



FSCO A12-004886

BETWEEN:

STACEY TAYLOR

Applicant

and

PEMBRIDGE INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: Arbitrator Marvin J. Huberman

Heard: January 8, 9, 13, 14, and 22, 2014, at ADR Chambers in Toronto, Ontario

Appearances: Mr. Charles E. Gluckstein for Ms. Stacey Taylor
Mr. Daniel J. Rosenkrantz for Pembridge Insurance Company of Canada

Issues:

The Applicant, Ms. Stacey Taylor, was injured in a motor vehicle accident on September 10, 2009. She applied for and received statutory accident benefits from Pembridge Insurance Company of Canada ("Pembridge"), payable under the *Schedule*¹. She exhausted the standard medical and rehabilitation benefits available under her automobile insurance policy. The Applicant applied to Pembridge for a determination that she sustained a catastrophic impairment ("CAT"). Pembridge denied her application. It maintained that the Applicant did not sustain a catastrophic impairment as a result of this accident, as defined in the *Schedule*.

¹ *The Statutory Accident Benefits Schedule* – Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.

The parties were unable to resolve their disputes through mediation, and the Applicant applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

There are several issues in dispute in this proceeding (as identified in the pre-hearing letter of Arbitrator Schnapp, dated April 29, 2013). The parties request, however, that at this time, this hearing be restricted to the following issue, and that the hearing of all other issues be postponed until after the determination of this issue:

Therefore, the issue in this Hearing is:

1. Did the Applicant sustain a catastrophic impairment as a result of the accident as defined in clauses 2(1.2)(f) and (g) of the *Schedule*?

Result:

1. The Applicant did not sustain a catastrophic impairment as a result of the accident as defined in clauses 2(1.2)(f) and (g) of the *Schedule*.
2. If the parties are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75-79 of the Dispute Resolution Practice Code.

EVIDENCE AND ANALYSIS

Factual Background

The Applicant, Stacey Taylor, was born on November 15, 1967, and is currently 46 years of age. She is the second of four siblings with one older brother and a younger sister and brother. She was raised in Hamilton, Ontario, and studied Archaeology at Wilfred Laurier University. She graduated with an Honours Bachelor's Degree in 1990. At the time of the accident, she was

working for Parks Canada as an archaeologist and was stationed in Fort George in Niagara-on-the-Lake doing field work. She lives with her common-law partner, Rita Celotto, with whom she has shared a home in Hamilton for the past twelve years.

Ms. Taylor's Medical Condition before the Accident

Ms. Taylor enjoyed excellent general health before the accident. In 2002, Ms. Taylor suffered a fracture of her right elbow which required open reduction and internal fixation. She had surgery and two pins were inserted. Her elbow recovered, and though she lost some range of movement in the joint, that injury healed without incident. She continued to experience limited range of motion in her right elbow and it continued to cause mild stiffness up until the time of the subject accident. She was consuming no medication prior to the accident. Ms. Taylor was diagnosed over ten years ago with an overactive bladder. She did not have any pre-accident personal history of psychiatric or neurological issues; nor did she have any additional history of injuries, surgeries, hospitalizations, illness or disease; neither did she have a history of prior motor vehicle accidents.

The 2009 Accident

On September 10, 2009, Ms. Taylor was the seat-belted driver and sole occupant of her motor vehicle, a Honda Civic. She was driving to work at Fort George in Niagara-on-the-Lake. Her car was struck on the front driver-side door by another vehicle, the driver of which failed to stop at a stop sign. Ms. Taylor's vehicle rolled over twice and came to rest on the roof in a ditch. She was extricated from her vehicle by emergency personnel. She was taken by ambulance to Hamilton General Hospital. Her Glasgow Coma Score was 14/15 and improved to 15/15 en route to the hospital.

Ms. Taylor's Medical Condition after the Accident

At the hospital, investigations revealed that Ms. Taylor sustained multiple injuries including comminuted fractures of the left pelvis, involving the ileum, ischium, superior and inferior pubic rami and left acetabulum; right ankle non-displaced fractures of the medial malleolus; minimally

displaced fractures of her vertebrae, the L1 and L2 transverse processes, and a small amount of subarachnoid blood in the right parietal region of the brain. She also suffered a dislocation of the middle finger on the left hand.

Ms. Taylor was admitted to the hospital. On September 12, 2009, she underwent open reduction and internal fixation for her left pelvic and acetabular fracture and right ankle fracture. On October 8, 2009, Ms. Taylor was discharged from hospital to St. Joseph's Villa, in Dundas, Ontario, for further recuperation.

On October 20, 2009, Ms. Taylor had further surgery at the hospital. An arthroscopy of her left hip was carried out and some bone fragments were removed from the hip joint. For approximately six weeks following her surgery, Ms. Taylor was treated with bed rest and was then allowed into a wheelchair, non-weight-bearing.

While on bed rest, Ms. Taylor developed a bilateral deep vein thrombosis in her right leg. This complication was treated with intravenous heparin and then with oral anticoagulants. Ms. Taylor remained on Warfarin for about six months.

About eight weeks following her surgery, Ms. Taylor began weight bearing, with a walker. On November 16, 2009, Ms. Taylor was discharged from hospital and was using a cane in her right hand for support at that time.

In January 2011, Ms. Taylor underwent further surgery to remove the hardware/screws from her right ankle.

On November 20, 2011, and thereafter, Ms. Taylor followed up with her surgeon, Dr. Kwok, who advised that her fractures had healed, and that she was too young for hip arthroplasty. She was diagnosed with osteoarthritis in the hip and she was told that she will one day require a complete hip replacement.

After the accident, Ms. Taylor received psychological treatment once a month for cognitive-related issues. She participated with an occupational therapist regularly and with a speech language pathologist who came in every couple of months.

Ms. Taylor was assessed by an urologist and diagnosed with increased urinary frequency from an overactive bladder. She has been put on bladder medication, which has been helpful.

Ms. Taylor also received chiropractic and physiotherapy treatment. She attended active release therapy and manual therapy. She did home exercises daily. She also attended massage therapy once weekly and psychological counseling once monthly. She went for restorative Yoga and Pilates. She has also seen a pain management specialist in Grimsby, Ontario.

Ms. Taylor also followed up with her own family physician regularly. Ms. Taylor reported that she was working for Parks Canada as a full-time “archaeologist” prior to being involved in the accident of September 10, 2009. She also reported that her job required extensive travel around Ontario. The physical demands of her job included standing, walking, driving, bending, stooping, kneeling, squatting, crouching, lifting, and digging.

Ms. Taylor reported that she remained off work, continuously, since the accident of September 10, 2009. She was unable to squat, bend, lift and carry any items. She also reported cognitive difficulties, which prevented her from performing the required tasks.

Ms. Taylor reported that Parks Canada provided her a job where she is brought back seasonally to work as a Material Culture Researcher. She said this involved her looking at artifacts indoors and using computers. This is administrative-type work, involving writing reports at a desk job. Ms. Taylor returned to work on February 28, 2011, working six hours per day, three days per week. She lived in Cornwall, Ontario, where she worked. She said that she found work exhausting. She returned to work for the season in April 2012.

Following the accident, Ms. Taylor took approximately 1½ years off work following which she returned to work on a graduated basis. Currently she is working five hours per day which she has

done for the last year or so. No longer able to participate in field work, Ms. Taylor continues to do the office and lab work. She has no plans to increase her hours to full time, which is 7½ hours per day.

The Evidence of Ms. Taylor

Ms. Taylor testified that at the time of the accident she was working for Parks Canada as an archaeologist. She started with Parks Canada in 2002. Her job involved looking for sites, hiking, clearing trails, clearing areas for infrastructure, artifact analysis, report writing, and site reports.

Her job was located at Fort George and she was supervisor of a crew of four. They were excavating in advance of a fence replacement at the fort. They were looking for the original footprint of the 1812 fort and then any artifacts that may have been left. She worked at that location for three months prior to this accident. She worked five days a week, 7½ hours a day.

She hoped that once the dig was finished, that she would have enough experience to apply for a Master's Degree in Archaeology. This was a two year course which would involve one year off of work, unpaid. She hoped to then return to Parks Canada with a Masters in Archaeology and to obtain a higher level, called an HR2.

The September 10, 2009, Accident

The subject accident occurred on September 10, 2009, at about 8 a.m., just outside of Niagara-on-the-Lake. Ms. Taylor was driving her car. There was no one else in the car with her. She was going to Fort George. She cannot recall much of the accident. She woke up in the emergency room of the Hamilton General Hospital. When she was in the hospital, Ms. Taylor was told that her injuries included a fractured pelvis, broken leg, two spinal fractures, head injury, scarring and dislocated finger joints and scars.

Two days after the accident she had a hip put back together and screws put in her right ankle. About a month later, Ms. Taylor had a scope put in her hip to remove scar tissue and bone fragments.

She was discharged from the hospital to St. Joseph's, an old age home. On November 16, 2009, she was discharged to her home. There was then a period of therapy and rehabilitation. Ms. Taylor saw an occupational therapist, a neurologist, two surgeons, a speech pathologist, a physiotherapist, and a massage therapist.

Ms. Taylor returned to work at Parks Canada in April 2011. Her employer created a position for her in the Material Culture Research department. This involved researching artifacts that the archaeologist had found and photographing them. This position was in Cornwall, Ontario. It was mainly an office job involving computer work.

Ms. Taylor did not return to any form of field work after the subject accident, nor has she ever been back to Fort George or any of the other archaeology sites to do any work since the accident. Her new position in the Material Culture Research department in Cornwall is five hours away from Ms. Taylor's home in Hamilton. She gets to work by train. She works a five-hour day. Her work is seasonal. She therefore only works a certain amount of months per year and her salary was cut to eight months.

Ms. Taylor testified that she is currently not working, as she is on seasonal layoff. She starts back to work on April 1, 2014. She is not receiving any income at this point.

After the accident, Ms. Taylor could not return to her former position as an archaeologist because there was no way that she could physically do her job anymore. She cannot bend over; she cannot walk for hours in the woods looking for sites; she cannot do the physical lifting; and she cannot fill up two buckets of dirt and carry them, as she previously could.

Ms. Taylor stated that there is no modified job for an archaeologist in the field at Parks Canada.

Although she enjoys the work that she is doing as a Material Culture Research person, it certainly is not what she would have chosen to do. Ms. Taylor believes that the quality of her work as a material culture specialist has been affected by the subject accident. She cannot keep dates in her head now or cultural divides in her head anymore for the information that she is looking at; neither can she do any real heavy lifting, like removing boxes of artifacts for comparisons to the artifacts she is studying. This is accommodated for her by having someone else remove the boxes for her.

Ms. Taylor stated that her concentration has been affected because of the accident in that she is not working in a very efficient way.

Ms. Taylor testified that she hopes to keep her job at Parks Canada. As the culture research department was eliminated, technically she is floating in a job as an archaeologist. She stated that there have been some concerns since the accident that her job would not be held open for her. In 2012, there was a massive restructuring of her department and everyone was let go but ten people. She felt absolutely devastated as these were her friends and colleagues on whom she could rely to help her with her research and with other tasks.

