

**BETWEEN:**

**FARAJ SALIBA**

**Applicant**

**and**

**ALLSTATE INSURANCE COMPANY OF CANADA and  
PROGRESSIVE CASUALTY INSURANCE COMPANY**

**Insurers**

**REASONS FOR DECISION**

**Before:** Suesan Alves

**Heard:** February 8, 9, 10, 11 and 12, 1999, at the offices of Mark Nimigan, in Hamilton, Ontario. On March 11, 1999, a further medical report, portions of which were deleted on consent, was filed by the Applicant. This report was made Exhibit 77.

**Appearances:** David B. Hayward for Mr. Saliba  
Joanna M. Chadwick for Allstate Insurance Company of Canada  
Robert A. Robinson for Progressive Casualty Insurance Company

**Issues:**

The Applicant, Faraj Saliba, was injured in motor vehicle accidents on January 28, 1992, and on May 3, 1992. He applied for and received statutory accident benefits payable under the *Schedule*<sup>1</sup> after each of the accidents. Allstate Insurance Company of Canada (“Allstate”) paid Mr. Saliba weekly income benefits until July 13, 1992. Progressive Casualty Insurance Company

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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.

(“Progressive”) paid Mr. Saliba weekly income benefits until January 25, 1995. In this arbitration Mr. Saliba claims ongoing entitlement to weekly income benefits. Both insurers dispute such entitlement. The parties were unable to resolve their disputes through mediation, and Mr. Saliba applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Is Mr. Saliba entitled to weekly income benefits as a result of either or both accidents under section 12(2) and 12(5)(b) of the *Schedule*?
2. If yes, which insurer is required to respond to Mr. Saliba’s claims for statutory accident benefits?
3. If both insurers are required to respond, should Mr. Saliba’s benefits be apportioned between Allstate and Progressive? If so, what is the amount of Mr. Saliba’s weekly income benefit?
4. Is there a causal connection between the motor vehicle accident(s) and Mr. Saliba’s surgery in September 1997?
5. Is Progressive entitled to a repayment of the benefits it paid under section 27 of the *Schedule*?

Mr. Saliba claimed interest on overdue benefits and his expenses in respect of the arbitration.

**Result:**

1. Mr. Saliba is entitled to weekly income benefits as a result of each accident under section 12(2) and 12(5)(b) of the *Schedule*, on an ongoing basis.
2. Allstate and Progressive are both required to respond to Mr. Saliba's claims for statutory accident benefits.
3. Mr. Saliba's benefits should not be apportioned. Subject to section 12(4) and section 15 of the *Schedule*: Mr. Saliba is entitled to a weekly income benefit of \$600 from Allstate and \$446.76 from Progressive. Subject to these parameters I leave it to the parties to sort out the precise amounts owing during various periods. I remain seized of the issue in the event the parties are unable to agree.
4. Mr. Saliba is entitled to interest on overdue benefits.
5. There is a causal connection between the motor vehicle accidents and Mr. Saliba's surgery in September 1997.
6. Mr. Saliba is entitled to his expenses in respect of this arbitration.
7. Progressive is not entitled to a repayment under section 27 of the *Schedule*.

**EVIDENCE AND ANALYSIS:**

## Entitlement to Weekly Income Benefits

### *Evidentiary rulings*

Four of the medical witnesses were unavailable for cross-examination. Three of the doctors who assessed Mr. Saliba are dead; another was unable to testify for medical reasons. My rulings with respect to their evidence and other evidentiary issues are set out in the attached Appendix.

### *Background*

Faraj Saliba is presently 54 years of age. He was born in Jerusalem, where he is reported to have obtained an education which is the equivalent of Grade 6 or up to Grade 8 in Ontario. In 1977, when he was approximately 32 years of age, Mr. Saliba emigrated to Canada. He married in 1986, and is the father of four children who are all under eleven years of age.

In 1979 Mr. Saliba began working for Dofasco. He had been working there for approximately twelve years at the time of the first of the two 1992 motor vehicle accidents which are the subject of this arbitration. The first accident occurred on January 28, 1992. Allstate paid Mr. Saliba's claims for statutory accident benefits following this accident, and terminated his weekly income benefits on July 13, 1992. On May 3, 1992, Mr. Saliba was injured in a second accident, aggravating his earlier injuries. Progressive paid Mr. Saliba weekly income benefits until January 25, 1995.

In this arbitration, Mr. Saliba claims ongoing entitlement to weekly income benefits under section 12(2) and 12(5)(b) of the *Schedule*. He alleges that he continues to be disabled as a result of the injuries he sustained in either or both accidents. Allstate and Progressive dispute Mr. Saliba's entitlement to further weekly income benefits. In the alternative, if Mr. Saliba is found to be

disabled as a result of his injuries, each insurer alleges that the other should respond to Mr. Saliba's claims for statutory accident benefits, and if both are responsible, then Mr. Saliba's benefits should be apportioned.

At the time of the accidents, Mr. Saliba had three undiagnosed conditions. He alleges that either or both accidents caused these conditions to become symptomatic, and directly or indirectly caused him to require surgery. Unfortunately, following the surgery, Mr. Saliba developed incomplete quadriplegia. Both insurers agree that following the surgery Mr. Saliba meets the test for disability benefits including post 156 week benefits. However, they dispute that there was any causal relationship between Mr. Saliba's injuries from the motor vehicle accidents and the surgery and subsequent disability. Both insurers submit that the surgery was performed with respect to a congenital condition, was ill-advised, and ought not to have been undertaken.

Progressive also alleges that it paid statutory accident benefits in error, and claims a repayment of the benefits which it paid. Allstate disputes that there was an "error" within the meaning of the *Schedule* which would entitle Progressive to repayment.

At the hearing, counsel for Mr. Saliba and Progressive agreed to withdraw the issue between them of whether the amounts paid to Mr. Saliba by his long term disability insurer should be deducted from his weekly income benefits on a net or gross basis.

### ***Test for entitlement***

In order to succeed in this arbitration, Mr. Saliba must establish on a balance of probabilities that he was substantially unable to perform the essential tasks of his occupation as a wash and steam bay attendant as a result of the injuries he sustained in either or both of the motor vehicle

accidents. In the post 156 week period, Mr. Saliba's injuries must continuously prevent him from doing any job for which he is reasonably suited by his education, training and experience. For the reasons which follow I find that Mr. Saliba continues to meet the test for entitlement to weekly income benefits, including post 156 week benefits as a result of the injuries he sustained in both accidents, and that such entitlement is ongoing.

