date wrote: “On touching his back he seems to be exquisitely tender everywhere incl. trigger points in the trapezius. I think it would be worthwhile to see what a rheumatol. thinks...”<sup>18</sup>

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<sup>14</sup>Exhibit 8, Medicals, Tabs 5 and 6.

<sup>15</sup>Exhibit 8, Medicals, Tab 3.

<sup>16</sup>Exhibit 8, Medicals, Tab 1.

<sup>17</sup>The evidence does not clearly establish when Mr. C started to receive physiotherapy treatment in Toronto.

<sup>18</sup>Exhibit 8, Medicals, Tab 1.

Accordingly, Mr. C was examined by **Dr. Amir A. Mewa**, a rheumatologist, on February 16, 1994.

Dr. Mewa's report states:

My clinical impression is that this gentleman suffers from post-traumatic myalgia and aches and pains. He does have some tender points suggestive of fibromyalgia, but tender points are also in diffused areas and therefore one cannot make a clear cut diagnosis for such. He is a very anxious individual and I think every encouragement should be given for him to try and do the exercise program and rehabilitate him so that he can return to the workforce.<sup>19</sup>

On his third visit to the U of T Health Service, on February 23, 1994, Mr. C requested a referral for a "more aggressive physio" treatment.<sup>20</sup> In accordance with this request, he received treatment at an orthopaedic and sports medicine clinic in Toronto on March and April 1994 but his progress was still reported to be slow.<sup>21</sup>

On his return to Kitchener in April 1994, Mr. C sought massage and Manual Lymph Drainage treatment from a registered massage therapist, Ms. Deanna Brenneman. She reported to Pafco:

The Swedish massage had to be very superficial pressure for Mr. C. Even at this pressure (almost to the point of just stroking) he would be very sensitive to any areas that had increased muscle tension.

...it looks at this point to be a slow process.

I also think that he should not be driving with his present range of motion and lack of quick reflexes.<sup>22</sup>

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<sup>19</sup>Exhibit 8, Medicals, Tab 1.

<sup>20</sup>Exhibit 8, Medicals, Tab 1.

<sup>21</sup>Exhibit 8, Medicals, Tabs 7 and 15.

<sup>22</sup>Exhibit 8, Medicals, Tab 10.

Mr. C was again examined by Dr. Adler on May 6 and 17, 1994. She reported to Pafco that in addition to his neck pain and tender trapezius muscle, he “now complains [of] low back pain/arm pain & calf pain,” “depression” and “insomnia.” She advised him “to get out & exercise if possible.”<sup>23</sup> For further treatment, Dr. Adler referred him to Dr. J. P. Schaman at the Ontario Aerobics Centre in Breslau.

After his first examination of Mr. C, on June 14, 1994, **Dr. Schaman** wrote:

It is my impression that this 25 year old man has developed a severe chronic pain syndrome and he probably meets the criteria of a fibromyalgia syndrome. I suspect he has also developed a significant secondary depression. I described to him how a chronic pain syndrome develops, with pain causing decreased activity, causing deconditioning (decreased strength, flexibility, range of motion, and aerobic endurance capacity) which causes a decrease in the pain threshold which causes increased pain, etc.<sup>24</sup>

Dr. Schaman admitted Mr. C to the Centre’s 10- week chronic pain program, involving passive therapy, supervised exercises and instruction. Mr. C completed this program on September 29, 1994. On the same day, Dr. Schaman wrote to Mr. Brian Globe at Pafco. His report to Mr. Globe made the following observations and recommendations regarding Mr. C:

He still seems to be following the “chronic pain cycle.” He has not exercised with the intensity, duration, and frequency that I had planned. He stated that “I feel better when I don’t do anything.” He has also considerable difficulty sleeping at night and he stated the previous night (the night of September 28<sup>th</sup>, 1994) he did not sleep at all. He admits to sleeping during the day. I found him to be very depressed and lacking any type of ambition or enthusiasm.

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I did make a number of recommendations to him and these included:

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<sup>23</sup>Exhibit 8, Medicals, Tab 3.

<sup>24</sup>Exhibit 8, Medicals, Tab 9.

1. To strictly avoid sleeping during the day, hoping that he would be able to sleep better at night.
2. To force himself to perform more regular daily exercise.
3. I recommended that he borrow a smaller accordion as he is unable to play his own instrument. The accordion appears to be his main link to a productive life. He had studied in school to play this instrument and he is known to be a “specialist in the accordion.” Because the instrument he owns is too large and causes him discomfort he has avoided playing. I feel that psychologically this has caused him considerable harm and that if he could borrow a smaller instrument and start to play it again that his might bring him out of his chronic pain-depression cycle.
4. To consider a course in self hypnosis and psychological therapy. Dr. Alan Goebel is a clinical psychologist who has helped me with various patients in the past who had depression and chronic pain. Dr. Goebel uses various techniques often using self hypnosis and other methods.<sup>25</sup>

Dr. Schaman ended his letter to Mr. Globe with the statement: “...I look forward to hearing from you with respect to the insurance company absorbing the costs of psychological therapy.”<sup>26</sup>

There is no evidence that Pafco responded to Dr. Schaman’s request for funding for psychological therapy. A copy of Dr. Schaman’s report was sent to Dr. Adler and was contained in her clinical notes and records. Her consultation note of January 2, 1995 states that Mr. C had been “advised to see psychologist re depression” but there is no indication in her records that he actually received this kind of treatment.<sup>27</sup>

On October 3, 1994, Mr. C was assessed on Pafco’s behalf by **Dr. Michael M. Howell**, a medical doctor and Fellow of the American Academy of Disability Evaluation Physicians. Dr. Howell reviewed some of the earlier medical records, not including Dr. Schaman’s report of September 29, 1994.