As regards her physical injuries and complaints that she says are related to this accident, Ms. Taylor said that the major one is the left hip, which now has osteoarthritis so she has constant pain with a huge limitation in her range of motion with the hip. This makes her walking extremely awkward and that in turn affects her lower back, her coccyx, her sacrum, and her lower spine.

Her right ankle no longer has the pins in it but now it is an issue of swelling and scar tissue creating the swelling. She occasionally has upper back issues if she walks or sits for a long period of time. The compensation of the back creates issues there.

She has stomach issues because of the medication she has to take. She has to take pills for that.

She is now taking various medications including Rabeprazole Sodium for pain daily; Tylenol twice a day for pain; Celebrex on bad days once to twice a day depending on the pain; and an iron

supplement and a vitamin B12 supplement. Excluding the vitamins, Ms. Taylor has been taking this group of medications for about two years. The Celebrex is at a low dosage right now but it will probably increase as her osteoarthritis gets worse.

Ms. Taylor testified that she has bursitis in both hips. The right hip bursitis is probably caused by the over-compensating of the left hip and her walk has twisted her body quite substantially and it is putting a lot of pressure on the right hip.

As regards her bladder difficulties, Ms. Taylor said that she did have a frequency issue with her bladder and now it has become an urgency problem on top of the frequency, so she does not actually have the warning that she has to go to the washroom. She just has to go to the washroom. This is a new problem since the subject accident.

Ms. Taylor said that her left hip issues limits her in her range of motion and affects how long she can stand for. She can stand for perhaps 15 to 20 minutes. Her sitting tolerance is not very long either. She said that she constantly has to get up or use cushions which move the hip around. If she sits for too long, not only is it painful, but stiffness develops.

Going upstairs also bothers her hip. If she could avoid the stairs, she would. Otherwise, she is using the handrail and usually going up one step at a time. Ms. Taylor said that she uses a cane for walking because of her hip problem. She uses it every day, but not in the house. She also uses orthopaedic shoes and compression stockings that help with the swelling, as an aid for her hip.

Ms. Taylor said that she sees her surgeon, Dr. Kwok, once a year now. Her next appointment is in June, 2014. Dr. Kwok told Ms. Taylor that she would definitely need a hip replacement but it would be closer to when she was aged 50. She is too young to have it before that time. Dr. Kwok also informed Ms. Taylor that artificial hips last about 15 years.

With respect to her right ankle, mainly right now it has been a swelling situation. There has been major scar tissue associated with the fracture and with a hole she had in her leg, just a deep flesh wound that has created a lot of scar tissue. It is an area where fluids gather. Ms. Taylor has a

swollen right ankle basically nightly. This affects her activities in that it flares up when she walks long distances without her proper shoes.

Ms. Taylor said that she first noticed problems with her right hip about two years ago. She was told that it was the over-compensation for the left hip. She is leaning to the right side and putting more weight on it.

Ms. Taylor is taking stomach medication given to her by her family doctor. Sometimes this helps, and sometimes it does not.

Ms. Taylor testified that her bladder issues have worsened. She was told that the accident made her bladder issues worse. She said that she saw a physiotherapist who specialized in bladder disorders who was able to find quite a bit of scar tissue because of where her scars are close to the bladder and a reduced pelvic floor that she attributes to the accident. Ms. Taylor is doing exercises now to try to offset that problem.

Ms. Taylor described the psychological concerns that she is dealing with as follows.

Ms. Taylor testified that she has short-term memory issues which causes a lot of frustration and depression because she cannot remember things that she really should be able to, which is critical not only for her job but also for everyday life. She also has anxiety, not only over her job but also driving. She said that she is the world's worst passenger in the car - they call it hyper-vigilance – because as a result of the accident everything makes her anxious while driving.

She also said that she has memory problems. Last week she left the stove on and put a wooden cutting board on it and it caught fire. She forgets her smart phone. She also has to make lists for everything because she cannot remember the things she is supposed to be doing since she is easily distracted and frustrated. She tries to compensate for that. This affects her at work because it takes her twice as long to find the required information in a book or a report in comparison to what she was able to do prior to the accident.

Ms. Taylor testified that it is very frustrating and depressing that she has lost her career; she has lost knowledge; and her life has been turned upside down. The pain every day just adds to that. It is exhausting and depressing. She cries constantly and is extremely moody. She gets a little bit angry and short tempered.

Ms. Taylor testified that her frustration is pretty much a daily thing for her at work. However, she can take herself out of work and go to the lab facility so that she does not have to interact with other people, which can sometimes be the better way to deal with things. She has not had any problems with other staff where people have brought this to her attention.

Ms. Taylor said that she still has a car and is able to drive. Before her parents passed away, she was able to drive to their house which was a distance of two hours away. Her mother died in June 2011 from a heart attack. Her father passed away in July 2013 from leukemia. She drove to visit her parents when they were alive two or three times in a year.

Ms. Taylor testified that she suffers from fatigue which comes from the pain, or the fatigue leads to her concentration problems. That's why she tries to get her work done in the mornings. Later in the day, she struggles to find words and to finish sentences because she is quite fatigued. She is exhausted at night, but cannot sleep. She gets five hours of sleep a night. It has been that way since she got out of the hospital. She does not take medication to help her sleep; neither has she seen anybody about her sleep problems. She said that the pain in both her hips keeps her up. She can be sound asleep and then wake up because of the pain.

Ms. Taylor said that she started seeing Dr. Velikonja in 2010 for her concerns about depression and anxiety. Her treatment included meditation, breathing exercises and talking it through which sometimes is helpful. Several books have also been recommended to her. She has counseling with Dr. Velikonja once a month now. At the beginning, it was more often. It went to once a month when Ms. Taylor went back to work in 2011.

Ms. Taylor testified that she told Dr. Velikonja in 2011 about her depressive symptomology. She also saw Dr. Velikonja and told her about the death of her parents. Ms. Taylor found it helpful to

talk to Dr. Velikonja about their death. Other than seeing Dr. Velikonja about some of her psychological symptoms, Ms. Taylor is not currently seeing any other therapists except a physiotherapist and a massage therapist, both of whom she sees once a week. These therapies address her pelvis, right hip and back complaints.

Ms. Taylor testified that since the accident, she has not returned to any of her activities that she did with her partner, Rita, including camping, skiing and adventure travelling.

Ms. Taylor stated that her relationship with Rita has been affected since the accident because of her frustration and short temper. Rita has become more of a caregiver than a partner sometimes. Before the accident, Ms. Taylor and Rita pretty much split the household responsibilities equally. Now Ms. Taylor does not do any of the yard work or gardening or laundry. Most of the cooking is done by Rita. Although Ms. Taylor can do some of the preparatory cooking, and light dusting, Rita basically does everything else. Ms. Taylor said that she cannot do these tasks because of her injuries and limitations. Ms. Taylor also stated that the accident has affected her in a social way with her friends and her family. She really does not go out very often anymore. She does not have any desire to go out anymore. She finds it difficult to follow what is going on when there is a crowd of people or even just friends sitting around the table, if there are too many conversations going on. It becomes frustrating and she does not think it is worth it, so she just does not even bother anymore.

Ms. Taylor testified that in terms of her emotional effects, she finds that some of those symptoms have been getting worse over time. Antisocial behaviour seems to be increasing. Her tearfulness has increased. She did not think that she really cried before the accident. She said that it is probably increasing from when she was discharged from hospital and was sad until currently. She said that she thinks she is just getting sick of being in pain all the time and is just to the point of giving up on it.

Ms. Taylor testified that she needs assistance at home. Rita helps with the cooking and with laundry.

Cross-Examination of Ms. Taylor

On cross-examination, Ms. Taylor testified that very shortly after she started back at work in Cornwall for Parks Canada, her mother passed away in June 2011. Ms. Taylor had started working in Cornwall in April of 2011.

Ms. Taylor said that her mother's death was difficult for her. To cope with that loss, Ms. Taylor was talking with Rita and Dr. Velikonja about it. She also took five days off from work.

Ms. Taylor testified that in 2011 there was a seasonal lay off and she would have finished work in November and started again in April. She then came home to Hamilton for the period that she was on the seasonal lay off. When she saw the assessors in North York in about February 2012, she told them that she was still working 18 hours a week, which would be three hours a day, five days a week. This was increased from nine to 18 hours per week. At some point, she got up to 25 hours of work per week in 2012.

Ms. Taylor testified that her long-term disability carrier, Sun-Life, determined that it was not going to give her any more benefits in late 2012, because she had demonstrated the ability to work 25 hours a week for some period of time.

Ms. Taylor had a lay off again in November 2012, and returned to work in Cornwall in April 2013. She is working 25 hours per week, being five days a week, five hours a day. She has done that since April 2013. Ms. Taylor was laid off again on October 31, 2013.

Ms. Taylor stated that when she was in Cornwall and working five days a week, she rented a room from her roommate and co-worker, Carla. They did their shopping together. Carla did all the cleaning. In the nice weather, Ms. Taylor could bike to work and on colder days she would drive her vehicle to work.

Since the accident, Ms. Taylor has been in Cuba and Cozumel for vacations, mainly to get in the salt water. For her birthday this year, she went to British Columbia in November 2013. She and Rita spent the weekend at Radium Hot Springs.

Ms. Taylor testified that she did have frequency problems with her bladder before the accident. She saw her family doctor about the problem before the accident. At that time, he suggested exercises as a form of treatment for her. Ms. Taylor said that Dr. Greenspain did a single test for her in February 2010 that showed a small capacity bladder. Dr. Greenspain gave her a prescription and sent her away. Ms. Taylor stated that the medication prescribed would work for a few weeks, wear off, and Dr. Greenspain would put her on something else. For a while that would work, especially if she took the medication right before going to sleep.

Ms. Taylor testified that she has never been to a sleep disorder clinic nor has she ever been tested to see why she has sleep difficulties. She stated that she has never talked to a physician, someone who is licenced to do so, or even Dr. Velikonja about taking medication to assist her with sleep. She does not want to take any medications at all. She did not take any medications before the accident. She does not want to take any medications now. She certainly does not want something to help her sleep. Her family doctor raised the issue with her and she decided that she does not want to try the medications for these reasons. Ms. Taylor stated that for the same reasons, she is not interested in taking any antidepressant medications.

Re-Examination of Ms. Taylor

On re-examination, Ms. Taylor testified that she has some remaining scars that affect her emotionally. She said that she has to be in the pool every day for physiotherapy as part of her exercise routine. She has to wear shorts because her scars glow under water. She cannot look at them. It's very hurtful.

I accept the substance of Ms. Taylor's evidence. I found her to be forthright and she gave her evidence without any attempt to exaggerate. Her credibility was not in dispute.

Dr. Harold Becker

Dr. Harold Becker is a medical doctor and the Medical Director of Omega Medical Associates. He was qualified as an expert in the use of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition (the “*Guides*”). He has extensive experience with the *Guides* and is frequently called upon to speak and instruct professionals on the subject of catastrophic impairment determinations for purposes of the *Schedule*.