### ***Pre-accident condition and employment***

Prior to the January 1992 accident, Mr. Saliba suffered from a number of medical conditions. These included glaucoma, some difficulty with his vision, mild hearing loss, degenerative disc disease, fused C2-3 vertebrae, spinal stenosis, and intermittent back problems.<sup>2</sup> On some occasions his back pain was treated with chiropractic manipulations and back strengthening exercises, and appears to have resolved by 1990. He sustained contusions, burns, abrasions, slips and falls, fractures and contusions to his right hand and injured his right shoulder while working at Dofasco in 1980. As a result of the 1980 shoulder injury, Mr. Saliba was required to avoid heavy manual labour and lifting above his right shoulder.

I find that Mr. Saliba was employed as a wash and steam bay attendant at Dofasco since 1983, and was so employed at the time of the first accident in January 1992. His performance appraisals were almost entirely positive during his 12 years of employment at Dofasco. I accept that before the January 1992 accident, Mr. Saliba had a number of significant impairments. However, based on his performance appraisals, I find that despite his impairments, Mr. Saliba was able to do his

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<sup>2</sup>1979 contusion to low back; 1980 pain left side and mid-back; 1982 slip and fall on ice, pain in lower and middle back and left forearm, sprained wrist, some tenderness in T12-L2 area, some nerve root irritation down left side, paraesthesia down left leg in L5-S1 distribution, pain in mid thoracic area; released to normal duties by chiropractor in January 1983 and by orthopaedic surgeon in February 1983; 1984, February, left lower lumbar pain; discharged March 1984; 1984 motor vehicle accident, minimal neck and low back discomfort treated with analgesics; 1986 pain to mid back and left thigh; 1990 pain to left shoulder and hip.

job. He was a willing employee, with an average degree of productivity, who followed directions, took initiative and was able to get along with his co-workers and supervisors.<sup>3</sup>

Mr. Saliba's job was to clean large industrial vehicles such as 55-ton trucks, earth movers, bulldozers and front-end loaders using a steam wand or a power wash. Mr. Saliba estimated these vehicles were five to six metres high. He worked alone, and was required to wash as many vehicles as he could during a twelve-hour shift.

Mr. Saliba worked primarily on his feet, and manipulated the wand reaching at, above, and below shoulder level to direct the steam onto the vehicles. He would go on top of, under and inside the machines, and crouch under them while cleaning. Mr. Saliba testified that at times there was too much oil and grease on the vehicle and he would have to shovel this material. Occasionally he had to use the power wash. He would climb up four to six vertical steps, pull out the hose, and then turn on a tap at chest level in order to do so.

I find the physical requirements of Mr. Saliba's job to be: standing, walking, kneeling, bending, climbing, reaching, stooping, crouching, looking up, down and from side to side while carrying and manipulating the wand and hose from floor to knee, floor to waist, and from floor to above shoulder level.<sup>4</sup> I also find that he was required to bend and lift occasionally while shovelling. He also required some degree of agility, manual dexterity, eye, hand and foot co-ordination, and

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<sup>3</sup>To the extent that those appraisals may vary from the ratings obtained by Acumen Rehabilitation Management in an interview with Mr. Moriarity, Manger of Operations, Dock and Yard, I prefer to rely on the original performance appraisals which were signed by Mr. Moriarity, and which were done closer in time to the events which were appraised.

<sup>4</sup>There is conflicting evidence as to whether the steam wand and the hundred foot steel hose which Mr. Saliba used to clean the vehicles weighed ten pounds or ten kilograms. There is also conflicting evidence about whether the steam from the power wash was under 100 or 1000 pounds of pressure per square inch. In any event, I accept that considerable effort was required to hold and manipulate either implement, and that Mr. Saliba used both hands to do so.

stamina, given the 12 hour duration of the shift with a total of one hour and fifteen minutes in breaks.

### ***Communication skills***

Dr. John Schneider, a psychologist who assessed and treated Mr. Saliba at Progressive's request, described Mr. Saliba as capable of engaging in basic communications in English; however, "more complex or demanding communications are problematic. In addition, he appears to have difficulty remembering and organizing his experiences to communicate them clearly. Information given in response to questions was often vague or incomplete, with further information sometimes coming to light at a later point in the interview." In Dr. Schneider's opinion, this was due to a combination of language difficulty and memory/cognitive limitations rather than deliberate evasiveness.

I accept Dr. Schneider's opinion of Mr. Saliba's language, communication, cognitive and memory skills. It is consistent with Mr. Saliba's presentation during his testimony. His language difficulties were also noted by his employer. During his post-accident treatment, Mr. Saliba's communication difficulties appear to have contributed to his premature termination of a treatment program.<sup>5</sup>

### ***Post-accident condition***

On January 28, 1992, while Mr. Saliba was driving home after working a night shift, he fell asleep at the wheel and his car struck a pole. He went home by taxi, and later to the emergency

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<sup>5</sup>Mr. Saliba attended a comprehensive treatment program at the CBI between January 24, 1994 and February 9, 1994. Difficulties such as poor attendance, poor compliance and a language barrier were noted. One of the therapists attempted to engage in goal setting with Mr. Saliba. He misunderstood, and believed that the therapist meant that he could return to his job. Mr. Saliba then terminated his involvement in the CBI treatment program.

department of Joseph Brant Hospital. The following day he saw his family physician, Dr. H. Phills.

According to Dr. Phills' clinical notes and records, Mr. Saliba sustained injuries to his neck, lower back and right shoulder. He complained of neck pain, headaches in his forehead, at the back and occipital regions of his head, and was tender over his C4-C7 vertebrae. He complained of chest pain, and had a tender sternum. He had pain radiating from his neck into his right shoulder and right upper back, but had a good range of shoulder movement. He had a painful lower back, and was tender over the L4-S1 area. Mr. Saliba had problems sitting or standing for long periods. Dr. Phills diagnosed strained cervical and lumbar muscles and a strained right shoulder, and referred Mr. Saliba for physiotherapy.

Mr. Saliba made slow but steady progress at physiotherapy. He was at the point of graduating to a more active component of his physiotherapy program, when he was injured in a second accident. On May 3, 1992, less than four months after the first accident, Mr. Saliba was a passenger in a van which was involved in a collision. Dr. Phills described Mr. Saliba's injuries as a "painful aggravation of previous injury to neck, right shoulder and back. No change in previous physical status except for increased pain." X-rays showed a congenital fusion of his C2-3 vertebrae, degenerative disc disease at the C6-7 levels of his cervical spine and at L5-S1 of his lumbar spine. The medical practitioners agree that these were pre-existing conditions.