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<sup>25</sup>Exhibit 8, Medicals, Tab 9.

<sup>26</sup>Exhibit 8, Medicals, Tab 9.

<sup>27</sup>Exhibit 8, Medicals, Tab 14.

He also conducted an examination though, where the back lower body were concerned, he noted that Mr. C “was impossible to examine due to his writhing on the examination table.” Dr. Howell’s examination resulted in many “non-organic findings,” including:

- ! reported symptom complex inconsistent with condition
- ! reported functional limitations inconsistent with condition
- ! disability greater than indicated by condition
- ! abnormal pain inventories
- ! reported pain level inconsistent with direct observations of patient
- ! reported functional limitations inconsistent with direct observations of patient
- ! pain behaviour demonstrated
- ! non-organic findings present on examination

Dr. Howell’s final report provided the following diagnoses:

1. Chronic pain syndrome
2. Symptom magnification - severe to marked
3. Probable depression
4. Minimal Soft Tissue impairment
5. Somatoform pain disorder
6. Deconditioning

Dr. Howell’s report also provided the following explanations of the first two diagnoses:

Chronic pain is a useless, malevolent, and destructive process which can be long-lived and progressive. Pain perception is markedly enhanced, and pain behaviour becomes maladaptive and counterproductive. Both pain perception and pain behaviour are grossly disproportionate to any underlying noxious tissue. Tissue damage generally has healed and no longer serves as an underlying generator of pain. Chronic pain is often improperly diagnosed and inadequately treated, resulting in deteriorating coping mechanisms and pacing skills, and progressive limitations in functional capacity, which contribute to the evolution of the syndrome. Chronic pain syndrome is a bio-psychosocial phenomenon of maladaptive behavior. The presence of two or more of the following characteristics, “the six Ds,” is considered sufficient to establish the diagnosis of chronic pain syndrome: *duration* (although classically six months, this can be recognized far earlier); *dramatization* (use of emotionally charged words, exaggerated, histrionic deportment or physical presentation); overuse or abuse of *drugs*; *despair* (emotional upheaval, dysphoric manifestations, impairment of pacing and coping mechanisms), *disuse* (physical deconditioning, further aggravating and perpetuating the chronic pain cycle), and *dysfunction*.

The diagnosis of symptom magnification syndrome is not intended to discredit entirely the subject complaint of pain, its possible basis in organic pathology, or the existence of a certain degree of objective disability. However, this individual reports symptoms which are essentially non-negotiable, which serve to control his environment, and which result in significant amplification of his perceived and expressed functional limitations. This should not be interpreted to suggest an intentional misrepresentation of pain and disability, but more likely represents a learned pattern of illness behavior. There may be significant behavioral barriers to full functional recovery, and these may need to be addressed aggressively in the management of this individual's represented disability.

Dr. Howell recognized “a **probable** causal relationship between [Mr. C's] initial complaints and limitations of neck and back pain and the reported injury” but he stated that Mr. C's “current disability [is] largely self imposed and not based on pathology”, (emphasis in the original). He expressed the opinion that Mr. C was capable of light work or of resuming his studies. He also expressed the opinion: “this man clearly needs psychiatric assessment *and treatment*...I suggest a referral to a Psychiatrist”, (my emphasis).<sup>28</sup>

After reviewing a copy of Dr. Schaman's report of September 29, 1994, Dr. Howell wrote a second report to Pafco, dated February 17, 1995, in which he stated: “I agree with Dr. Schaman that this man has not really benefited from the standard treatment therapy. I would rather have this man see a Psychiatrist, because drug therapy may be indicated.”<sup>29</sup>

There is no evidence that Pafco responded to Dr. Howell's recommendation for psychiatric therapy. While Dr. Howell's reports indicate that copies were sent to Dr. Adler, copies of these reports were not contained in Dr. Adler's records as presented at the hearing. Her consultation note of August 16, 1994 refers to Mr. C's upcoming appointment with Dr. Howell but her subsequent consultation notes do not refer to Dr. Howell's reports.<sup>30</sup>

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<sup>28</sup>Exhibit 8, Medicals, Tab 11.

<sup>29</sup>Exhibit 8, Medicals, Tab 11.

<sup>30</sup>Exhibit 8, Medicals, Tab 14.

In her consultation note dated April 17, 1995, Dr. Adler indicated that she had advised Mr. C to return to school in the fall in order “to give him a goal.”<sup>31</sup>

On May 5, 1995, Mr. C was assessed on Pafco’s behalf by **Dr. E. N. Zamora**, a psychiatrist. The start of the examination was delayed when Mr. C expressed reluctance to sign a consent form. This left Dr. Zamora with inadequate time to do a complete assessment. Based on his “fragmented clinical assessment,” and relying heavily on Dr. Howell’s findings, Dr. Zamora diagnosed “chronic pain syndrome and *major depression which has been inadequately treated*,” (my emphasis). He recommended drug therapy and stated: “a multidisciplinary medically oriented program which includes internal medicine assessment, behavioural psychology intervention and psychiatric input would be important...” Dr. Zamora was also concerned that the major depression was “secondary to a closed head injury” and he, therefore, recommended a series of neurological assessments, “including EEG, a sleep deprived EEG, SPECT Scan, CT Scan and probably moving on to an MRI.” However, he added that these tests “should not delay the beginnings of an active multidisciplinary rehabilitation program.”<sup>32</sup>

There is no evidence that Pafco responded to Dr. Zamora’s recommendation for a series of neurological tests or an active multidisciplinary rehabilitation program, including psychological and psychiatric intervention. While Dr. Zamora’s report indicates that a copy was sent to Dr. Adler, a copy of this report was not contained in Dr. Adler’s records as presented at the hearing and her consultation notes make no reference to Dr. Zamora’s report. Dr. Adler’s consultation note of November 13, 1995 contains the entry: “attending ?MO in Hamilton. Has investigations planned -?CAT ?MRI- very vague”<sup>33</sup> This suggests that Dr. Adler only learned that Dr. Zamora had recommended a series of neurological assessments from Mr. C, not from Dr. Zamora’s report.