Dr. Harold Becker testified as to the use of the *Guides* and his combination of the impairment ratings in Ms. Taylor’s case. He provided evidence as to the proper method of determining and scoring particular impairments as part of the process of establishing impairment ratings. He oversaw the work of Dr. Lisa Becker and Dr. Jeremy Frank.

GAF Scores and the “California Method”

Psychiatrists and psychologists frequently use a Global Assessment of Functioning (GAF) to estimate a person’s current state of mental and emotional wellness.

The GAF is a numeric scale (0-100) used to subjectively rate the social, occupational and psychological functioning of adults, that is, how well or adaptively one is meeting various problems in living.² Dr. Becker identified the California Method which involves the use of a scale which correlates GAF scores to WPI (Whole Person Impairment).³ Dr. Becker explained that the California Method was just a published document with some validity through the State of California which is really a slide rule to interpolate ratings from Table 3, page 142 of the *Guides*.

Dr. Becker said that the California Method is used by other practitioners. He also said that the language and descriptors of the GAF align with the language and descriptors found in the *Guides*, at Chapter 14, “Psychological Impairment Categories”.

² The GAF Scale was entered into evidence as Exhibit 2.

³ The California Rating Method Scale was entered into evidence as Exhibit 3.

He stated further that the California Method was a useful tool as it allowed psychologists to work with the GAF Scale, one which they are already accustomed to from training and practice.

Dr. Harold Becker converted the GAF score arrived at by Dr. Frank into a WPI score, using the California Method. The result was 11-23% WPI based on a GAF score of 55-63. I accept Dr. Harold Becker's evidence with respect to his conversion of the GAF score arrived at by Dr. Frank into a WPI score, using the California Method.

I find that the California Method is an acceptable method to convert GAF scores into WPI ratings.

However, for the reasons below, I find that Dr. Frank's GAF score of 55-63, which was converted by Dr. Harold Becker into a WPI score of 11-23% for Ms. Taylor's mental and behavioural impairments, is unreliable and does not accurately reflect Ms. Taylor's impairments.

Ranges v. Specific Numbers in Impairment Ratings

Dr. Harold Becker provided an overview of the assessment reports of both his team and that of Dr. Platnick. One of the main points of departure between Dr. Harold Becker's team and Dr. Platnick's team is the use of a range of impairment percentages versus the selection of a specific number.

Dr. Harold Becker was critical of Dr. Platnick's choice of a number within the given ranges in the *Guides*.

Dr. Harold Becker defended the principled use of his range of numbers where the *Guides* are silent with respect to the selection of specific values. He indicated that in most situations precise numbers do not make sense from a clinical point of view as a patient's condition can fluctuate on a day-to-day basis. In his view, where indicated, a range most accurately captures the patient's condition. He stated:

“As I describe, these ranges have a dual meaning. They are not only the confidence limits of today’s rating, in my opinion they express the variability in the presentation of a patient with an impairment that relates to a table...I think the ranges of impairment protect us from the error of picking a very precise number in an imprecise situation.”

In Dr. Harold Becker’s view, therefore, the ultimate decision as to catastrophic impairment based on WPI ratings necessarily rests with the Arbitrator.

Summary of Catastrophic Impairment (CAT) Assessments

Ms. Taylor was assessed at Omega Medical Associates (the “Omega team”) by Dr. Lisa Becker, physiatrist, and Dr. Jeremy Frank, psychologist, on August 23, 2011. Dr. Harold Becker completed the Impairment Summary and the Application for Determination of Catastrophic Impairment (OCF-19) dated September 20, 2011. He concluded that when physical impairments and mental and behavioural impairments are combined, Ms. Taylor rated 31-60% Whole Person Impairment (“WPI”).

Ms. Taylor underwent an insurer’s Multidisciplinary Cat Assessment through North York Rehabilitation Centre (the “North York Rehab team”) on January 16 and February 1, 2, 3, 8 and 14, 2012. Assessments were conducted by Dr. C. Gallimore, orthopaedic surgeon, Dr. S. Esmail, neurologist, Dr. L. Reznick, psychiatrist, Dr. P. Duhamel, neuropsychologist, Ms. T. Shaw, occupational therapist, and Ms. P. Mark, physiotherapist. The Executive Summary/Catastrophic Impairment Calculation dated March 27, 2012, was prepared by Dr. H. Platnick, physician. He concluded that Ms. Taylor’s physical impairments reached 26% WPI, and that her mental and behavioural impairments reached 8% WPI, and when combined, the total rating was 32% WPI. As a result, Dr. Platnick concluded that Ms. Taylor did not meet the definition of catastrophic impairment under any of the criteria listed under section 2 of the *Schedule*, even when impairments were combined.

Dr. Platnick issued an Addendum report on April 17, 2013, in which he focused on Ms. Taylor’s hip injury, the development of arthritis and the rating for a total hip replacement. He was asked to determine the worst case scenario and maximum values for severe hip arthritis with minimal

cartilage interval and for total hip replacement with poor results. He concluded that even if he substituted the maximum WPI values of 20% for severe hip arthritis and 30% for total hip replacement with poor results, and completed a recalculation, Ms. Taylor's physical impairments would reach 39% WPI, and when combined with mental or behavioural impairments at 8% WPI, the total value would be 44% WPI. As Ms. Taylor's overall impairment rating would fall below the 55% impairment threshold, Dr. Platnick concluded that Ms. Taylor did not meet the definition of catastrophic impairment under any of the criteria listed under the *Schedule*.

On September 12, 2013, the Omega team undertook a rebuttal of the North York Rehab team's evaluation of Ms. Taylor to further assess her catastrophic status in accordance with the *Schedule*. Ms. Taylor was re-assessed by Dr. Lisa Becker, physiatrist, and Dr. Jeremy Frank, psychologist. The clinical evaluations of the North York Rehab team and Dr. Platnick's Executive Summary/Catastrophic Impairment Calculation were reviewed. Dr. Harold Becker completed the Summary Report of the findings of the assessment team and the Final Analysis in respect of Ms. Taylor's catastrophic impairment. He opined that, based on the Omega team's multidisciplinary evaluation, Ms. Taylor has at least 44-71% WPI, which meets the catastrophic impairment threshold under Criterion 7 (physical impairments) as a direct result of the accident for strictly physical impairments and under Criterion 7 for both physical and mental and behavioural impairments when scores for both are combined.

Positions of the Parties

Ms. Taylor's position is that she sustained a catastrophic impairment as a result of the accident, as defined in the *Schedule*.

Pembridge acknowledges that Ms. Taylor sustained significant injuries and is left with some permanent impairments of function as a result of the accident. It takes the position, however, that Ms. Taylor does not meet the 55% WPI threshold of catastrophic impairment as defined in clause 2(1.2)(f) of the *Schedule*.

Pembridge argues that Ms. Taylor's assessors, the Omega team, made methodological errors by using ranges of percentages and the GAF score and California Method to rate Ms. Taylor's impairments.

Burden of Proof

The burden of proof rests with Ms. Taylor. She must prove on the balance of probabilities that, as a result of the accident, she sustained a catastrophic impairment as defined in clauses 2(1.2)(f) and (g) of the *Schedule*.⁴

Role of the Arbitrator

Under the *Schedule*, the determination of catastrophic impairment is ultimately an adjudicative, not a medical determination.

The role of the assessor is to provide a clinical opinion as to the level of an individual's impairment. The *Guides* at pages v-vi state:

Evaluating the magnitude of these impairments is in the purview of the physician while determining disability is usually not the physician's responsibility. This addition emphasizes that impairment percentages derived by using the *Guides* criteria represent estimates rather than precise determinations. Permanent impairments are evaluated in terms of how they affect the patient's daily activities.

Under clauses 2(1.2)(f) and (g) of the *Schedule*, the trier of fact has the responsibility to try to accurately express and estimate all of the impairments that an insured person has sustained as a result of the accident, and then to determine whether the insured person, on a balance of probabilities, has sustained a catastrophic impairment, as defined in the *Schedule*.

⁴ *Scarlett v. Belair*, [2013] OFSCD No. 42, at para. 33; *Bassel Haddad and Economical Mutual Insurance Company*, FSCO A10-003390, 2012, at p. 3; *M.D. and Aviva Canada Inc.*, FSCO A10-001381, December 19, 2013, at p. 8.

The adjudicator must weigh expert evidence and determine its probative value. Like all other evidence, expert testimony must be given only the weight it deserves – no more, no less. The adjudicator may accept the expert evidence, reject it, or accept part of it and reject other parts of it.⁵

In *Walker and State Farm Mutual Automobile Insurance Company*⁶, Senior Arbitrator Rotter aptly summarized the role of the adjudicator as follows:

The evidence of a DAC assessor is and remains opinion evidence, which I must weigh carefully in coming to any conclusion. The weight to be accorded any such evidence must be in the discretion of the adjudicator, based on a careful evaluation of the thoroughness, relevance, neutrality and value of the opinion provided. Such factors as, for example, the familiarity with the details and history of a particular case, the length and thoroughness of the examination, and the particular area of expertise of the evaluator must all be carefully assessed. Ultimately, the arbitrator has the responsibility of considering *all* of the evidence – not just the evidence from the DAC – and making a final determination based on his or her best judgment. It is not sufficient to simply accept or adopt the judgment of the DAC assessor, who does not have the legal responsibility or opportunity to hear and weigh all the available evidence in a particular case.

Thus, it is the role of the adjudicator to scrutinise the evidence and give to it such weight as he or she thinks it deserves.

Adjudicators decide cases, experts do not.

Did. Ms. Taylor sustain a catastrophic impairment as a result of the accident as defined in clauses 2(1.2)(f) and (g) of the *Schedule*?

I find that Ms. Taylor did not sustain a catastrophic impairment as a result of the accident as defined in clauses 2(1.2)(f) and (g) of the *Schedule* because she does not meet the 55% WPI threshold.

⁵ *B. v. RBC General Insurance Co.*, [2009] OFSCD No. 5, at para. 24.

⁶ *Walker and State Farm Mutual Automobile Insurance Company*, FSCO A009905, February 23, 1996.

The Law

The Relevant Thresholds

The *Schedule* defines “impairment” as a loss or abnormality of a psychological, physiological or anatomical structure or function.⁷

Under clause 2(1.2)(f) of the *Schedule*, a catastrophic impairment is an impairment or combination of impairments that, in accordance with the *Guides*, results in 55 percent or more impairment of the whole person (WPI).

Under clause 2(1.2)(g) of the *Schedule* a catastrophic impairment is an impairment that, in accordance with the *Guides*, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to a mental or behavioural disorder.

The *Schedule* requires that medical and legal professionals rate impairment under clause (g) using the criteria and methods set out in Chapter 14 of the *Guides*, entitled Mental and Behavioural Disorders.

Following evaluation of the patient, assessors must rate any resulting impairment according to how it impacts four broad and overlapping areas of function. They are:

- a. Activities of Daily Living (“ADLs”);
- b. Social Functioning;
- c. Concentration, Persistence and Pace; and
- d. Adaptation – Deterioration or Decompensation in Work or Work-like Settings.