On June 8, 1992, Dr. David Wismer, an orthopaedic surgeon, examined Mr. Saliba at Allstate's request. Dr. Wismer agreed that Mr. Saliba sustained a combination of soft tissue injuries to his cervical and lumbar spine. He was also of the opinion that Mr. Saliba sustained a recurrence of a rotator cuff type of pathology impingement syndrome. He anticipated that Mr. Saliba would be able to return to work within the next six to eight weeks, provided he continued to progress at the same rate.

Dr. Wismer recommended that Mr. Saliba continue with daily physiotherapy over the next two months, and for a period of at least four to five months after he returned to work. He reported to Allstate that there was nothing unusual about Mr. Saliba's presentation, and that he appeared very genuine, honest and straightforward. In his opinion, Mr. Saliba was progressing as well as could be expected from his injuries.

### ***Attempted return to work***

Mr. Saliba approached his family physician wishing to return to work, and Dr. Phills agreed he could do so, effective September 9, 1992. Mr. Saliba returned to Dofasco a week earlier. Dofasco was willing to offer Mr. Saliba a gradual return to work at his job as a wash and steam bay attendant to build his work tolerance. He was to start at four hours a day, gradually increase his hours and duties over a six to eight week period and return to full time duties on October 13, 1992. He would continue attending physiotherapy during this period.

Mr. Saliba had difficulties performing his work as a wash and steam bay attendant, and on September 25, 1992, Dofasco moved him to modified and lighter duties, doing mail delivery, washing respirators, laundry and janitorial work. This modified position was not long term and Mr. Saliba was expected to resume his regular job.

Mr. Saliba continued to see Dr. Phills in regular follow-up. Between September 10, 1992 and October 15, 1992, Dr. Phills' notes reflect Mr. Saliba's increasing headaches, neck and shoulder pain, difficulty performing modified work, and inability to lift heavy objects without increasing his neck, shoulder and back pain. On October 14, 1992, Mr. Saliba was discharged from physiotherapy to a home exercise program. At this point he had reached six hours of work per day and was projected to work eight hours per day by the end of the month.

Dr. Phills' notes in October and November 1992 show no change in Mr. Saliba's pattern of pain in his neck and back. On October 15, 1992, Dofasco personnel agreed to extend his period of modified and lighter duties. On November 3, 1992, Dofasco again agreed to extend the accommodation period, noting as always that he was expected to return to regular duties as a wash and steam bay attendant.

In December 1992, in addition to pain in his lower back, Dr. Phills noted that Mr. Saliba also had pain in the joints of his shoulder, elbow, wrist and fingers. On January 28, 1993, Mr. Saliba indicated to his employer that he was experiencing increased discomfort and stiffness to his neck but felt he was able to remain at work. On February 1, 1993, Dr. Phills noted: "Swelling of left side of neck and left shoulder unable to rotate hand. Spasm cervical muscles. Off work."

On February 2, 1993, Mr. Saliba went off work due to increased discomfort. Once the swelling in his neck subsided, Dr. Phills agreed he could return to modified work, and on February 15, 1993, Mr. Saliba did so. According to Dr. Phills' note of March 25, 1993, Mr. Saliba reinjured his lower back and neck while cleaning and bending at work. He was tender over his C5-6-7 vertebrae on the left side and L4-5/S1. Mr. Saliba continued to work, and Dr. Phills' notes reflect his persisting pain.

On July 29, 1993, while sweeping the floor in the lunchroom, Mr. Saliba bent over and "contacted his head" on a coffee machine as he stood up. On August 3, 1993, Mr. Saliba complained to his foreman of increased pain, and was sent to the medical department at Dofasco. The Dofasco Medical Services Medical History Notes reflect that on that date Mr. Saliba complained of increased pain and stiffness in his neck and upper back "due to MVA" and that he was going home to see his family doctor. This was noted to be a valid visit. Dr. Phills' clinical notes for August 3, 1993 state "severe pain in neck and lower back unable to sit for long periods severe

occipital headache with (not legible) Lumbar movement pain radiating into left leg walks with (not legible) limp. Off work indefinite.” Mr. Saliba has not returned to work since that date.

Dr. R.A. deVilliers, a neurologist and neurosurgeon who treated Mr. Saliba, testified at the hearing. He was asked whether the July coffee machine incident could have been responsible for Mr. Saliba’s disability. He opined that it would depend on the severity of the contact. Dofasco’s records from a physician states “a scalp laceration without mention of complication.” I find it unlikely that a severe contact would have been described in this manner. I also find it unlikely that Dr. Phills’ note of Mr. Saliba’s visit four days later would fail to mention a severe contact to Mr. Saliba’s head, had this occurred.

I accept that there is a temporal connection between this incident and Mr. Saliba going off work a few days later. However, attributing Mr. Saliba’s disability to this event would mean ignoring Mr. Saliba’s continuous complaints of pain which date from the time of the two accidents which are the subject of this arbitration, and the continuing difficulties he experienced in the ten months before this incident, while he performed modified light janitorial duties.

I find that Mr. Saliba had difficulties throughout the 11 month period he attempted to return to his full-time duties. Dr. Phills’ records show that he adjusted Mr. Saliba’s medications during this period, and supported and encouraged Mr. Saliba. I find that Mr. Saliba made a sincere attempt to return to his pre-accident job, and that Dofasco was supportive of his efforts. Despite his persistence, the support of his employer and family physician, Mr. Saliba was unable to do so. I find that Mr. Saliba remained substantially disabled from performing his pre-accident job. I accept his testimony that he is unable to work at his pre-accident job or at lighter janitorial work. I accept Mr. Saliba’s testimony that he “lost hope” after his failed attempt, which he considered to be two attempts to return to work.

From about December 1993, various health practitioners comment on Mr. Saliba's emotional reaction to his injuries, peculiar posture, gross functional overlay, voluntary magnification, marked symptom magnification, illness behaviour, or multiple pain behaviours.<sup>6</sup> Possible explanations for these behaviours included: an adaptive posture to minimize his physical pain, non-verbal communication of physical pain, a low pain threshold, lack of motivation, chronic pain syndrome, voluntary magnification or malingering.