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<sup>31</sup>Exhibit 8, Medicals, Tab 14.

<sup>32</sup>Exhibit 8, Medicals, Tab 12.

<sup>33</sup>Exhibit 8, Medicals, Tab 14.

Later in May 1995, Mr. C received further massage treatment from Ms. Tara C. Fulop in Waterloo. From May to August 1995, Mr. C received cranial sacral therapy from Ms. Fulop's partner, Ms. Sharon Gascon. According to the reports of Ms. Fulop and Ms. Gascon, Mr. C obtained no lasting benefit from either form of treatment.<sup>34</sup>

On September 21, 1995, Mr. C was involved in another motor vehicle accident. The next day, he told hospital emergency staff that the vehicle he was driving rear-ended another vehicle and that he was experiencing neck spasms and lower back pain. Radiological examination of the cervical spine and prevertebral soft tissue was normal and a diagnosis of whiplash was entered in the hospital records. Dr. Adler's consultation note of September 27, 1995 noted this new accident, together with Dr. Adler's observations: "o/e moves neck freely while talking - when asked to move has difficulty; imp mild whiplash superimposed on previous injury with pain magnification."<sup>35</sup>

On December 6, 1995, Mr. C was assessed on Pafco's behalf by **Dr. Adrian R. M. Upton**, a neurologist. He told Dr. Upton that he was "worse" after the September 1995 accident but that he "would not have been worse if he had not had the first accident." On examination, Dr. Upton found no evidence of organic problems, wasting, reflex change or organic loss. He did find multiple inconsistencies and evidence of amplification, including:

- ! 'giving way' and fluctuation of effort
- ! slow movements on request but normal movement spontaneously
- ! rapid neck movement in conversation and full neck movement as I walked around the room
- ! limited neck movement on request
- ! slow answers to sensory questions but normal results after a time
- ! tenderness to light touching of skin
- ! calluses on both hands in someone who claims to be unable to do anything

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<sup>34</sup>Exhibit 8, Medicals, Tab 4.

<sup>35</sup>Exhibit 8, Medicals, Tab 14.

Dr. Upton was aware that Dr. Zamora had diagnosed chronic pain syndrome and major depression but observed that, in his opinion, “a possible diagnosis of conscious amplification should have been considered.” Dr. Upton was also aware that Dr. Zamora had recommended a series of neurological assessments but he did not arrange to have these carried out. Rather, he stated: “I do not have any documentation of any head injury or unconsciousness. Dr. Howell states that Mr. C did not strike any part of the car in the accident of August 18, 1993.” Under the heading further treatment, Dr. Upton concluded:

In my opinion, the ‘diagnosis’ of ‘fibromyalgia’ cannot be proven or disproven. In my opinion the degree of amplification masks any real symptoms or problems. In my opinion continued acceptance of his account of his complaints will encourage his continued behaviour and amplification.

I was unable to detect any residual neurological effects of his accident of August 18, 1993. I was unable to identify any organic problems that require treatment.

In my opinion he should be encouraged to normalise his life and he should return to his music studies. In my opinion there is no physical impediment for recovery.<sup>36</sup>

Pafco’s decision to terminate Mr. C’s section 13 benefits on January 23, 1996 appears to have been primarily based on the result of Dr. Upton’s assessment in December 1995. Mr. C was not assessed again on Pafco’s behalf until September 1999.

According to the medical evidence for the period December 1995 to September 1999, a period of almost four years, Mr. C’s situation improved very little. Dr. Adler’s consultation note of February 5, 1996 indicates that Mr. C complained to her on that date that his neck pain was “worse.” On October 29, 1996, Dr. Adler noted that Mr. C was still complaining of chronic pain and sleeping during the day and that he had made no attempt to return to work or school. She advised him that she did not think he was as disabled as he thought he was and that he needed “to find something to do,” suggesting that he contact the March of Dimes. Dr. Adler’s next consultation note of April 15, 1997 suggests no change in Mr. C’s situation. For the rest of 1997, Dr. Adler’s clinical notes and records focus on the fact that

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<sup>36</sup>Exhibit 8, Medicals, Tab 13.

Mr. C was diagnosed and treated, apparently successfully, for cancer in one testicle. However, Dr. Adler's records for 1998 and early 1999 confirm that Mr. C continued to complain of neck and back pain and "non-specific" pain.<sup>37</sup>

In July 1998, Mr. C returned to see Dr. Schaman, complaining of "non-stop pain," "not any better in the last five years." Dr. Schaman's impression was that he continued to suffer from chronic pain, fibromyalgia syndrome, depression and psychogenic magnification.<sup>38</sup>

Dr. Schaman referred Mr. C to **Dr. Hugh Smythe**, a rheumatologist at the Toronto Hospital. His first report to Dr. Schaman, dated March 29, 1999, starts with the observation that Mr. C had been referred "because of abdominal pain, sleep disturbance and fatigue following a motor vehicle accident in August of 1993." However, following examination, Dr. Smythe defined his therapeutic goal as being to help Mr. C to reduce his back and neck pain through "an appropriate fitness program." For the back, Dr. Smythe stated that Mr. C "must do this sit-up exercises, exactly as prescribed, every day for the rest of his life, and then use these rebuilt muscles to protect his low back." For the neck, Dr. Smythe "demonstrated to [Mr. C], a variety of techniques to ensure delivery of reliable support [through the use of pillows] to his vulnerable lower neck through sleep."