The Table, at page 301, provides a guide for rating mental impairment in each of the four areas of functional limitation on a five category scale that ranges from no impairment (Class 1) to extreme

⁷ Subsection 2(1).

impairment (Class 5). The *Guides* recommends the following as anchors for the categories of the scale: “None” means no impairment is noted in the function; “Mild” implies that any discerned impairment is compatible with most useful functioning; “Moderate” means that the identified impairments are compatible with some but not all useful functioning; “Marked” is a level of impairment that significantly impedes useful functioning; and “Extreme” means that the impairment or limitation is not compatible with useful function.

The Ontario Court of Appeal in *Pastore*⁸ confirmed that a finding of marked impairment in *one* of the four areas of function delineated in the *Guides* is sufficient to qualify as a catastrophic impairment under clause (g) of the *Schedule*.

Under the *Guides*, the WPI for physical impairment is arrived at by first rating each individual rateable physical impairment as a percentage. These percentages are then combined in accordance with the “Combined Values Chart” at pages 322-324 of the *Guides*, to arrive at a percentage impairment of the whole person.

In *Kusnierz*⁹, the Ontario Court of Appeal confirmed that mental impairments can also be combined with physical impairments to arrive at a WPI under clause (f) of the *Schedule*, using the same Combined Values Chart. However, mental and behavioural impairments rated under clause (g) of the *Schedule* must first be converted into a numerical scale so that they too can be rated at a percentage. The mental and behavioural impairments can then be combined in a like manner with physical impairments to arrive at a combined WPI, using the Combined Values Chart.

The *Guides* does not provide a specific methodology for converting descriptions of mental and behavioural impairments into percentage ratings of impairment. Neither does the Court in *Kusnierz* mandate a particular conversion methodology. Assessors, arbitrators and judges have used various methods in determining a percentage impairment rating for mental and behavioural impairments. In *Jaggernaut*¹⁰, Arbitrator Feldman analyzed six approaches or methods used by

⁸ *Aviva Canada Inc. v. Pastore*, [2012] O.J. No. 4508.

⁹ *Kusnierz v. Economical Mutual Insurance Company*, [2011] O.J. No. 5908.

¹⁰ *Jaggernaut and Economical Mutual Insurance Company*, FSCO A08-001413, December 20, 2010.

assessors and decision-makers to determine a percentage impairment rating for mental and behavioural impairments, including using Table 3 from Chapter 4 of the *Guides* (page 142), and using GAF scores and the “California Method”.

Table 3 from Chapter 4 of the *Guides* provides a method for rating whole person impairment which results from emotional or behavioural impairments that are neurologically based but which may also have psychiatric features.

Table 3 - Emotional or Behavioural Impairments

Impairment Description	% Impairment of the Whole Person
<i>Mild</i> limitation of daily social and interpersonal functioning	0-14
<i>Moderate</i> limitation of Some but not all social and interpersonal daily living functions	15-29
<i>Severe</i> limitation impeding useful action in <i>almost</i> all social and interpersonal daily functions	30-49
<i>Severe limitation of all daily functions</i> requiring total dependence upon another person	50-70

In this case, Pembridge’s assessors used Table 3 from Chapter 4 of the *Guides* to rate Ms. Taylor’s mental or behavioural impairments at 8% WPI, being a **Mild** limitation of daily social and interpersonal functioning.

The GAF (Global Assessment of Functioning) is a numeric scale (0-100) used to estimate a person’s current state of mental and emotional wellness, and to subjectively rate the social, occupational and psychological functioning of adults, including how well or adaptively one is meeting various problems-in-living. The State of California introduced, through a regulation, a Table which permits GAF scores to be converted into Whole Person Impairment ratings. The GAF Scale is included in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) in the section on multi-axial assessments.¹¹

¹¹ The Global Assessment of Functioning (GAF) Scale was entered into evidence as Exhibit 2.

In this case, Ms. Taylor’s assessors, the Omega team, used the GAF Scale and identified a GAF score at 55-63. Under the GAF Scale, the score 70-61 indicates some mild symptoms or some difficulty in social, occupational or school functioning, but generally functioning pretty well, has some meaningful interpersonal relationships. A score of 60-51 indicates moderate symptoms or any moderate difficulty in social, occupational or social functioning. Thus, Ms. Taylor’s GAF score of 55-63 straddles two categories – mild and moderate – in the GAF Scale. Dr. Harold Becker used the California Method to convert Dr. Frank’s GAF score of 55-63, through Table 3 from Chapter 4 of the *Guides*, into a WPI score of 11-23% for Ms. Taylor’s mental and behavioural impairments.

In *Ms. M.G. and The Economical Mutual Insurance Company*¹², Arbitrator Sapin, citing *Jaggernaut*, noted that assessors have devised a number of approaches for converting qualitative mental or behavioural ratings to percentage values, including the GAF scores and the California Method, that have been considered with approval by triers of fact.

AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition

The *Guides* define an impairment as a deviation from normal in a body part or organ system and its functioning. The *Guides* add that impairments are conditions that interfere with an individual’s activities of daily living, such as standing, walking, caring for the home, recreational activities, social activities and work activities.¹³

The premise of the *Guides* is that it is possible to improve *estimates* of the severity of human impairments based on generally accepted medical standards. An impairment percentage derived by means of the *Guides* is intended, among other purposes, to represent an “informed estimate” of the degree to which an individual’s capacity to carry out daily activities has been diminished.¹⁴

¹² *Ms. M.G. and The Economical Mutual Insurance Company*, FSCO A09-002443, November 23, 2012, at p. 21.

¹³ *Guides*, ch. 1, p. 1 and the Glossary, at p. 315.

¹⁴ *Guides*, ch. 1, pp. 1-2.

For an evaluation to be considered to have been done “in accordance” with the *Guides*, it should be carried out in accordance with the directions in the *Guides* and should be based on the following three components:

- e. Gather and review as much information as possible;
- f. Follow the *Guides*’ protocols for evaluating each body part or system;
- g. Utilize the tables relating to the evaluation protocols.¹⁵

The *Guides* at page 3 state:

The physician’s judgment and his or her experience, training, skill, and thoroughness in examining the patient and applying the findings to *Guides* criteria will be factors in estimating the degree of the patient’s impairment. These attributes compose part of the “art” of medicine....

The *Guides* are designed to estimate impairment of function. Therefore, it is important not to confuse the seriousness of a diagnosis with the level of impairment.

The *Guides* recognize that certain impairments can be evaluated by using a single numerical percentage; and that for some impairments there are valid reasons to use ranges of percentages for estimating impairment. However, where a range of percentages is provided, the *Guides* give little or no direction or guidance for how a specific number is to be selected within that range.¹⁶

The use of fixed percentages to measure impairment is seen primarily but not exclusively in Chapter 3 of the *Guides*, which deals with the Musculoskeletal System. Other chapters of the *Guides* use ranges of percentages to evaluate impairments.¹⁷

¹⁵ *Jaggernaut, supra*, at pp. 9-10.

¹⁶ See the *Guides*’ examples at pp. 32, 148, 174-5, 205, 222, 230, 236, 252, 271 and 281; see also the *Guides* at pp. 1, 2, 3, 5, 8 and 12 where reference is made to a singular percentage, and not a range of percentages.

¹⁷ See, for example, the chapters dealing with the Nervous System (ch. 4), the Respiratory System (ch. 5), the Cardiovascular System (ch. 6), the Hematopoietic System (ch. 7), the Visual System (ch. 8), the Digestive System (ch. 10), the Urinary and Reproductive Systems (ch. 11), the Endocrine System (ch. 12) and the Skin System (ch. 13).

The objective to be achieved under the *Guides* and the *Schedule* is to use a method – either a fixed percentage or a range of percentages – that reflects an accurate estimate of the extent of the impairment. As the Ontario Court of Appeal has acknowledged in *Kusnierz*:

“An objective, standardized system of assessment is only useful to the extent that it can reflect a person’s actual level of impairment.”¹⁸

Ms. Taylor’s WPI Ratings on Account of her Physical Impairments

The Omega Team

In her Physical Medical Assessment, dated September 12, 2013, Dr. Lisa Becker provided WPI impairment scores of 37-62% for impairments identified in her report as being associated with physical injuries sustained by Ms. Taylor in the accident. They are summarized as follows. Chapter, page and table references are made to the American Medical Association, *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition (the “*Guides*”).

- h. Lumbosacral Spine – 5% WPI (Chapter 3, Page 110, Table 72);
- i. Pelvis – 2% WPI and 10% WPI respectively (Chapter 3, Page 131, Table 3.4);
- j. Lower Extremities – 18-32% WPI (Chapter 3, Page 85, Table 64);
- k. Right Hip – 3% WPI (Chapter 3, Page 85, Table 64);
- l. Right Ankle – 0% WPI;
- m. Cognitive Impairment – 1-14% WPI (Chapter 4, Page 142, Table 2);
- n. Sleep Disturbance – 1-9% WPI (Chapter 4, Page, 143, Table 6);
- o. Skin – 0-9% WPI (Chapter 13, Page 280, Table 2);
- p. Medications – 1-3% WPI (Chapter 3, Page 9);
- q. Bladder – 0-15% WPI (Chapter 11, Page 265, Section 11.3).

¹⁸ *Kusnierz, supra*, at para. 27.

North York Rehab Team

In his Executive Summary/Catastrophic Impairment Calculation, dated March 27, 2012, Dr. Platnick provided whole person impairment scores under Criterion 7 (Physical Impairment) for Ms. Taylor's injuries and impairment sustained as a result of the accident. They are summarized as follows:

- r. Left lower extremity – 15% WPI based on the Gait Derangement Table;
- s. Low back – 5% WPI for DRE Lumbosacral Category II: Minor Impairment;
- t. Scars – 4% WPI with mid-range selected as the scarring is not affecting Ms. Taylor's activities of daily living and is more of a cosmetic and stress-related issue;
- u. Right Lower Extremity Impairment – 2% WPI under the Arthritis Impairment Table for a likely 3mm cartilage interval without confirmation by recent radiographic measurement;
- v. Head Injury – 2% WPI which is indicative of mild impairment.

When the above values were combined, Dr. Platnick concluded that Ms. Taylor's injuries and impairments sustained as a result of the accident reached **26% WPI** under Criterion 7 (Physical Impairments) and that she does not achieve the 55% Whole-Person Impairment threshold.

Findings – Physical Impairment Ratings

Lumbosacral Spine

I find that the correct rating for Ms. Taylor's lumbosacral spine is 5% WPI.

Dr. Lisa Becker and Dr. Platnick rated this impairment 5% WPI. I accept this agreed-to rating.

Pelvis

I find that the correct rating for Ms. Taylor's pelvis is 0% WPI.

Dr. Platnick did not rate Ms. Taylor's left hemipelvic fractures. Dr. Lisa Becker's Impairment Ratings for the comminuted ileum and ischium fractures were 2% WPI and 10% WPI, respectively.