Given Mr. Saliba's attempt to return to work, I reject lack of motivation as an explanation. In reviewing the medical documentation in relation to Mr. Saliba's work-related injuries, I note that each of his medical visits at Dofasco is recorded as a "valid visit," that there are instances when he declines medication or suggestions of modified work, and occasions where he has asked his family physician and the plant physician to send him back to work early after a period of sick leave. In light of this history, and his lengthy attempt to return to work, I find it unlikely that Mr. Saliba was malingering. I find three factors persuasive in explaining Mr. Saliba's behaviour. As his family physician suggested, he was attempting to minimize his physical pain, and, as Dr. Schneider suggested, this was unconscious behaviour, and a non-verbal communication of his physical pain.<sup>7</sup>

These reports of pain behaviour are in marked contrast to the straightforward presentation which Dr. Wismer remarked upon in 1992. Since a successful return to work depends on both physical and behavioural factors, I accept the opinion evidence of Dr. R.A. Dolan, a neurosurgeon, and of Dr. K.A. Bowler, a physiatrist, who later assessed Mr. Saliba, that his pain behaviours reflect an

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<sup>6</sup>These include the Canadian Back Institute, Dr. Bhalla, orthopaedic surgeon, Dr. Schneider, psychologist, Dr. Goldenberg, trauma consultant, Dr. Dolan, neurosurgeon, Dr. Kapoor, neurologist, Dr. Bowler, physiatrist, Dr. Howell, disability evaluating physician, Dr. Ameis, physiatrist, Dr. Urovitz, orthopaedic surgeon, Dr. Cameron, orthopaedic surgeon, Dr. deVilliers, neurologist and neurosurgeon, and Dr. Gray, neurologist.

<sup>7</sup>Reports dated August 1994 and November 1, 1994.

additional aspect of disability. I also accept that these behaviours would need to be reversed before Mr. Saliba could successfully return to work.

### ***Complaints, evaluations and treatment***

Mr. Saliba was treated with hydrotherapy, active physiotherapy, a work hardening program, a lumbosacral brace, adjustable canes, medication and supportive counselling. He continued to complain of headaches, neck and low back pain radiating into his left leg and great toe, paresthesia, reduced grip strength in his left arm, sensory loss in his fingers, numbness and tingling in his left arm radiating into his fourth and fifth fingers, recurrent temporary paralysis in his arms and legs, and L'Hermitte's sign, or shock like symptoms when he flexed his neck. These complaints prompted referrals to an orthopaedic surgeon, a neurologist, and two neurosurgeons.

The x-rays, CT-Scans and MRI studies revealed that Mr. Saliba had a number underlying pre-existing conditions. In addition, they showed compression of his spinal cord in his neck, and possible impingement on the exiting nerve root caused by the osteophytic narrowing of his left L4-5 intervertebral foramina; however, clinical correlation was required. Dr. S.K. Bhalla, an orthopaedic surgeon, reported that his findings correlated with this impingement. Dr. Bhalla also diagnosed lumbar spinal stenosis. Dr. Bhalla saw Mr. Saliba between February and October 1994, and opined that Mr. Saliba remained totally disabled based on various examinations and investigations, and his lack of improvement. I accept Dr. Bhalla's opinion.

In November 1994, Dr. M. Howell, a disability evaluating physician, examined Mr. Saliba on behalf of Progressive. He opined that Mr. Saliba was not disabled from performing work as a janitor. In light of Mr. Saliba's difficulties during his attempt to return to his pre-accident job at Dofasco, I reject Dr. Howell's conclusion that Mr. Saliba was able to perform janitorial work.

“There is no better evidence of incapacity to perform a task than the failure of an honest and sustained attempt to do it.”<sup>8</sup>

At the time of Dr. Howell’s examination, approximately a year had elapsed since Mr. Saliba went off work on August 3, 1993. During that time, the clinical notes of Dr. Phills show no significant improvement in Mr. Saliba’s condition. To the extent that Dr. A. Ameis, physiatrist, Dr. E. Urovitz and Dr. H. Cameron, orthopaedic surgeons, have adopted Dr. Howell’s opinion on disability, I also reject their opinions.

Dr. Howell assessed Mr. Saliba on behalf of Progressive in relation to the accident which took place in May 1992. His assessment was conducted approximately two years and six months post-accident. During the first three years or 156 weeks post-accident, the *Schedule* requires disability to be measured against an ability to perform the essential tasks of pre-accident work; not against post-accident modified duties.

On July 18, 1995, Dr. J.M. Aubin, an orthopaedic surgeon, assessed Mr. Saliba on behalf of his long-term disability insurer, Sun Life.<sup>9</sup> Dr. Aubin noted Mr. Saliba’s complaints of severe back pain and a good deal of neck pain, difficulties with lifting, bending, walking more than short distances, with carrying even light parcels, and poor sleep. In Dr. Aubin’s opinion, Mr. Saliba had severe progressive lumbar spinal stenosis, and is totally disabled from any type of employment.

Dr. Wismer reported significant stenosis at Mr. Saliba’s L3-4 vertebrae and testified that there were significant osteoarthritic changes in his lumbar spine, which also showed sclerosis, or

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<sup>8</sup>*Foden v. Co-Operators Insurance Association*, [1978] I.L.R. Parg. 1-1045 (S.C.O.) per Reid, J.

<sup>9</sup>Dr. Aubin was asked to determine whether Mr. Saliba was “prevented from engaging in any occupation or employment for wage or profit for which he is reasonably qualified”. In my view, the test is similar to the post 156 week test under section 12(5)(b) of the *Schedule*.

thickening of the bones. Dr. Wismer testified that such changes are generally not seen until patients are in their fifties or sixties. Dr. deVilliers testified that in his opinion Mr. Saliba's spine was "normal for a man of his age." A possible explanation for the difference in Dr. deVilliers' opinion is that when he saw Mr. Saliba in 1996, he was 51 years of age, while the CT-Scan and MRI studies were done two years earlier, when he was 49. I prefer the opinions of Dr. Bhalla, Dr. Wismer and Dr. Aubin with respect to the condition of Mr. Saliba's lumbar spine.

Shortly after Dr. Aubin's assessment, Mr. Saliba was involved in two further motor vehicle accidents. The limited evidence with respect to those accidents comes from the testimony of Mr. Saliba, Dr. deVilliers, and from Dr. Phills' clinical notes and records.

According to Dr. Phills' notes, on August 1, 1995, Mr. Saliba's car was rear-ended. It was a minor accident; however, the impact was sufficient to aggravate Mr. Saliba's cervical and lumbar muscles. He had a tender neck, low back, and limited range of motion in both these areas, but no neurological loss. A week later Dr. Phills noted Mr. Saliba's neck and back pain were subsiding. He had improved on Surgam, and there was pain radiating from his back into his left leg. His August 29, 1995 note states "chronic cervical and lumbar pain; no change from last week."