In his report dated September 23, 1999, Dr. Smythe noted that Mr. C was "much better than when I first saw him" but that "these strategies are not intuitively obvious, and the message has to be reinforced and adjusted from time to time." Dr. Smythe went on to observe:

Perhaps a greater concern is that he has no long term plans and not defined objectives as to what he wishes to do with his life. He has now not been working for 5 years and is not taking any educational or retraining courses. He is just 31 years of age, and I strongly urged the need for defining goals, so that he can participate in a much broader, richer, world.<sup>39</sup>

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<sup>37</sup>Exhibit 8, Medicals, Tab 14.

<sup>38</sup>Exhibit 8, Medicals, Tab 8.

<sup>39</sup>Exhibit 4.

Dr. Smythe saw Mr. C again on March 21, 2000 and noted that “he is much improved.” However, on October 23, 2001, Dr. Smythe reported to Dr. Schaman that Mr. C continued to complain of neck and back pain and that “unfortunately, he recalls little of the explanations and advice I had given him on 3 previous visits.” Dr. Smythe’s report of October 23, 2001 also contains this observation: “There is no tenderness at any of the upper body sites listed in the Criteria for Fibromyalgia. These are linked to the 5-6 level, which is receiving adequate support his sleeping technique.”<sup>40</sup>

On September 7, 1999, Mr. C was assessed on Pafco’s behalf by **Dr. Michael S. Ross**, a psychiatrist.<sup>41</sup> In reviewing the earlier medical documentation, Dr. Ross noted Dr. Schaman’s recommendation for psychological treatment but his report suggests that this recommendation was only presented to Mr. C as something to consider. As noted earlier, Dr. Schaman’s recommendation was also presented to Pafco as a specific funding request. Despite referring to the reports of Drs. Howell and Zamora, Dr. Ross’ own report ignores the fact that Drs. Howell and Zamora had both recommended psychiatric treatment. Dr. Ross’ report also makes no mention of the fact that, according to the medical documentation he reviewed,<sup>42</sup> Mr. C never received the psychological and psychiatric treatment recommended by Drs. Schaman, Howell and Zamora.

After conducting his own assessment, Dr. Ross wrote a report dated October 13, 1999 in which he said:

Mr. C presented for direct evaluation in a manner that strongly indicated that he made conscious attempts to grossly exaggerate, if not completely falsify aspects of the assessment when he was aware that formal assessment was actually taking place.

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<sup>40</sup>Exhibit 4.

<sup>41</sup>Mr. C had attended for an assessment by Dr. Ross on April 27, 1999 but, after discussing the purpose of the assessment with Dr. Ross, decided not to sign the consent form without first obtaining legal advice. The assessment was therefore postponed. Dr. Ross’ report indicates that Mr. C signed the consent form on October 13, 1999.

<sup>42</sup>As stated below, the OHIP Summary indicates that Mr. C did attend seven psychotherapy sessions between October 1993 and September 1995 but this information appears not to have been made available to Dr. Ross; it was obtained after he wrote his first report and is not referred to in his subsequent reports.

The results outlined in some detail cannot be accounted for on the basis of cerebral injury or any psychiatric disturbance relevant to Mr. C's situation. These aspects can be completely explained on the basis of motivational factors.

But despite his diagnosis of malingering, Dr. Ross acknowledged that it was "still important to consider other elements that may be useful to a fuller psychiatric understanding of his presentation." He expanded on this theme in the following paragraphs of his report:

Mr. C is an individual who presents with predominant pain complaints and behaviours associated with self-limitation and psychological factors that reflect his underlying personality makeup and bear on his current level of psychological adaptation. In this respect, if concerns with regard to feigned illness are temporarily set aside, it might reasonably be hypothesized that he would meet the DSM-IV criteria for Pain Disorder Associated With Psychological Factors (DSM-IV 307.80). Individuals with this type of condition can present with inconsistencies and discrepancies. By definition, there is a significant element of their presentation that reflects nonorganic findings. Thus, even if only for completeness' sake, one might consider that there could be elements of Mr. C's presentation that may have at least partially been accounted for on the basis of a bona fide Pain Disorder.

In this regard, it could be argued that, unbeknownst to Mr. C and despite his apparent but superficial level of independent function in the preaccident period, he nonetheless had deeply-ingrained, unresolved and unconscious conflicts in the area of dependency. These could be seen to have come to the fore in the context of the initial pain that he did experience in relation to his actual soft tissue injuries. He was initially distressed emotionally as well. In that context, it can be viewed that his dependent stance with regard to treatment manifested itself in the expectation that others would care for him, with the result that he would be rescued from his plight. In this way, psychological factors could be seen as relevant to the predisposition to and precipitation and perpetuation of the pain complaints long after his organic injuries healed. In the context of these difficulties, the development of ongoing sleep disturbance, augmented by poor sleep hygiene and fluctuating yet minor depressive complaints might not be unexpected over time.

That said, it is noted that Mr. C was provided with various appropriate treatments. The potential pitfalls in this situation were pointed out to him in detail by Dr. Schaman and others who attempted to engage him in active treatment.