I do not accept Dr. Lisa Becker's opinion.

Dr. Lisa Becker testified that through inadvertence, she did not rate Ms. Taylor's pelvic fractures in her initial assessment in 2011. This oversight was corrected in Dr. Lisa Becker's 2013 assessment.

Dr. Lisa Becker did not conduct her assessment of Ms. Taylor's pelvis in accordance with the *Guides*. She relied on Chart "3.4 The Pelvis" in the *Guides*. The Chart requires a healed fracture of the ischium to be displaced 1 inch or more in order to be given an impairment value associated with that selected disorder of the pelvis.

Dr. Lisa Becker did not measure Ms. Taylor's ischium fracture's "displacement" nor did she look at the x-rays.

Dr. Gallimore, Orthopaedic Surgeon, reviewed the diagnostic imaging and noted fractures of the left hemipelvis including the ileum and ischium, and the superior and inferior pubic ramie. However, only the inferior pubic ramus was described as moderately displaced.

There was no evidence of any impairment related to the ischium fracture.

There is no evidence as to how the ileum fracture caused any impairment of function.

There is no evidence of any displacement of the ileum in the medical documentation. The *Guides* also require there to be a dislocation with respect to the healed fraction of the ileum.

Lower Extremities

Left Lower Extremity

I find that the correct rating for Ms. Taylor's left lower extremity is 15% WPI.

I accept Dr. Platnick's rating of 15% WPI which was based on the Gait Derangement Table, which Dr. Lisa Becker acknowledged is an acceptable method of rating Ms. Taylor's left lower extremity impairment.

I reject Dr. Lisa Becker's opinion that Ms. Taylor should be afforded 15-30% WPI for a future need of a total hip replacement.

I also reject Dr. Platnick's opinion in his Addendum Report, dated April 17, 2013, in which he recalculated Ms. Taylor's WPI score using 30% WPI based on a worst case scenario for a future hip replacement with "poor result".

These ratings are not in accordance with the *Guides*. The *Guides* specifically refer to estimates based on current and not future findings.¹⁹

It is inappropriate to assess future impairment.²⁰ Under the *Guides*, it is inappropriate to evaluate a future condition such as a post-surgical outcome where such medical intervention could have a significant impact on functionality.²¹

¹⁹ *Guides*, ch. 2.2, p. 8

²⁰ *B. and RBC General Insurance Company*, FSCO. A07-001066 (2009), at pp. 6-7; *Haddad and Economical*, FSCO A10-003390 (2012), at p. 25

²¹ *Guides*, ch. 2.1, at p. 3; ch. 2.3, at p.9; ch. 3.3j, at p.112; and Glossary, at p.315 ("Permanent Impairment")

Instead of being based on a sound factual foundation, the rating 15-30% WPI is highly speculative and is predicated on an event (Ms. Taylor having future hip surgery) and on a result (a good outcome) which may never occur. Ms. Taylor may not undertake the surgery, by choice or otherwise, and, if she does, the outcome of that surgery may not be good, but rather may be fair or poor. A good result would provide a 15% WPI, a fair result 20% WPI, and a poor result 30% WPI.

Since the goal of hip replacement surgery is to improve pain and function, a patient would likely not undertake such surgery if the odds were equally in favour of a poor or good outcome. If Ms. Taylor does not undertake the future hip surgery, a non-existent condition would then have been inappropriately rated.

Opinion evidence which is based on unproven hypothetical facts is to be given no weight. It is a well-established principle of the common law that opinion evidence is worthless unless it is founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof: *R. v. Abbey*.²²

I agree with Dr. Platnick who stated in his Executive Summary/Catastrophic Impairment Calculation, dated March 27, 2012, that once Ms. Taylor has a total left hip replacement, a rating can be applied and that the minimal rating for a hip replacement is 15% WPI with a good result. Dr. Lisa Becker agrees with this rating.

Right Hip

I find that the appropriate rating for Ms. Taylor's right hip is 0% WPI.

I do not accept the opinion of Dr. Lisa Becker that because Ms. Taylor developed right hip greater trochanteric bursitis since her last visit with Dr. Becker in 2011, there is sufficient causal connection between Ms. Taylor's bursitis and the accident on a balance of probabilities.

²² [1982] 2 S.C.R. 24, at pp. 43-45.

The parties agreed that Ms. Taylor did not injure her right hip in the accident. Ms. Taylor had no complaints related to her right hip when she was first seen by Dr. Lisa Becker in August, 2011. The development of right hip greater trochanteric bursitis by Ms. Taylor is first recorded in Dr. Becker's Physical Medicine Assessment, dated September 12, 2013, four years after the accident.

Dr. Lisa Becker acknowledged that there are many risk factors for the development of trochanteric bursitis. These include that it is more common in women than men, more common in the middle aged and elderly, that it can occur when there is a specific injury to that area, that it can be associated with spinal problems, leg length discrepancies, rheumatoid arthritis, prior surgery, bone spurs or calcium deposits and overuse.

Dr. Lisa Becker concluded that Ms. Taylor developed right greater trochanteric bursitis as a result of her altered gait biomechanics without the benefit of an x-ray, bone scan or MRI to rule out a bone spur. Neither did she question Ms. Taylor as to whether an injury had occurred to the right trochanteric area.

Dr. Lisa Becker did not conduct her assessment of Ms. Taylor's right greater trochanteric bursitis in accordance with the *Guides*.

In order to achieve the 3% rating, the trochanteric bursitis must be "chronic" according to the *Guides*.

I am not satisfied on the evidence before me that Ms. Taylor's right greater trochanteric bursitis is chronic or constitutes an impairment under the *Guides*. The weight of the evidence does not support a finding that Ms. Taylor's right greater trochanteric bursitis has impacted on her activities on daily living or functionality sufficient to warrant a WPI rating.

Right Ankle

I find that the correct rating for Ms. Taylor's right ankle is 2% WPI.

Dr. Lisa Becker found that 0% WPI applied.

Dr. Platnick provided 2% WPI for possible reduction in ankle cartilage interval.

In his orthopaedic assessment, dated March 27, 2012, Dr. Gallimore noted that while there were no recent radiographic findings that could be reviewed with respect to the arthritis, Ms. Taylor could have some rating, likely of a 3mm cartilage interval in the right ankle area, under Table 62 (p 3-83) of the *Guides*, giving 2% WPI.

Dr. Lisa Becker acknowledged the possibility that Ms. Taylor will develop posttraumatic arthritis in the right ankle.

I accept the findings and WPI ratings of Drs. Platnick and Gallimore.

I prefer the opinion of Drs. Platnick and Gallimore to that of Dr. Lisa Becker because this subject matter falls within the particular area of expertise of Dr. Gallimore, an orthopaedic surgeon.

Head Injury

I find that the correct rating for Ms. Taylor's head injury is 2% WPI.

Ms. Taylor sustained a closed head injury in the course of the accident and had evidence on CT scanning of subarachnoid blood in the right parietal region.

I accept the conclusion of the North York Rehab team which included Dr. Esmail, a neurologist, and Dr. Duhamel, a neuropsychologist, that Ms. Taylor had a 2% WPI.

2% WPI is a number within the range of 1-14% WPI assigned by Dr. Lisa Becker for Ms. Taylor's ongoing mental status impairment.

The 2% WPI rating was not randomly chosen by the North York Rehab team from the 1-14% WPI range, as contended by Dr. Lisa Becker.

I prefer the opinion of the North York Rehab team over that of Dr. Lisa Becker because she did not review the assessments of Drs. Esmail nor Duhamel nor of Ms. Taylor's treating neuropsychologist, Dr. Velikonja. Rather, she relied on the summary prepared by Dr. Harold Becker. She also acknowledged that the assessments and opinions of Drs. Duhamel and Esmail are based on the application of their clinical skills, experiences and judgment.

In his Neurological Assessment, dated March 27, 2012, Dr. Esmail notes the head injury with the loss of consciousness and the small amount of subarachnoid haemorrhage, which had since cleared, and the absence of any focal neurological symptoms. He concluded that Ms. Taylor's neurological examination was entirely normal and that there was no bedside evidence for any cognitive impairment. His opinion was that, from a neurological perspective, Ms. Taylor did not have any accident-related impairments. Her short-term memory and difficulty with her concentration were found to be related to Ms. Taylor's ongoing psychological or depressive concerns. I accept Dr. Esmail's opinion.

In his Neuropsychological Assessment, dated March 27, 2012, Dr. Duhamel concluded that Ms. Taylor's emotional and behavioural symptoms are unlikely related to an acquired brain injury. While Ms. Taylor's performance gradient was consistent with mild reduction in visual spatial skills, she did not report any associated impairments in daily activities. His opinion was that Ms. Taylor's neuropsychological test scores are indicative of mild impairment and that she is able to assume all usual roles and perform activities of daily living. Dr. Duhamel thus determined that Ms. Taylor's impairment does not exceed 2% WPI. I accept this opinion.

I also accept Ms. Taylor's evidence that she has been able to return to work on modified duties and hours; that she reported cognitive impairment in the form of reduced short-term memory, difficulty concentrating and multi-tasking; that she requires strict scheduling, prompts from her iPhone and takes copious notes so that she can function effectively at work. I do not accept the opinion of Dr. Lisa Becker that in light of Ms. Taylor's reported impairment and the fact that the *Guides* do not provide instruction on how to select a number within a range that Ms. Taylor should be provided with the full range of 1-14% WPI.

Based on all the evidence before me, I find that the appropriate rating in respect of Ms. Taylor's head injury is 2% WPI.

Sleep Disturbance

I find that the correct rating for Ms. Taylor's sleep disturbance is 0% WPI.

Ms. Taylor reported having difficulty falling asleep and frequent awakenings during the night. She reported feeling fatigued and less alert during the day as a result. Ms. Taylor testified that she was exhausted at night but could not sleep, has been getting five hours of sleep per night, and since getting out of the hospital, takes no sleep medication. The pain in her hips keeps her awake and she can be awoken because of this pain.

Dr. Lisa Becker expressed the opinion that while Ms. Taylor's sleep disturbance is likely multifactorial, in the context of a closed head injury, she qualifies for 1-9% WPI. I do not accept that opinion.

I find that no impairment rating should be applied under this heading because pain is already accounted for and because there is insufficient evidence of a brain injury causing Ms. Taylor to have sleep issues.

The *Guides* are intended to be used as a means to accurately estimate the extent of each impairment, and not to under-estimate or over-estimate the extent of the impairment. The latter concern includes not double counting impairments.

The *Guides* at p. 152 provide:

In some instances, pain will affect the proper functioning of a specific organ system. In the *Guides*, impairment per cents shown in the chapters considering the various organ systems make allowance for the pain that may accompany the impairing conditions.