On or about September 18, 1995, Mr. Saliba drove to Toronto to visit his priest who had been hospitalized following a stroke. While he was driving on the 401, he changed lanes, and another car struck his vehicle. His car spun around, then hit the guard rail. The damage to his car was approximately \$2,000. He was taken to hospital by ambulance and discharged. Dr. Phills' notes state that Mr. Saliba reinjured his neck and lower back with painful left shoulder and arm, was having dizzy spells with buzzing in both ears, a limited range of motion in his cervical and lumbar spine; not much change.

There is little medical opinion evidence with respect to the role of these accidents. Dr. deVilliers testified that these 1995 accidents probably did play a role in Mr. Saliba's symptoms. However, he could not deduce from this that the two 1992 accidents were not causally related, since by history, Mr. Saliba's symptoms started after the first of his 1992 accidents. I make no finding with respect to the role of these two 1995 accidents and the extent to which they may cause or contribute to any disability. While it is conceivable that the subsequent accidents might create fresh entitlement to statutory accident benefits, the evidence does not suggest that having become symptomatic, Mr. Saliba would again become asymptomatic. The 1995 accidents would not therefore relieve either Allstate or Progressive from their obligations under the *Schedule*.

In July 1996, Mr. Saliba was assessed by a physiatrist, Dr. K.A. Bowler, as part of a functional abilities assessment at MedWorks Assessments. He diagnosed mechanical low back pain, bilateral low and mid back pain, and chronic pain syndrome. Dr. Bowler opined that Mr. Saliba was unable to perform his job duties as a janitor at Dofasco, or any job for which he was suited having regard to his education, training and experience.<sup>10</sup> Dr. Bowler recommended an active exercise program, psychological treatment with respect to Mr. Saliba's pain behaviours, and treatment for his hypertension.

According to the MedWorks assessment, Mr. Saliba demonstrated the strength to perform at a medium level on an occasional basis, defined as between zero to 33% of the work day. In Dr. Bowler's opinion, Mr. Saliba's inability to maintain a posture for longer than approximately 10 minutes limits his ability to be successful in a competitive work environment.

In October 1996, Dr. Wismer again examined Mr. Saliba on behalf of Allstate. Dr. Wismer noted a functional overlay, and was not persuaded that Mr. Saliba was disabled. Dr. Wismer testified at

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<sup>10</sup>Dr. Bowler recommended a bone scan to determine whether there was any evident organic pathology in Mr. Saliba's low back and hips. This suggests the CT-Scans and MRI studies were not made available to him.

the hearing. In cross-examination, he agreed it would have been relevant to know that between September 1992 and August 1993 Mr. Saliba visited his family physician on 17 occasions and that on most of those occasions, Dr. Phills recorded cervical and lumbar pain and strain in his clinical notes and records. Dr. Wismer agreed that this information would change his opinion and prognosis. He was not asked how this would change his opinion and prognosis in cross-examination or in re-examination.

I accept the opinions of Drs. Phills and Bhalla, which are supported by those of Drs. Bowler and Aubin that Mr. Saliba continued to be physically disabled. I also accept the opinion of Dr. Dolan which is supported by Dr. Bowler, that Mr. Saliba's pain behaviours would have to be addressed and reversed before he could successfully return to work. I find no persuasive evidence that Mr. Saliba recovered sufficiently from his injuries to be able to return to either his pre-accident job or to the modified work he performed post-accident. I conclude that Mr. Saliba has established that he remained substantially disabled from performing the essential tasks of his job as a wash and steam bay attendant.

### ***Causation***

Mr. Saliba alleges that his injuries and consequent pain and disability are caused by either or both of the motor vehicle accidents. This is disputed by Allstate and Progressive. Mr. Saliba has the burden of adducing credible evidence to establish that his pain "probably," or more likely than not, resulted from the automobile accident or accidents in question.<sup>11</sup> Arbitrators have stated that the accident(s) need not be the sole cause but must significantly or materially contribute to the disability.

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<sup>11</sup>*Hamelin and Alpina Insurance Company, Limited*, (OIC A-003506, July 19, 1994); *Koch and AXA Insurance (Canada)*, (OIC A-951417, June 6, 1996), confirmed on appeal (OIC P96-00058, May 8, 1997) and many others

Mr. Saliba had pre-existing conditions which were largely asymptomatic pre-accident. Two neurosurgeons who treated Mr. Saliba, Dr. Dolan and Dr. deVilliers, have provided a plausible explanation of Mr. Saliba's lack of symptoms prior to the accidents and his prolonged symptoms post-accident. Dr. deVilliers testified at the hearing. In his opinion Mr. Saliba had congenital spinal stenosis, that is to say he was born with a smaller than normal spinal column. He also had acquired spinal stenosis due to degenerative disc and joint disease, in that osteophytes and bulging or herniated discs were taking up space in his already narrow spinal column. Mr. Saliba also had a fused C2-3 vertebrae, his spinal cord was compressed from the front and back at the C2-3 level, at C3-4, C4-5, with less compression at the C5-6 level. At some points, his spinal cord was less than half its usual diameter. There was evidence of increased signal in the spinal cord, indicative of some spinal cord compression. Mr. Saliba's symptoms, particularly those of intermittent quadriparesis and L'Hermitte's sign, were consistent with such compression.

In Dr. deVilliers' opinion, Mr. Saliba had a vulnerable spine. On a physiological basis, trauma, such as the motor vehicle accidents, could cause damage to the ligaments of the spine. The narrow diameter of Mr. Saliba's spine predisposed his spinal cord to injury. The congenital fusion made his spine less flexible, created more leverage at the areas above and below the fusion, and made those areas more susceptible to injury. Dr. deVilliers testified that after an injury a person may experience pain from soft tissues, muscles, discs, ligaments, and other sensitive parts, typically the spinal nerve roots. He noted that the spinal cord has a limited capacity to adjust to change, yet it is able to accommodate gradual progressive change. This adjustment process could explain Mr. Saliba's lack of symptoms pre-accident.

The vulnerable nature of Mr. Saliba's spine could explain the extent of his post-accident pain. Dr. Dolan, who treated Mr. Saliba between 1993 and 1996, opined that Mr. Saliba's degeneration and stenosis would render his cervical and lumbar spine more liable to injury affecting his nerve roots

at the respective levels. Dr. Wismer and Dr. Trevor Gray, a neurologist, agreed that in general degenerative disc disease could prolong a recovery from soft tissue injuries.