While the possibility that Mr. C had unresolved conflicts that were engaged as outlined has been noted, it must be borne in mind that Mr. C never had psychological or psychiatric symptoms of sufficient numbers and severity to interfere significantly with his mental status. In this context, it is understood that it was Mr. C's responsibility to participate actively in treatment. He did not do so despite the exhortations of many clinicians. Based on a thorough review of the available documentation in combination with ample opportunity for direct clinical evaluation, this assessment finds that there was never a point at which it might have been reasonable to suggest that Mr. C was mentally incapable of shouldering his responsibility to make active use of the information and services with which he was provided. He did not do so.<sup>43</sup>

Soon after writing this report, Dr. Ross received a copy of Mr. C's transcripts from the University of Toronto indicating that, as I have already noted, his academic performance in the year after the accident was slightly better than his performance in the three years before the accident. Dr. Ross then wrote a further report dated October 27, 1999 in which he observed that during his examination "Mr. C consistently sought to portray his academic performance [after the accident] as significantly diminished although he knew that was not the case...[thus] verifying the suggestion that he consciously magnified his symptoms."

In April 2001, Dr. Adler referred Mr. C to **Dr. John Chong** of the Musicians' Clinic of Canada. Dr. Adler's referral note said: "this man was involved in a MVA in 1993 and has had chronic neck and back pain since; he previously played accordion and would like help in resuming this [activity]". After the first appointment, on May 7, 2001, Dr. Chong wrote a consultation report to Dr. Adler in which noted "a diagnosis of pain all over." Nevertheless, he confirmed that he had managed to get Mr. C to play the accordion while sitting on a stool "so that he did not have the 50lbs. slung over his painful neck and shoulders and back." Dr. Chong also recommended that Mr. C use a MIDI accordion weighing only 12 to 14 lbs. In his consultation notes for the next three appointments, the last appointment being just two weeks before the hearing, Dr. Chong indicated that Mr. C was "playing a bit", "trying to play"

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<sup>43</sup>Exhibit 8, Medicals, Tab 17.

and “not playing” but was still “very depressed.”<sup>44</sup> At the hearing, Dr. Chong testified that not being able to play the accordion makes Mr. C depressed.

Finally, an OHIP Summary for the period August 18, 1993 to September 9, 1999 was entered into evidence.<sup>45</sup> It indicates that Mr. C received individual psychotherapy or counselling in respect of “anxiety neurosis, hysteria, neurasthenia, reactive depression” for 30 or 60 minutes on the following seven dates: October 19, 1993, February 10, 1994, September 29, 1994, October 13, 1994, December 5, 1994, February 7, 1995 and September 14, 1995. The evidence contains no records from the treatment providers for the first two sessions; Dr. Schaman is listed as the treatment provider for the last five sessions.

***General analysis of the medical evidence:***

The medical evidence identifies six possible causes for Mr. C’s ongoing problems: chronic pain syndrome and depression, fibromyalgia, a closed head injury, malingering, the motor vehicle accident of September 21, 1995 and testicular cancer. I make the following findings with respect to each.

***Chronic pain syndrome and depression:***

In my view, the preponderance of the medical evidence supports a finding that Mr. C developed and continues to suffer from a chronic pain syndrome and depression as a result of the motor vehicle accident of August 18, 1993. This was the diagnosis given by Dr. Schaman in June 1994 (repeated in July 1998), by Dr. Howell in October 1994 and by Dr. Zamora in May 1995. It is also a diagnosis which is consistent with Dr. Adler’s notes, Dr. Smythe’s reports in 1999-2001 and Dr. Chong’s report in May 2001. In my view, this diagnosis can even be reconciled with Dr. Ross’s opinion, as explained below. It cannot, however, be reconciled with Dr. Upton’s opinion which I, therefore, reject as being contrary to the preponderance of the medical evidence.

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<sup>44</sup>Exhibit 2.

<sup>45</sup>Exhibit 8, Medicals, Tab 21, OHIP summary.

***Fibromyalgia:***

In my view, the preponderance of the medical evidence does not support a finding that Mr. C developed fibromyalgia as a result of the motor vehicle accident of August 18, 1993. Dr. Mewa refused to make a definitive diagnosis of fibromyalgia as did Dr. Upton. Dr. Smythe stated that the criteria for fibromyalgia were not met. I acknowledge Dr. Schaman's opinion that these criteria had "probably" been met but, on weighing the available medical opinion, I find that a diagnosis of fibromyalgia has not been established in this case.

***Closed head injury:***

Since the neurological assessments recommended by Dr. Zamora were never carried out, his concern about a possible closed head injury is not resolved by the evidence before me. Dr. Upton's opinion on this point is of little value because it is based on the assumptions that Mr. C did not strike his head in the accident or experience any unconsciousness at the scene. The hospital records (which Dr. Upton did not receive) do not support these assumptions. Had Dr. Adler received a copy of Dr. Zamora's report, she may have ordered the neurological assessments he recommended. However, for reasons not disclosed by the evidence, it appears that she did not receive Dr. Zamora's report. As a result, Dr. Zamora's concern about a closed head injury remained just that, a concern. This does not establish, on the balance of probabilities, that Mr. C suffered a closed head injury in the accident.

***Malingering:***

I reject Dr. Ross' diagnosis of malingering. This is not because I reject the evidence of symptom magnification; the evidence on this point comes from many sources and is, in my view, incontrovertible. Nevertheless, I prefer Dr. Howell's view that, in Mr. C's case, symptom magnification "more likely represents a learned pattern of illness behaviour" than it does "intentional misrepresentation."