As Justice Spiegel stated, with approval of the Ontario Court of Appeal, in *Desbiens*:

In my view, this means that in arriving at the percentages assigned to impairment of the musculoskeletal system, for example, the Guides have taken into account that these impairments may be accompanied with pain. Therefore, if this pain interferes with....sleep, it has already been included in the impairments found in the musculoskeletal system and cannot be rated as a separate impairment.²³

Chapter 4 of the *Guides* provides criteria for evaluating impairments resulting from dysfunction of the brain.²⁴

Table 6 describes the impairment criteria for Sleep and Arousal Disorders, on which Dr. Lisa Becker relies to qualify Ms. Taylor for 1-9% WPI for her likely multifactorial (meaning, multiple causes) sleep disturbance. This criteria required thorough neurological examination, an estimate of the effects on Ms. Taylor's activities of daily living, and an evaluation of the effects of appropriate treatment.

Although Dr. Lisa Becker testified that she did a thorough neurological evaluation, she did not estimate the effects on Ms. Taylor's activities of daily living nor did she evaluate the effects of appropriate treatment, and she did not examine or explore the etiology of Ms. Taylor's sleep disturbance.

Dr. Lisa Becker did not consider whether medicine or anything else might be the cause of Ms. Taylor's fatigue. Ms. Taylor has never been to a sleep disorder clinic and has not been tested to see why she has sleep difficulties. She did not want to take medication to help her sleep.

On the other hand, Ms. Taylor was examined by Dr. Esmail, a neurologist, who found that she had no neurological injury or impairment. While Dr. Duhamel, a neuropsychologist, allowed that there may be some manifestations of a brain impairment, he did not include sleep disturbance as a symptom.

²³ *Desbiens v. Mordini*, [2004] O.J. No. 4735, at para. 181

²⁴ *Guides*, ch. 4, pp. 139-143

In March 2010, Ms. Taylor's sleep was interrupted because of bladder issues and not brain impairment.

Ms. Taylor's current evidence indicates that hip pain is the current cause of her sleep disturbance.

I therefore find that no impairment rating should be applied for sleep disturbance.

Skin (Scarring)

I find that the correct rating for Ms. Taylor's scars is 4% WPI. Ms. Taylor has multiple well-healed surgical scars over the left pelvis, groin, lateral hip and right ankle.

Dr. Lisa Becker is of the opinion that Ms. Taylor therefore qualifies for 0-9% WPI.

Dr. Platnick rated the scars at 4% WPI.

I prefer the opinion of Dr. Platnick over that of Dr. Lisa Becker.

The *Guides* note that the signs and symptoms of skin disorder may be intermittent and not present at the time of an examination. The selection of an appropriate impairment percentage estimate within a class should be guided by the frequency and complexity of medical treatment.

The Omega team failed to outline any frequency or intensity of signs and symptoms of skin disorder nor did they note the frequency and complexity of treatment.

Dr. Lisa Becker's report about Ms. Taylor's scar contains no information concerning the impact of the scars on Ms. Taylor's activities of daily living.

In re-examination, Ms. Taylor testified that her scars were "terrible", they "glow under water" and that she "can't even look at them ... [as] it's very hurtful". However, Ms. Taylor continued, as part of her exercise routine, to wear shorts and to be in a pool every day for physiotherapy. She

also travelled to Cuba and Cozumel to bathe in the salt water and this past November, she attended Radium Hot Springs in British Columbia for a holiday.

Dr. Gallimore found the scars to be well-healed and that the scarring was not affecting Ms. Taylor's activities of daily living. He was of the opinion that the scarring was more of a cosmetic and stress-related issue. Therefore, he placed Ms. Taylor in the mid-range and selected 4% WPI.

I accept the opinion of Dr. Gallimore.

Medications

I find that the correct rating for Ms. Taylor's medication is 0% WPI.

Dr. Lisa Becker stated that Ms. Taylor is taking several daily medications for pain and, therefore, she qualifies for 1-3% WPI.

I do not accept this opinion.

The usage of medications in and of itself does not entitle Ms. Taylor to an impairment rating for medication under the *Guides*.²⁵

Under the *Guides*, "the physician may choose to increase the impairment estimate by a small percentage (eg, 1% to 3%)", in certain instances.²⁶

Specifically, the circumstance in which the physician may choose to increase the impairment estimate occurs when the treatment of an illness "may result in apparently total remission of the patient's signs and symptoms".²⁷

²⁵ *Haddad and Economical*, FSCO A10-003390 (2012), at p. 27

²⁶ *Guides*, ch. 2, p. 9

²⁷ *Guides*, ch. 2, p. 9

The *Guides* indicate that in some instances, the “pharmaceuticals themselves may lead to impairments. In such an instance, the physician should use the appropriate parts of the *Guides* to evaluate the impairment related to the pharmaceutical”.²⁸

Dr. Lisa Becker acknowledges that she did not analyze the effect of the medicines that Ms. Taylor was taking nor the side effects; neither did she evaluate if the medicine impairs Ms. Taylor in any way. There is no evidence suggesting that the medicines being taken by Ms. Taylor result in any apparent total remission of her signs and symptoms.

I am not satisfied that Ms. Taylor takes medicine for pain on a daily basis. Ms. Taylor testified that she did not want to take any medications, and it is therefore likely that she was not taking Celebrex daily. When she was seen by Dr. Lisa Becker, Ms. Taylor was taking other medication for stomach upset but not for pain. She also took an iron supplement which Dr. Lisa Becker acknowledged was unrelated to the car accident.

I therefore find that no WPI rating should be given for medications.

Bladder

I find that the correct rating for Ms. Taylor’s bladder impairment is 0% WPI.

Dr. Lisa Becker wrote:

“Ms. Taylor reported urinary frequency, urgency, and daily dribbling incontinence. While she had a history of urinary frequency that pre-dated the motor vehicle accident, she indicated her symptoms progressed and worsened following the motor vehicle accident. She has apparently undergone several investigations and tried multiple medications without any benefit. The exact cause of her bladder symptoms is not fully apparent. This requires further assessment by an urologist and the accident relatedness of her symptoms should be addressed. If her current bladder symptoms are determined to be accident related then she would qualify for Class 1 Bladder Impairment which provides 0-15% WPI (Chapter 11, page 254, Section 11.3).”

²⁸ *Guides*, ch. 2, p. 9

Ms. Taylor reported a frequency issue pre-accident and claimed a new urgency issue post-accident. She testified that a physiotherapist said her worsened bladder issues were caused by the accident.

Dr. Becker acknowledged that the Omega team had no urologist, that none of the medical materials reviewed determined that Ms. Taylor's bladder symptoms were related to the accident, nor did she find any injury to Ms. Taylor's bladder.

In her review of the medical materials provided to her, Dr. Lisa Becker did not note the report of Dr. MacNiven, dated December 20, 2010, which indicated that "...there are no problems with bowel or bladder function, for a while she did have a disruption in her system due to the medications but this resolved..."

Although Ms. Taylor reported to Dr. Lisa Becker when seen in August, 2011, "frequency prior, worse after", nowhere does she record the intensity or the frequency of her symptoms either pre or post-accident; nor is there any commentary on how any urinary difficulties impact on Ms. Taylor's activities of daily living. Dr. Lisa Becker did not conduct the requisite analysis in respect of apportionment or aggravation of a pre-existing medical condition or infirmity, as required under the *Guides*.²⁹

Against Ms. Taylor's evidence of a new problem with urgency is a consultation note dated September 18, 2009, completed by Dr. Greenspain, the treating urologist, eight days after the accident. It reads: ".....Ms. Taylor admits to a long history of urinary urgency with occasional urge incontinence.....the most likely diagnosis is over-active bladder."

In his Executive Summary/Catastrophic Impairment Calculation, dated March 27, 2012, Dr. Platnick was of the opinion that Ms. Taylor's symptoms of urinary urgency and frequency pre-date the accident. No accident-related impairment to the urinary system has been identified and no rating applies. I agree and accept Dr. Platnick's opinion.

²⁹ *Guides*, Glossary, pp. 316-317

I am unable to find on the evidence before me that Ms. Taylor's current bladder symptoms are accident related. Indeed, it is more likely than not that her current bladder symptoms are not accident related, and therefore no WPI rating applies.

Ms. Taylor's Level of Impairment on Account of Mental or Behavioural Disorders

I find that Ms. Taylor has an overall Class 2 (mild) impairment, on account of her mental or behavioural disorders.

Dr. Reznek, a psychiatrist, found that Ms. Taylor had no psychiatric impairment in direct relationship to the motor vehicle accident. Accordingly, there was no DSM-IV diagnosis given.

Dr. Reznek stated, "As regarding Ms. Taylor's capacity to perform activities of daily living, she has a Class 1 or no impairment." He said that Ms. Taylor has a Class 1 or no impairment within the domain of social functioning; that she may have a Class 2 or mild impairment with respect to her ability to concentrate and persist at a task; and he found that Ms. Taylor has at most a Class 2 or mild impairment with respect to her capacity to work in stressful circumstances.

Dr. Reznek opined overall, that Ms. Taylor does not have a Class 4 or marked impairment or Class 5 or extreme impairment as a result of having a mental or behavioural disorder. Dr. Reznek offered a numeric value for mental or behavioural impairment of 8% WPI.

Dr. Frank, a psychologist, undertook a psychological evaluation of Ms. Taylor and identified a DSM-IV Axis I diagnoses as follows:

- Adjustment Disorder with Depression, Chronic, Moderate in severity
- Specific (isolated) Phobia – situational type (passenger anxiety)

Dr. Frank identified ordinal mental and behavioural impairment ratings under the *AMA Guides*, Chapter 14 analysis, as follows:

- Mild (Class 2) Impairment in activities of daily living
- Mild (Class 2) Impairment in social functioning
- Moderate (Class 3) Psychologically-based Impairments in Concentration, Persistence, and Pace
- Mild to Moderate (Class 2-3) Impairment in work adaptation.

Dr. Frank assessed a Global Assessment of Function (GAF) score estimated at 55-63. Dr. Harold Becker used the California Method to convert this GAF score through the *Guides*, Chapter 4, Table 3, to a WPI score, which he identified as 11-23% WPI as the rating for Ms. Taylor's mental or behavioural impairments.

Ms. Taylor was assessed in March 2010 by Dr. Velikonja, a neuropsychologist, who provisionally diagnosed an Adjustment Disorder with Anxious Mood and a Specific Phobia (driving related anxiety) and diagnosed a Cognitive Disorder NOS (mild neurocognitive symptoms). A GAF of 60 was provided. Dr. Velikonja opined that Ms. Taylor sustained a complex mild to moderately severe traumatic brain injury consequent to the subject accident.

In December 2010, Dr. Velikonja issued a progress report in which she offered the same diagnoses and provisional diagnoses and also diagnosed a Pain Disorder associated with a General Medical Condition. A GAF of 60 was again provided.

Ms. Taylor's Level of Impairment in Her Activities of Daily Living

I find that Ms. Taylor's level of impairment in her Activities of Daily Living is mild.

There is little evidence concerning Ms. Taylor's activities of daily living before the accident.

Ms. Taylor testified that currently she does not do yard work, gardening or laundry; nor does she do the preparatory cooking work and light dusting.