I also accept Dr. deVilliers' opinion that the motor vehicle accidents aggravated or accelerated Mr. Saliba's condition. Dr. deVilliers opined the accidents were related to Mr. Saliba's pain by history. This is supported by the events chronicled in Dr. Phills' clinical notes and records.

Dr. Howell also opined that there was a causal relationship between Mr. Saliba's post-accident pain and the motor vehicle accidents. There is a temporal connection, supported by the opinion evidence of Dr. Bhalla, Dr. Howell, Dr. Dolan and Dr. deVilliers. I conclude that Mr. Saliba's largely asymptomatic pre-existing conditions were rendered symptomatic by the motor vehicle accidents, causing him to suffer the disabling neck and back pain of which he complained following the accidents.

### ***The Surgery***

In 1997 Mr. Saliba had a cervical laminectomy to relieve the compression to his cervical spinal cord. Mr. Saliba alleges that there is a causal relationship between either or both of the motor vehicle accidents, and his cervical laminectomy. Both insurers dispute that such a causal relationship exists.

Dr. deVilliers opined that the 1992 motor vehicle accidents precipitated, aggravated, hastened or accelerated the degenerative process of Mr. Saliba's spine, and directly or indirectly hastened his need for surgery. Dr. deVilliers acknowledged that initially he did not connect all of Mr. Saliba's complaints with his pain, and that it was possible that this progression could have occurred in the absence of trauma. However, he maintained his opinion that there was a temporal connection and that Mr. Saliba's symptoms of spinal cord dysfunction were interrelated with his spinal stenosis

and injuries. When considered in the context that Mr. Saliba was largely asymptomatic pre-accident and symptomatic post-accident, I find Dr. deVilliers' opinion plausible.

Mr. Saliba complained of shock like symptoms when he bent his neck. This is known as L'Hermitte's sign. In Dr. deVilliers' opinion, this is a very sensitive determinant of demyelination, or a loss of myelin sheaths. These sheaths insulate the nervous system, and prevent "cross- talking" between various nervous structures. Since it is subjectively experienced by the patient, it is more properly a neurological symptom. This symptom is seen in cases of multiple sclerosis, spinal cord compression, tumors, and other disorders of the cervical spinal cord.

Dr. deVilliers testified that he found no reason to doubt Mr. Saliba's complaints. In his opinion, a lay person would not have the wherewithal to make up such symptoms; indeed, many physicians do not know about these symptoms. Dr. deVilliers was concerned that there was significant compression of Mr. Saliba's cervical spinal cord. Compression of the spinal cord, particularly in the neck, can be a serious problem. Damage to the spinal cord is not likely to be reversible. Most of the nerves to the rest of the body pass through the neck, and potentially, Mr. Saliba risked paralysis.

Dr. deVilliers was faced with a conundrum. The MRI showed severe compression of Mr. Saliba's spinal cord, and his symptoms were consistent with that compression. Yet his neurological examination continued to be normal. Based on the data he had, he could recommend one of three courses of action to Mr. Saliba. He could continue to observe him, with the possibility that no further compression of his spinal cord would occur; he could continue to observe him and hope that if further compression did occur, surgery would take place before significant and irreversible paralysis occurred; or he could proceed with surgery to avoid the risk of paralysis. The surgery itself carried a two per cent chance of paralysis. Timing of the surgery could be a critical factor.

In Dr. deVilliers' judgment, the surgery should proceed, given Mr. Saliba's symptoms of L'Hermitte's sign, intermittent quadriparesis and his complaint of chest pain. Dr. Dolan also agreed that the surgery might be helpful to Mr. Saliba. Mr. Saliba consented to the cervical laminectomy which took place on September 23, 1997. Dr. deVilliers testified that he removed the laminae of the C2-C6 vertebrae, and the C2-3 fused vertebrae, as well as the yellow ligament. In his opinion, satisfactory decompression was achieved, and nothing abnormal happened during the surgery. Unfortunately, Mr. Saliba awoke with quadriplegia.

Dr. Hugh Cameron, an orthopaedic surgeon, assessed Mr. Saliba on behalf of Progressive following the surgery. He opined that the surgery should not have been performed because Mr. Saliba had a normal neurological examination, and because Mr. Saliba had a psychological problem; not a physical one. He opined that even if Mr. Saliba had not developed quadriplegia, the surgery would not have been successful, since a psychological problem cannot be fixed by surgery. Since I have concluded that Mr. Saliba is physically disabled and there is an additional psychological component to that disability, I reject Dr. Cameron's opinion.

Dr. Gray was critical of Dr. deVilliers' decision to proceed with surgery on a two year old MRI study. He disagreed with Dr. deVilliers that there were signs of a pending myelopathy since Dr. deVilliers recorded a normal neurological examination. Dr. Gray opined that the "gold standard" would have been evidence of progressive neurological deficit, along with an up-to-date MRI. I did not understand Dr. Gray to mean that this was a standard of care or a requirement before proceeding with such surgery. Dr. Gray acknowledged that he had no evidence that Dr. deVilliers was other than a competent neurosurgeon. He agreed that Mr. Saliba was the sort of patient who would probably place his trust in his physicians.

I find that Mr. Saliba sought medical treatment for his post-accident pain and symptoms and followed the advice of his treating practitioners. Medicine remains an inexact science and it would appear that there is a great deal of room for differing opinions and judgment. There is no suggestion that Dr. deVilliers failed to disclose the risks of surgery, or that he carried out the surgery in an improper manner. I find no new intervening act which would relieve Allstate and Progressive from responsibility for Mr. Saliba's statutory accident benefits. Although Mr. Saliba's disability has worsened following the surgery, this also does not relieve Allstate and Progressive from responsibility for Mr. Saliba's statutory accident benefits.<sup>12</sup>

### ***Causation - which 1992 accident?***

Mr. Saliba has stated that he believes that most of his injuries are the result of the January 1992 accident. Each Insurer states the other is responsible for Mr. Saliba's statutory accident benefits.

Dr. Phills was not prepared to apportion responsibility between the 1992 accidents. He completed Canada Pension and Sun Life medical certificates, in which he referred only to the January accident.

Dr. Wismer and Dr. deVilliers could not tell which of the accidents had a more significant impact on Mr. Saliba. Dr. deVilliers felt both were probably involved and there was no way of determining which was more severe or long lasting. The physiotherapist who was treating Mr. Saliba before the second accident, noted some setback in his recovery. Dr. A.K. Kapoor opined that Mr. Saliba's injuries got worse after the second accident. Dr. Dolan proposed a 75-25% split between the first and second accidents, and Dr. Howell adopted this apportionment.