Dr. Ross appeared to admit this possibility when he acknowledged that, by definition, “inconsistencies,” “discrepancies” and “non-organic findings” are “a significant element” in the presentation of individuals who suffer from a Pain Disorder With Associated Psychological Factors. However, Dr. Ross was apparently able to ascertain that Mr. C does not suffer from such a Disorder because he has been “provided with various appropriate treatments” and has not discharged his “responsibility to participate actively in treatment.” It is this part of Dr. Ross’ analysis which I reject.

There is evidence that Mr. C failed to put the required effort into the exercise programs prescribed by Dr. Schaman and Dr. Smythe. It is also clear that he has failed to pursue Dr. Adler’s suggestions that he try to return to school or find something else to do. Still, in my view, this passivity and lack of ambition must be evaluated in the light of the evidence that, as a result of the accident, Mr. C started to suffer from depression. With the exception of Dr. Upton, every doctor who has treated or assessed Mr. C since May 1994 has done one of three things: diagnosed depression and recommended psychological or psychiatric treatment for it (Drs. Schaman, Howell and Zamora), confirmed or acknowledged that he was suffering from depression (Drs. Adler and Chong) or described him in terms which were consistent with a diagnosis of depression (Dr. Smythe). Dr. Zamora actually did more than just diagnose “major depression” and recommend treatment for it; he also observed that Mr. C “*has been inadequately treated*” for this condition. Yet, the only evidence before me that Mr. C has ever received any psychological or psychiatric treatment is that contained in the OHIP Summary: seven psychotherapy or counselling sessions spread over three years, five of them provided by Dr. Schaman, a doctor who had recommended to Pafco that treatment be provided by a psychologist.

I am unable to determine why Mr. C did not receive more psychological or psychiatric treatment. The evidence supplies no answers to the following questions: why did Mr. C not receive treatment at the U of T Health “psych. services downstairs” in November 1993? why did Pafco not respond to Dr. Schaman’s request to fund psychological treatment in September 1994? why did Dr. Adler not receive a copy of Dr. Howell’s report recommending psychiatric treatment in October 1994? why did Dr. Adler not receive a copy of Dr. Zamora’s report recommending psychological and psychiatric

treatment in August 1995? why did Dr. Adler not, herself, arrange for more psychological or psychiatric treatment?

But while the evidence does not answer these questions, it leaves no doubt in my mind that Mr. C did not receive the “appropriate” psychological and psychiatric treatment recommended by Drs. Schaman, Howell and Zamora. As I read their reports, these doctors contemplated something more intensive than seven psychotherapy sessions spread over three years, five of them provided by a doctor who had recommended that treatment be provided by a psychologist. However, since Mr. C did attend and participate in these sessions, I find it likely that he would have attended and participated in more intensive psychiatric or psychological treatment had this been arranged for him.

I cannot, therefore, accept Dr. Ross’ broad assertions that “[Mr] C was provided with various appropriate treatment” and that he failed “to actively participate in treatment.” Since these statements were clearly important to Dr. Ross’ decision to adopt a diagnosis of malingering, rather than a diagnosis of Pain Disorder With Associated Psychological Factors, I reject his diagnosis of malingering.

***The motor vehicle accident of September 21, 1995:***

I accept Dr. Adler’s finding that the accident of September 21, 1995 caused a second “mild whiplash superimposed on previous injury with pain magnification.” This accident clearly constituted a complicating factor in Mr. C’s slow recovery from the accident of August 18, 1993. However, the accident of September 21, 1995 was not the first time Mr. C complained of low back pain, as Mr. Wilson suggested during the hearing. He had complained to Dr. Adler of low back pain in May 1994. Moreover, the diagnoses of chronic pain and depression were made many months before the accident of September 21, 1995: by Dr. Schaman in September 1994, by Dr. Howell in October 1994 and by Dr. Zamora in May 1995 (though his report is dated August 9, 1995). The evidence does not, therefore, support a finding that the accident of September 21, 1995 replaced the accident of

August 18, 1993 as the sole cause of Mr. C's ongoing problems after September 21, 1995. I find that the accident of August 18, 1993 remained a material, though perhaps not the only, cause of these problems.

***Testicular cancer:***

There is no medical evidence to support Mr. C's submission that his testicular cancer of 1997 was caused by the accident of August 18, 1993 or related treatment. There can be no doubt that this condition constituted another complicating factor in Mr. C's slow recovery from depression caused by the accident of August 18, 1993. However, in my view, it did not sever<sup>1</sup> the causative link between the accident of August 18, 1993 and his ongoing problems after 1997.

**Issue 3: Substantial inability to perform essential tasks under section 13(1)**

In the case of *Whitney and Cooperators General Insurance Company*, cited earlier, the Director of Arbitrations held that "the key feature of the phrase 'substantial inability' [found in section 13(1)] is the requirement that the disability be 'relatively great in size or importance'..." She also said:

In some cases, an adjudicator might find that a moderate inability to perform almost every essential task normally carried out by an insured person, coupled with a complete inability to perform a few essential tasks results in a "substantial inability to perform the essential tasks" normally engaged in. In other cases, an adjudicator might find that a substantial inability to perform each essential task is the proper application of the eligibility test.<sup>46</sup>

In other words, in order to award Mr. C "no income" benefits under section 13(1) for the period January 23, 1996 to August 18, 1996, I must be satisfied by the evidence that, during this period, he suffered at least a "moderate inability to perform almost every essential...coupled with a complete

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<sup>46</sup>*Supra*, see note 10.

inability to perform a few essential tasks". In my view, the evidence does not meet this test, particularly the requirement to show a complete inability to perform a few essential tasks.