Dr. Reznick, who saw Ms. Taylor in early 2012, noted that she was able to do her self-care, personal hygiene, communicate and ambulate. She had no significant difficulties with sexual

function. She got herself up in the morning, washed herself, toileted herself, dressed herself, got food for herself and was able to feed herself. She was able to do the dishes; she then got out of the house and drove herself to work. She worked six hours per day, three days per week. She returned home from work afterwards. She and her partner made dinner in the evening, and thereafter they relaxed, talked to one another and watched some television. Occasionally, they went out and socialized with their friends or colleagues. On the basis of this information, Dr. Reznek opined that Ms. Taylor has no impairment in the domain of activities of daily living.

Dr. Frank assessed Ms. Taylor in August, 2011 and August, 2013, each time within weeks of the death of one of Ms. Taylor's parents. Dr. Reznek reported that Ms. Taylor performed light cleaning and dusting, washed the dishes, cooked light meals, went for smaller grocery shopping trips, was able to do chores at home if she paced herself, would rent movies and rarely went to restaurants since her partner is a "great cook". While she had pain, Ms. Taylor was sexually active. Her social activity was decreased because of depression and low energy. She did not do garbage disposal or move furniture. She cooked heavy meals. She did not lift laundry baskets or bend to get clothes out of the machine. She did not do larger grocery shopping trips.

On the basis of this information, Dr. Reznek opined that Ms. Taylor's psychological difficulties do not appear to be impacting significantly upon her ability to carry out her activities of daily living. There is some indication of reduced social activity owing to her depressive symptoms and to the extent to which depressive symptoms and pain catastrophizing tendencies contribute to her disengagement in pain-escalating activities. It is my opinion that she is exhibiting Mild (Class 2) Impairment in Activities of Daily Living.

Social Functioning

I find that Ms. Taylor's level of impairment in Social Functioning is mild.

Ms. Taylor testified that she did not go out "very often anymore" and when sitting with crowds of people or friends, she finds it difficult to follow a conversation, so just doesn't "bother anymore".

Dr. Reznek reported that Ms. Taylor is able to get along with others, including her partner, her colleagues, her friends and neighbours, grocery clerks and other members of the public. Therefore, in this domain, Dr. Reznek opined that Ms. Taylor has a Class 1, or no impairment.

Dr. Frank noted that Ms. Taylor coped reasonably well with stress, did not fly off the handle and did go to the mall. Her relationship with her partner is close and meaningful and “generally good”. She denied having relationship difficulties with anyone in her life and has about five good friends. She does not see them much because they live five hours away and when she returns to Hamilton, she does not feel like doing anything. She gets along with her one co-worker.

On the basis of this information, Dr. Frank found that Ms. Taylor continues to have meaningful relationships and is not reporting relationship difficulties in her life. Her current depressive symptoms result in decreased interest in social activity, which may impact upon the quality of her relationships to some degree. In Dr. Frank’s opinion, Ms. Taylor suffers from Mild (Class 2) Impairment in Social Functioning.

Ms. Taylor’s Level of Impairment in Concentration, Persistence and Pace

I find Ms. Taylor’s level of impairment in Concentration, Persistence and Pace is mild.

Dr. Reznek reported that no difficulties with respect to Ms. Taylor’s ability to concentrate and persist at a task were demonstrated during his interview with her, or during the cognitive testing with her. He deferred to the neuropsychological testing and assumed that Ms. Taylor had some residual cognitive difficulties as a result of her mild traumatic brain injury. He concluded that Ms. Taylor has at most a Class 2 or mild impairment within this domain, as impairment levels are compatible with most useful functioning. He noted that Ms. Taylor was back at work.

Dr. Frank found that Ms. Taylor remained reasonably productive at work but had to take breaks hourly. She was able to complete two lengthy questionnaires without much difficulty. She indicated that the pains often impact upon her ability to sustain her attention at work and that this results in reduced pace and performance. On the basis of this information, Dr. Frank opined that

to the extent that Ms. Taylor's current depressive symptoms and pain catastrophizing tendencies influence her ability to complete tasks in a timely manner, she is exhibiting Moderate (Class 3) Impairment in Concentration, Persistence and Pace.

Ms. Taylor's Level of Impairment in Adaptation

I find that Ms. Taylor's level of impairment in Adaptation is mild.

Dr. Reznick reported that Ms. Taylor had been able to get back to work and was currently working three days per week for six hours per day. She may have had some difficulty working longer hours because of her pain. It was unclear that any such difficulties arose out of any emotional or behavioural disorders. However, based on this information, at most, Ms. Taylor has a Class 2 or mild impairment within this domain as impairment levels were compatible with most useful functioning.

Dr. Frank noted that Ms. Taylor could generally cope effectively in stressful situations. She indicated that she does have a propensity to react to work or work-like stress with irritability and anxiety. There was no evidence of any tendency to deteriorate significantly from a psychological perspective in response to stress. Dr. Frank opined that Ms. Taylor demonstrates Mild to Moderate (Class 2 to 3) Impairment in Adaptation to Work or Work-Like Settings.

Findings – Mental and Behavioural Impairments

Activities of Daily Living

I accept Ms. Taylor's evidence concerning her activities of daily living before and after the accident, and her capacity to carry out daily activities.

I do not agree with Dr. Reznick that, as regarding Ms. Taylor's capacity to perform activities of daily living, she has a Class 1 or no impairment. The evidence shows that Ms. Taylor's capacity

to carry out some daily activities of living, including physical and social activities, has been diminished.

I agree with Dr. Frank and find that Ms. Taylor's psychological difficulties are not impacting significantly on her ability to carry out her activities of daily living.

I find that Ms. Taylor's impairment levels are compatible with most useful functioning.

Therefore, I find that Ms. Taylor's level of impairment in her activities of daily living is Mild (Class 2).

Social Functioning

I accept Ms. Taylor's testimony with respect to her impairment within the domain of social functioning.

I do not agree with Dr. Reznek that Ms. Taylor has a Class 1 or no impairment in this domain.

I agree with Dr. Frank, and find, that Ms. Taylor's depressive symptoms result in decreased interest in social activity which impacts on the quality of her relationships to some degree.

I find that Ms. Taylor's level of impairment in Social Functioning is Mild (Class 2).

Concentration, Persistence and Pace

I accept Ms. Taylor's evidence concerning her difficulties with concentration and persistence at a task.

I agree with Dr. Reznek that Ms. Taylor has a Class 2 or mild impairment with respect to her ability to concentrate and persist at a task.

I agree with Dr. Frank, and find, that Ms. Taylor remains reasonably productive at work but she must take regular breaks; that the ability to sustain her attention at work is often impacted by her pains, which result in reduced pace and performance; and that her ability to complete tasks in a timely manner is affected.

I do not agree with Dr. Frank that Ms. Taylor exhibits Moderate (Class 3) impairment in Concentration, Persistence and Pace.

I find that Ms. Taylor's impairment levels in this domain are compatible with most useful functioning.

Therefore, I find that Ms. Taylor's level of impairment in Concentration, Persistence and Pace is Mild (Class 2).

Adaptation to Work or Work-Like Settings

I accept Ms. Taylor's evidence with respect to her ability to work in stressful circumstances. I agree with Dr. Reznick, and find, that at most, Ms. Taylor has a Class 2 or mild impairment within this domain, as her impairment levels are compatible with most useful functioning.

I agree with Dr. Frank, and find, that Ms. Taylor can generally cope effectively in stressful situations, and that she has a propensity to react to work or work-like stress with irritability and anxiety.

I do not agree with Dr. Frank that Ms. Taylor demonstrates mild to moderate (Class 2 to 3) impairment in adaptation to Work or Work-Like Settings.

I find that it is more likely than not that some of Ms. Taylor's difficulties arise not out of her emotional or behavioural disorders, but rather from other sources, including pain (which is rated under the physical impairment categories), an increase in Ms. Taylor's work hours by almost

33%, massive work restructuring which did not include Ms. Taylor's termination, and the death of Ms. Taylor's parents.

I did not put much weight on the opinion of Dr. Velikonja, because it did not sufficiently address Ms. Taylor's level of impairment of a function in accordance with the *Guides*, across the requisite four areas of function. Therefore, I find that Ms. Taylor's level of impairment in Adaptation to Work or Work-Like Settings is Mild (Class 2).

Ms. Taylor's WPI on Account of Her Physical Impairments

For the reasons below, I find Ms. Taylor's combined WPI for physical impairments is 26%, as follows:

• Left Lower Extremity	15%
• Low Back	5%
• Scars	4%
• Right Lower Extremity	2%
• Head Injury	2%
Total Combined	26% WPI

This finding is supported by the opinion of the North York Rehab team that Ms. Taylor's injuries and impairments as a result of the accident reach 26% WPI for physical impairments. I accept this opinion which I find to be reasonable and persuasive.

I find, overall, that the North York Rehab team's approach with respect to assessing Ms. Taylor's physical impairments to be comprehensive, thorough and thoughtful.

I find the Omega team's approach resulted in their over-rating of Ms. Taylor's physical impairments.

I find the Omega team's rating of 37-62% WPI for Ms. Taylor's physical impairments to be extremely problematic, but not because it is expressed as a range of percentages. The difficulty here is not methodological; it is evidential. The range 37-62% WPI makes the arbitrator's adjudicative task even more difficult than it already is. It also makes it much more challenging for Ms. Taylor to satisfy her burden of proof that she meets the 55% WPI threshold for catastrophic impairment under the *Schedule*.

To use Dr. Harold Becker's words, this range has "a dual meaning". Part of the range, 37-54% WPI, means that Ms. Taylor does not meet the catastrophic threshold for physical impairments; and the remaining part of this range, 55-62% WPI, means that Ms. Taylor meets or exceeds the catastrophic threshold.

To the question, "Does Ms. Taylor meet the 55% WPI threshold for physical impairments under the *Schedule*?", this range answers, "No, she does not, and Yes, she does" – at the same time.

This evidence supports different findings on this critical issue, and it is evenly weighted. Absent other evidence, this issue must be determined in a manner that favours Pembridge.

From an assessor's point of view, this range provides a clinical opinion as to the level of Ms. Taylor's physical impairments. From the perspective of an adjudicator, however, this range is of no assistance in determining the central issue in this case.

I find, therefore, that the range of 37-62% WPI assigned by the Omega team to Ms. Taylor's physical impairments, per se, is not persuasive. It has no probative value as to whether or not Ms. Taylor meets the 55% WPI threshold under clause 2(1.2)(f) of the *Schedule*, the determinative question in this case. I find that it deserves no weight in that respect.

Based on the totality of the evidence, I find that Ms. Taylor's WPI for her combined physical impairments is 26%.

Ms. Taylor's WPI on Account of Her Mental and Behavioural Impairments

I find that the correct rating for Ms. Taylor's mental and behavioural impairments is 11% WPI.

This rating is three percentage points higher than the value of 8% WPI assigned by the North York Rehab team.

For the reasons below, I find that the North York Rehab team under-rated Ms. Taylor's mental and behavioural impairments in the domains of Activities of Daily Living and Social Functioning.