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<sup>12</sup>*Alderson v. Callaghan* [1998] 40. O. R. 3d, Ont. C. A. applying *Athey v. Leonati*, [1996] 3 S.C.R. 458, S.C.C.

Drs. Cameron, Urovitz, Ameis and Gray opined that the second accident produced little or no ill effects, at most caused a very minor neck and back strain, which should have resolved somewhere between June 1992 and December 1992. All relied on Dr. Wismer's examination, and/or on the physiotherapist's statements in reaching their conclusion. However, those health practitioners felt it impossible to apportion responsibility to one accident or another. I reject the opinions that the effects of the second motor vehicle accident were trivial. Of the remaining opinions, two suggest the first accident is 75% responsible and the second 25% responsible. Even a 25% amount is more than minimal or trivial and is therefore material or significant.<sup>13</sup> I find it probable that both accidents significantly contributed to Mr. Saliba's disability.

In my view, neither the *Act* nor the *Schedule* contemplate apportionment of statutory accident benefits in such circumstances. Rather, each accident gives rise to entitlement to a fresh set of statutory accident benefits. Each insurer remains fully responsible for Mr. Saliba's statutory accident benefits since each 1992 accident was a cause of his impairment. In the case of weekly income benefits, deduction of collateral benefits prevents double compensation. I do not need to apportion Mr. Saliba's benefits on a precise basis, given my findings.

### ***Post 156 entitlement***

At the post 156 week mark, in order to qualify for weekly income benefits, Mr. Saliba's injuries must continuously prevent him from doing any job for which he is reasonably suited by education, training and experience.

Arbitrators have consistently used a fair and realistic approach and considered the actual circumstances of the insured person in determining whether employment is suitable. These

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<sup>13</sup>*Athey v. Leonati*, [1996] 3 S.C.R. 458, S.C.C.

circumstances include the age, education, training, and employment background of the person, the nature and status of the work, the hours of work, the level of remuneration, and job market considerations.<sup>14</sup>

Mr. Saliba would have been 50 years of age at the commencement of the post 156 week period.<sup>15</sup> His communication skills and elementary education are outlined above. In the past Mr. Saliba worked as a goldsmith, a door-to-door gold salesman, and a bellboy. After arriving in Canada, he worked for brief periods in a jewellery store, as a kitchen helper, a cleaner or assembler of truck chassis, and a wood cutter. In 1979 he began work at Dofasco, where he performed various jobs, all involving manual labour.

Mr. Saliba's longest pre-accident period of employment has been at Dofasco. He worked there for over twelve years and earned approximately \$17 per hour, plus benefits, at the time of the first accident. All of his training has been on-the-job and he has always performed manual work. I find that suitable work for Mr. Saliba, in the absence of his impairments, would involve manual work where he could learn the requisite skills on-the-job, and be paid in the vicinity of \$17 per hour, plus benefits.

Mr. Saliba's pain, his pain behaviours and his inability to maintain any one position for longer than ten minutes limit his ability to be competitively employed. I find that when Mr. Saliba's impairments are considered in conjunction with his age, education, training and experience, there

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<sup>14</sup>*Maas and State Farm Mutual Automobile Insurance Company* (OIC A-015935, October 16, 1996); upheld (OIC P96-00080, December 8, 1997), and others.

<sup>15</sup> I accept the submission of counsel for Progressive that the appropriate approach is to apply the post 156 week test at May 10, 1995, or 157 weeks following the date of the second accident. Given the absence of significant positive change from the time Mr. Saliba went off work on August 3, 1993, and the reasons for my decision, little turns on the precise date, in my view. I conclude that Mr. Saliba would also have met the post 156 week test as early as August 1993, and would have continued to do so in February 1995, if the 156 week test becomes applicable at that time.

is no remunerative work that Mr. Saliba would be able to perform in a competitive setting. For these reasons I conclude that Mr. Saliba has satisfied his burden of establishing, on a balance of probabilities, that the injuries he received in the 1992 accidents continuously prevent him from engaging in any occupation or employment for which he is reasonably suited by education, training or experience. He is therefore entitled to receive the weekly income benefits which he claims under section 12(5)(b) of the *Schedule*, on an ongoing basis.

### ***Quantum***

The parties agree that Mr. Saliba would be entitled to receive a weekly income benefit at the rate of \$600 per week from Allstate, and \$446.76 per week from Progressive, for the reasons given in *Vo and Maplex General Insurance Company*.<sup>16</sup> Under section 12(4)(b) of the *Schedule*, Progressive would be entitled to credit the \$600 amount paid by Allstate, reducing the amount Progressive is required to pay as a weekly income benefit to zero.

At various points, Mr. Saliba received short-term disability benefits administered by London Life, and long-term disability benefits from Sun Life. If these were collateral benefits within the meaning of section 12(4)(b) of the *Schedule*, they are deductible from the weekly income benefit payable. In addition, during the period of Mr. Saliba's attempted return to work, section 15 of the *Schedule* permits the insurer to deduct 80% of any income available from any occupation or employment from the amount payable as a weekly income benefit.

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<sup>16</sup> (OIC P-002777, March 11, 1994)

I leave it to the parties to sort out the precise amounts, given these parameters.<sup>17</sup> If the parties are unable to agree, I remain seised of the issue. In the result, subject to the deduction of any collateral benefits, and the amounts permitted to be deducted under section 15 of the *Schedule*, Mr. Saliba is entitled to receive \$600 from Allstate as a weekly income benefit.

### **Interest**

Mr. Saliba is entitled to interest on overdue weekly income benefits under section 24 of the *Schedule*. Allstate is responsible for payment of the interest on these benefits.

### **Repayment**

Progressive claimed a repayment under section 27 of the *Schedule*, based on error. This claim was not mediated. Although Allstate objected to this issue being raised, the Applicant did not. I will address the claim in the interest of completeness.

In order to succeed in this claim for repayment, Progressive must establish that “responsibility for the payment be attributable in some material way to the actions of the applicant.”<sup>18</sup> I find no evidence to support such a conclusion. Mr. Saliba submitted a proper application for benefits, and I find nothing in his application which would attract a repayment.