Mr. C presented no evidence that during this seven-month period, or indeed thereafter, he experienced any inability to take care of his personal hygiene, drive, engage in sexual relations or exercise or pursue university studies. I accept that Mr. C continued to suffer from chronic pain and depression throughout this period and up to the date of the hearing, but this, by itself, does not support a finding that he was or is completely unable to perform these essential tasks. In fact, Mr. C's academic performance in the year after the accident was actually slightly better than his performance in the three years before the accident. Likewise, the accident of September 21, 1995 confirms that he had returned to driving by then. Mr. C must also have been capable of engaging in some form of exercise prior to the relevant period because his treating doctors (Drs. Adler, Mewa and Schaman) all recommended exercise starting in 1994. If Mr. C could engage in exercises, he was, in all likelihood, also able to resume taking care of his own personal hygiene. There is even evidence that Mr. C was "sexually active" in November 1993, a time when the adverse physical effects of the accident should have been their most severe.

In order to overcome the cumulative effect of this evidence, Mr. C needed to prove that his condition deteriorated sharply during the relevant period. The evidence presented proves the opposite: Mr. C's symptoms appeared a few months after the accident and have changed very little since.

The issue of Mr. C's accordion deserves separate consideration. Reviewing the evidence as a whole, I make the following findings. Mr. C played Serbian music prior to the accident and had achieved a professional level of facility and technique. Serbian music requires a heavy accordion of the type he owned, weighing around 35 pounds. The initial whiplash injury caused by the accident made it painful for him to play this heavy accordion. In order to avoid the discomfort associated with playing the accordion, he played less. As a result of playing less, Mr. C lost the facility and technique he had acquired prior to the accident and this caused or contributed to a depression. As he became more depressed, he became less active and more deconditioned and this eventually led to a chronic pain

syndrome. The combined effects of the chronic pain syndrome and depression have sharply restricted both the way Mr. C plays the accordion and the duration of his playing. He has only been able to play by removing the weight of the instrument from his neck and shoulders; the duration of his playing has been reduced to about 15 minutes. These restrictions have prevented him from reacquiring the facility and technique he had prior to accident. As a result, he remains the victim of depression and chronic pain and has done little to explore other musical or non-musical ways to spend his time or reorganize his life.

As sad as these findings are, they do not establish that Mr. C was left with a complete inability to play the accordion during the relevant seven-month period or thereafter. Indeed, there is no evidence that he has ever completely stopped playing the accordion. At most, the evidence establishes that his playing has been restricted as described above. With Dr. Chong's care and guidance, his playing may well improve. I acknowledge that he may never play well enough to study with a master teacher or to make money. However, since he failed to prove that he did these things before the accident, his inability to do them after the accident has no legal significance. Moreover, even if the evidence established that Mr. C suffered a complete inability to play the accordion during the relevant period, that would not establish his complete inability to perform "a few essential tasks." However important accordion playing was to Mr. C, it was only one of his essential tasks.

In sum, I find that Mr. C has failed to prove a complete inability to perform *any* of the essential tasks in which he normally engaged before the accident during the relevant period. His claim for "no income" benefits under section 13(1) for the period January 23, 1996 to August 18, 1996 must, therefore, be dismissed.

**Issue 4:      Continuously prevented him from engaging in substantially all activities under section 13(8)(b)**

For the period after August 18, 1996, the question under section 13(8)(b) is whether the injury sustained in the accident continuously prevented Mr. C from engaging in substantially all of the activities in which he normally engaged before the accident.

On the facts of this case, I found no reason to distinguish between Mr. C's pre-accident "essential tasks," as contemplated by section 13(1), and his pre-accident "activities," as contemplated by section 13(8)(b). I have further found that Mr. C has failed to prove a complete inability to perform any of the essential tasks in which he normally engaged before the accident for the period January 23, 1996 to August 18, 1996. For the same reasons, I now find that Mr. C has also failed to prove that the accident continuously prevented him from engaging in substantially all of the activities in which he normally engaged before the accident in the period after August 18, 1996. His claim for "no income" benefits under section 13(1) for the period after August 18, 1996 must, therefore, also be dismissed.

#### **Issue 5: Claims made under section 6**

##### ***Cervical pillows:***

In his report dated September 23, 1999, Dr. Smythe stated that Mr. C had "bought a neck support pillow."<sup>47</sup> Mr. C testified that Dr. Smythe sold these pillows himself, presumably to patients for use in accordance with his instructions.

Given the apparent benefit which Mr. C derived from the pillow techniques recommended by Dr. Smythe, I find that Mr. C is entitled to recover the cost of two cervical pillows purchased from Dr. Smythe.

Mr. C presented no receipts in respect of these purchases to Pafco or at the hearing. He will have 30 days from the date of this decision to present a receipt to Pafco, failing which his claim in respect of cervical pillows will be dismissed. In the event Mr. C presents receipts in respect of pillow purchases within the required 30 days, I will retain jurisdiction to deal with any objection Pafco may have with respect to the authenticity of the receipts or the amount of the receipts. Mr. C will not be entitled to interest on any amount payable by Pafco for cervical pillows.

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<sup>47</sup>Exhibit 4.

***Housekeeping:***

When testifying on his own behalf, Mr. C presented no evidence with respect to his claim for housekeeping. On cross-examination, Mr. Wilson asked Mr. C questions about this claim which elicited the following information.

On 15 or 20 occasions since 1995 or 1996, Mr. C has paid a woman named Lisa \$100 to do his laundry and to clean his bedroom, his bathroom and his hallway. He was unable to find any receipts and did not present any receipts to Pafco or at the hearing. Lisa did not testify and Mr. C claimed to have lost contact with her.