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<sup>17</sup> Progressive commenced payments of Mr. Saliba’s weekly income benefits on September 4, 1992 in relation to the May 1992 accident. Progressive paid weekly income benefits from July 13, 1992 to October 4, 1992. These benefits were again commenced on November 3, 1994 for the period from August 22, 1994 to January 25, 1995, and are stated to have been paid at the rate of 25% of his entitlement.

<sup>18</sup> *Levenson and The General Accident Assurance Company of Canada*, (A-000260 February 18, 1992 )

I find that when Progressive paid Mr. Saliba benefits, it was aware of the earlier accident, and cognizant that both accidents likely contributed to his disability. It relied on medical opinion evidence that the second 1992 accident contributed to 25% of Mr. Saliba's disability, and paid benefits on this basis. Progressive also sought to negotiate payments of benefits with Allstate on the basis that Allstate would pay 75% of various benefits.

For these reasons I conclude that the payments made by Progressive were not made in "error" within the meaning of section 27 of the *Schedule*, and that Progressive is not entitled to a repayment of Mr. Saliba's statutory accident benefits.

**EXPENSES:**

Mr. Saliba's arbitration application was filed on November 21, 1995. For the reasons given in *S.M. and Markel Insurance Company of Canada*,<sup>19</sup> my authority to grant expenses is limited to determining whether the Applicant is entitled to his expenses in respect of the arbitration. Mr. Saliba's case had merit. He was successful, and his case was well presented. I exercise my discretion to award Mr. Saliba his expenses in respect of the arbitration. Since each insurer is required to respond to Mr. Saliba's claims for statutory accident benefits, I find it appropriate to order each insurer to pay half of Mr. Saliba's expenses.

September 16, 1999

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Suesan Alves  
Arbitrator

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<sup>19</sup>(OIC A96-000258, January 15, 1998)

## Appendix

### ***Unavailable witnesses:***

Three of the doctors who assessed Mr. Saliba are dead: Dr. Bhalla, an orthopaedic surgeon, Dr. Dolan, a neurosurgeon, and Dr. Howell, a disability evaluating physician. Dr. Phills, who has been Mr. Saliba's family physician since he arrived in Canada in 1977, retired from practice for medical reasons in 1997. Counsel for the Applicant filed a report from Dr. Phills' treating physician which stated that Dr. Phills was unable to testify for medical reasons.

The reports of Drs. Phills, Bhalla, Dolan and Howell were admitted as a matter of necessity. Since none of them could be subject to cross-examination, I place less weight on the opinions contained in their reports, and rely on their clinical notes and records wherever possible.

### ***Dr. Dolan's reports:***

Dr. Dolan saw Mr. Saliba between October 1993 and July 1996. Counsel for Allstate questioned whether Dr. Dolan had been one of Mr. Saliba's treating practitioners. I accept that a paralegal who was assisting Mr. Saliba in September 1993, and who is not associated with Mr. Saliba's counsel in this arbitration, suggested to Mr. Saliba that he see Dr. Dolan, and also wrote to Dr. Dolan in this regard.

Mr. Saliba testified that he discussed this suggestion with Dr. Phills, who agreed that he should see Dr. Dolan. Dr. Dolan reported to Dr. Phills that he had asked Mr. Saliba to ensure that he was aware that Mr. Saliba would be seeing him. A rehabilitation consultant reports that on December 28, 1993, Dr. Phills told her that he referred Mr. Saliba to Dr. Dolan.

Dr. Dolan reported to Dr. Phills in the way a consultant would ordinarily do, provided Mr. Saliba with a back brace and an adjustable walking cane, billed OHIP for his services, reported to counsel for Mr. Saliba that he and Dr. Phills would be acting in concert to encourage Mr. Saliba to attempt a further return to work, and completed a report in support of Mr. Saliba's CPP application. Even if the initial

suggestion that Mr. Saliba see Dr. Dolan could be characterized as being for medicolegal purposes, I find that Dr. Phills and Dr. Dolan acted in a manner which was consistent with Dr. Dolan being a consultant who treated Mr. Saliba and reported to Mr. Saliba's family physician.

I do not accept the submission that Dr. Dolan's reports should be assigned less weight because he was semi-retired in 1992 at the time he saw Mr. Saliba. Similarly, I reject the submission that his reports should be assigned even less weight because he would likely have been about seventy years of age when he saw Mr. Saliba. There is a presumption of mental capacity which can only be overcome with strong evidence. I heard no such evidence.

### ***OHIP records***

Counsel for Allstate submitted that there were discrepancies between the dates of services set out in Dr. Phills' clinical notes and records, and the dates of services in the decoded OHIP summary of services. She submitted that where there were discrepancies, I should rely on the OHIP summary, since it is unlikely that a health practitioner would render services and fail to bill for them.

I prefer to rely on Dr. Phills' clinical notes and records which are his primary records. Physicians are required to create and keep such records under section 18 of the Regulations to the *Regulated Health Professions Act*. The OHIP summary is generated from billings submitted by the physician's office. The covering letter which routinely accompanies an OHIP summary contains a disclaimer which reads: "The Ministry of Health assumes no responsibility whatsoever for the accuracy or completeness of this information. Without in any way limiting the generality of the foregoing, please be advised that this summary does not include any information which has not been placed on file in the mainframe computer."

For these reasons, where there is an absence of a billing to OHIP, or a discrepancy in the dates between the two records, I prefer the dates and information contained in Dr. Phills' notes and records.

**BETWEEN:**

**FARAJ SALIBA**

**Applicant**

**and**

**ALLSTATE INSURANCE COMPANY OF CANADA and  
PROGRESSIVE CASUALTY INSURANCE COMPANY**

**Insurers**

**ARBITRATION ORDER**

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

1. Allstate and Progressive shall both pay Mr. Saliba's claims for statutory accident benefits.
2. Mr. Saliba is entitled to weekly income benefits as a result of each accident under section 12(2) and 12(5)(b) of the *Schedule*, on an ongoing basis
3. Subject to section 12(4)(b) and section 15 of the *Schedule*: Allstate shall pay Mr. Saliba a weekly income benefit in the amount of \$600, and Progressive shall pay Mr. Saliba a weekly income benefit in the amount of \$446.76. If the parties are unable to resolve the precise amounts payable during various periods, I remain seised of this issue.
4. Allstate shall pay Mr. Saliba interest on overdue weekly income benefits.
5. There is a causal connection between the motor vehicle accidents and Mr. Saliba's surgery in September 1997.
6. Allstate and Progressive shall each pay Mr. Saliba one half of his expenses in respect of the arbitration.

September 16, 1999

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Suesan Alves  
Arbitrator