I reject this claim. It is unsubstantiated by any documents or other evidence. I also find it highly improbable that Mr. C required personal housekeeping services. It is clear from the various medical records (most recently Dr. Chong's consultation notes) that Mr. C has always lived at home with his parents except for the period he attended university in Toronto in 1993-94. I am also not persuaded that Mr. C's chronic pain and depression prevented him from doing light housekeeping of the type described in his evidence.

***Courses completed prior to the accident:***

Mr. C abandoned this claim at the hearing. It was, in any event, outside the scheme of benefits provided by the *Schedule*.

**Issue 6: Pafco's claim to an award under section 282(11.2) of the *Insurance Act***

Section 282(11.2) of the *Insurance Act* reads as follows:

If an insured person commences an arbitration that, in the opinion of the arbitrator, is frivolous, vexatious or an abuse of process, the arbitrator may award an amount to be paid by the insured person to the insurer that does not exceed the amount assessed against the insurer in respect of the arbitration under section 14.

In the case of *Richard and Lombard General Insurance Company of Canada*,<sup>48</sup> Arbitrator McMahon held that this section is intended to return to the insurer the filing fee which it should not have been required to pay because the application for arbitration was “so devoid of merit” that it should not have been filed in the first place. In the case of *Nguyen and Scottish & York Insurance Company Limited*,<sup>49</sup> I agreed with, but reversed this logic by holding that an applicant whose arbitration was not frivolous, fraudulent, vexatious or an abuse of process when commenced or filed should not be exposed to the risk of an award under section 282(11.2).

The evidence in this case does not, in my opinion, support a finding that Mr. C’s application for arbitration was frivolous, fraudulent, vexatious or an abuse of process when commenced or filed. While all but one of Mr. C’s claims have been dismissed, his claim for weekly income benefits was not necessarily “so devoid of merit” that it should not have been filed in the first place. It was largely a question of whether Mr. C discharged his onus to obtain, produce and present supporting evidence. His failure to discharge that obligation has led to the dismissal of his claim for weekly income benefits but it did not establish that no supporting evidence ever existed or that he had attempted to present a fraudulent claim. I am not, therefore, prepared to describe this arbitration as one which should never have been commenced in the first place.

**Issue 7: Expenses in respect of the arbitration under section 282(11) of the Insurance Act**

Expense awards must balance the need for access by insured persons to the dispute resolution system with the need to discourage undeserving claims and undesirable behaviour.<sup>50</sup> In addition, arbitrators must consider the following criteria as stipulated in the Expense Regulation:

- (a) each party’s degree of success in the outcome of the proceeding;

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<sup>48</sup>(OIC A97-001526, April 29, 1998)

<sup>49</sup>(FSCO A00-000136, May 10, 2001)

<sup>50</sup>*Allison and Markel Insurance Company of Canada* (OIC P-001231, August 21, 1996).

- (b) conduct of the insurer or the insured person that tended to shorten or facilitate the proceeding or that tended to prolong, obstruct or hinder the proceeding, including failure to comply with undertakings or orders;
- (c) whether the proceeding or any position taken by the insurer or the insured person during the proceeding was manifestly unfounded, frivolous, vexatious, fraudulent or an abuse of process;
- (d) the degree of complexity, novelty or significance of the factual or legal issues raised in the proceeding;
- (e) at the request of either party, any written offer to settle made in accordance with Rules 74 and 75, having regard to the outcome of the proceeding;
- (f) any other matter related to the proceeding that the adjudicator considers relevant to the issue of whether an award of expenses is justified.

Mr. C was more than simply unsuccessful in this proceeding. In terms of the evidence presented at the hearing, all but one of his claims was, in my view, “manifestly unfounded.” Pafco is, therefore, entitled to an award of expenses in relation to the hearing on April 15 and 16, 2002. The amount of this award, and of the previous awards in Pafco’s favour, will be determined in accordance with the assessment procedure set out in the *Dispute Resolution Practice Code*. I remain seized of these issues.

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David Leitch  
Arbitrator

May 30, 2002

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Date

**BETWEEN:**

**L. C.**

**Applicant**

**and**

**PAFCO INSURANCE COMPANY LIMITED**

**Insurer**

**ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. C is not entitled to benefits under section 12(1) of the *Schedule*.
2. Mr. C is not entitled to benefits under section 12(5) of the *Schedule*.
3. Mr. C is not entitled to benefits under section 13(1) of the *Schedule*.
4. Mr. C is not entitled to benefits under section 13(8) of the *Schedule*.
5. Mr. C is not entitled to benefits under section 6 of the *Schedule* in respect of housekeeping and courses completed prior to the accident. He will have 30 days from the date of this decision to present receipts to Pafco with respect to the purchase of cervical pillows, failing which his claim in respect of cervical pillows will be dismissed. In the event Mr. C presents receipts in respect of pillow purchases within the required 30 days, I will retain jurisdiction to deal with any objection Pafco may have with respect to the authenticity of the receipts or the amount of the receipts. Mr. C will not be entitled to interest on any amount payable by Pafco for cervical pillows.
6. Pafco is not entitled to an award under section 282(11.2) of the *Insurance Act*, R.S.O. 1990, c.I.8.
7. Pafco is entitled to an award of expenses in relation to the hearing on April 15 and 16, 2002. The amount of this award, and of the previous awards in Pafco's favour, will be determined in accordance with the assessment procedure set out in the *Dispute Resolution Practice Code*.

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David Leitch  
Arbitrator

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May 30, 2002

Date