The 11% WPI rating is within the range of 11-23% WPI assigned by the Omega team in respect of Ms. Taylor's mental and behavioural impairments.

For the reasons below, I find that the Omega team over-rated Ms. Taylor's mental and behavioural impairments in the domains of Concentration, Persistence and Pace and in Work Adaptation.

I find that Dr. Frank's GAF score estimated at 55-63 is unreliable and is not an accurate reflection of Ms. Taylor's impairments because:

- w. A GAF score is only a "snapshot" of how the person is doing at that moment and may be a poor measure of permanent or long-term mental or behavioural impairment;
- x. Dr. Frank examined Ms. Taylor in August 2011, within weeks of her mother's untimely death. His GAF score was 55-65;
- y. Dr. Frank examined Ms. Taylor for a second time in August 2013 within a month of her father's death. His GAF score was slightly reduced from 55-63;
- z. There were insufficient GAF scores taken over a considerable period of time by different qualified assessors with relatively consistent results indicating that Ms. Taylor had a permanent or long-term mental or behavioural impairment;
- aa. Dr. Frank agreed that a GAF score of 60 straddles the language in the GAF scale of "mild to moderate" and that when applying that "mild to moderate" language to Table 3 at Chapter 4, on page 142, of the *Guides*, it would suggest figures of 14%, 15% or 16% WPI;

bb. Dr. Harold Becker acknowledged that if the Arbitrator selected a GAF score of 60 and applied the California Method, one would arrive at a WPI of 15%.

Based on the totality of the evidence, I find that the appropriate rating for Ms. Taylor's mental and behavioural impairments is 11% WPI.

Combined WPI Ratings

According to the Combined Values Chart in the *Guides*, the combined value of the physical impairment ratings is 26% WPI. This does not meet the threshold of 55% WPI specified in clause 2(1.2)(f) of the *Schedule*, which is required to satisfy the definition of "catastrophic impairment".

Ms. Taylor's impairment rating based on mental or behavioural disorder, which I have found is mild, is 11%. This does not meet the threshold of a Class 4 impairment (marked impairment) or a Class 5 impairment (extreme impairment) specified in clause 2(1.2)(g) of the *Schedule*.

When the physical impairment rating of 26% is combined with the mental and behavioural impairment rating of 11%, this results in a WPI of 34%. 34%, "rounded to the nearest value ending in 0 or 5", as permitted by the *Guides*, yields 35%, which is insufficient to meet the criteria in clause 2(1.2)(f) of the *Schedule*.

Based on the above, I conclude that Ms. Taylor did not sustain a catastrophic impairment as a result of the accident as defined in clauses 2(1.2)(f) and (g) of the *Schedule*.

Expenses

The parties made no submissions on expenses. If they are unable to resolve this issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Marvin J. Huberman
Arbitrator

June 11, 2014
Date



FSCO A12-004886

BETWEEN:

STACEY TAYLOR

Applicant

and

PEMBRIDGE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. The Applicant did not sustain a catastrophic impairment as a result of the accident as defined in clauses 2(1.2)(f) and (g) of the *Schedule*.
2. If the parties are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75-79 of the Dispute Resolution Practice Code.

Marvin J. Huberman
Arbitrator

June 11, 2014
Date

ADR CHAMBERS

BETWEEN:

**VRINDER CHAUDHARY O/A BOMBAY AUTO CENTRE
("BOMBAY AUTO")**

Appellant

and

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE
MINISTER OF THE ENVIRONMENT (THE "PROVINCE")**

Respondent

REASONS FOR DECISION

BEFORE: Arbitrator Marvin J. Huberman
HEARD: July 28 and August 1, 2014, in Toronto, Ontario

**WRITTEN
SUBMISSIONS:** Provided on September 4, October 16 and 23, 2014

APPEARANCES: Mr. Suvendu Goswami
Lawyer for the Appellant, Vrinder Chaudhary o/a Bombay Auto Centre
("Bombay Auto")

Ms. Sarah Kromkamp
Lawyer for the Respondent, Her Majesty the Queen in Right of Ontario, as
represented by the Minister of the Environment (the "Province")

INTRODUCTION

[1] The Province and Bombay Auto entered into a Performance Contract, dated December 7, 2012 (the "Performance Contract"), in which it was agreed that the Province could terminate Bombay Auto's accreditation as a Drive Clean Facility if Bombay Auto breached any provision of the Performance Contract.

- [2] It was further agreed in the Performance Contract that Bombay Auto could appeal a termination to a single arbitrator to be agreed upon by the Province and Bombay Auto.
- [3] The Province terminated Bombay Auto's accreditation purportedly pursuant to the Performance Contract and Bombay Auto appealed the termination.
- [4] The Province and Bombay Auto agreed to retain Marvin J. Huberman, as a single arbitrator, to arbitrate the appeal of the termination in accordance with the *Arbitration Act*, 1991 (Ontario), as amended, and an Arbitration Agreement, made May 27, 2014.

THE FACTS – BACKGROUND

- [5] Bombay Auto is located at 151 Nantucket Blvd., Unit 8, in Scarborough, Ontario. On October 17, 2006, it was accredited as a Drive Clean Facility in the legacy program. On May 17, 2012, it applied for accreditation as a test and repair facility for light duty vehicles under the modernized program. On December 12, 2012, a Performance Contract was awarded to Bombay Auto following an accreditation audit, which permitted Bombay Auto to perform Drive Clean emissions tests and repairs on light duty vehicles under the modernized program. Bombay Auto's Drive Clean Facility number is 5715. Mr. Vrinder Chaudhary is the only inspector at this facility and his inspector ID is 26334.
- [6] In 1999, a mandatory vehicle inspection and maintenance program – the Drive Clean program – was implemented to reduce smog. Under the program, biennial emissions testing for light duty vehicles, and on ownership transfers for specified vehicles registered in the program area, are required. Vehicles are required to comply with provincially mandated emissions standards, in default of which the vehicles are required to undergo repairs. The program is based on the "Motor Vehicles" regulation (O. Reg. 361/98) made pursuant to the *Environmental Protection Act* (Ontario).
- [7] Drive Clean testing must be performed at certified Drive Clean Facilities ("DCF's"), and the Drive Clean test must be conducted by certified Drive Clean Inspectors. DCFs are accredited by the Province pursuant to Performance Contracts, the terms of which outline the responsibilities of a DCF, including the requirement to comply with the *Standard Operating Procedures for Ontario's Drive Clean Facilities* ("SOP"). The SOP includes the *Compliance Guideline for Light Duty Drive Clean Facilities* ("Compliance Guideline"), which delineates a remedy schedule for breaches of the Performance Contract and the SOP.
- [8] The Drive Clean Program, in the early years, tested a vehicle's tailpipe emissions for compliance with emissions standards, using a tailpipe probe. From January 1, 2013

onwards, following the modernization of the Drive Clean Program, the majority of Drive Clean tests (1998 and newer light duty vehicles) are conducted through On-Board Diagnostics (“OBD”) testing using a vehicle’s OBD computer.

- [9] OBD computers, found in modern vehicles, continually monitor the vehicle’s emissions controls system for faults using “Diagnostic Monitors”, some of which operate continually, and some operate during specific conditions. When a fault is discovered, a Diagnostic Trouble Code (“DTC”) is set and the Malfunction Indicator Lamp (“MIP”) is automatically activated. A vehicle’s OBD computer communicates with the Drive Clean Program’s Ontario Test Unit (“OTU”) which accesses this information with which it conducts the OBD Drive Clean test.
- [10] The OBD emissions test is performed by a certified inspector who scans or manually enters the vehicle information into the OTU, and then reviews this information for accuracy and if it is accurate, certifies that the information is accurate by clicking “continue”. A special cable is then connected to the vehicle’s OBD computer through which information is downloaded to the OTU. A centralized database (the “Drive Clean Information System” or “DCIS”) receives this data via modem which confirms and records the test result. Since the commencement of the modernized program, over 3 million OBD Drive Clean test results performed in Ontario have been recorded in the DCIS. The OTU then prompts the inspector to sign on the signature pad, confirming that the inspection was properly conducted, following which the OTU will printout a Vehicle Emissions Inspection Report (“VIR”) indicating whether the vehicle has passed or failed the emissions test.
- [11] During the course of the Drive Clean Program, some DCFs falsified test results to indicate that a vehicle passed when no inspection was conducted or where a vehicle should have failed the test. The vehicle owners may be incited to obtain false test results so as to avoid the time and/or expense of performing repairs to the vehicle; DCFs may be incited in order to charge a fee for this unlawful service that exceeds the cost of a legitimate Drive Clean test.
- [12] Test result falsification may occur through “clean scanning” under the modernized Drive Clean Program. Clean scanning bypasses the proper test procedure by inputting information for the vehicle which requires testing into the OTU, but connecting the OTU cable to a different vehicle, computer or OBD simulator which is capable of producing a passing test result. The objective is to have the OTU issue a fraudulent pass result for a vehicle that has not, in fact, been tested. An OBD simulator is an electronic device capable of mimicking a computer. Simulators of different degrees of sophistication may be found online, and the Province’s Drive Clean Services Contractor (“Parsons”), uses a simulator for testing purposes.

- [13] Since clean scanning enables polluting vehicles to remain on the road without undergoing the required repairs, it violates both the SOP and the Performance Contract, and it is contrary to the spirit and intent of the Drive Clean Program by providing that a DCF's accreditation should be terminated immediately on the first instance of test fraud, the Compliance Guidelines underlines the seriousness of this violation.
- [14] DCFs are monitored by the DCO and Parsons on an ongoing basis for compliance with the SOP so as to ensure that tests are conducted properly. DCFs are also monitored for indications of test fraud through a variety of audit types, including, record audits, telephone audits, real-time audits, electronic audits, overt audits and covert audits, which are described in detail in the SOP. DCFs agree to be audited by any of these audit types from time to time with or without notice under the SOP and the Performance Contract.
- [15] While some forms of test frauds may be detected by real-time data triggers, a record audit (post-test data analysis) is needed to detect more sophisticated forms of fraud. Several unique parameter data fields are collected by the OTU, in addition to emissions related information, from a vehicle's OBD computer. When collectively analyzed, this data comprises a "digital signature" for a specific make, model, year and engine type of vehicle. The data can be used to verify that the vehicle purportedly being tested corresponds with the vehicle connected to the OTU, and if the digital signature of the vehicle does not correspond with the expected vehicle type, this indicates that clean scanning has occurred. To determine what the expected signature of a particular vehicle is, the DCO utilizes the DCIS database of over 3 million OBD test records. Since OBD simulators have functional limitations in that they do not support all OBD parameters, which prevent them from generating accurate digital signals, they can be detected through post-test data analysis.
- [16] In October and November 2013, the DCO identified serious anomalies in the OBD test data generated at the Bombay Auto facility as part of an initiative by the DCO to investigate clean scanning at other facilities. Following a close examination of the data by David Petherick it was determined that prolific clean scanning had occurred at this facility through utilization of a simulator device. Fraudulent testing indicators included the significant vehicle parameter mismatches, when compared to what is exhibited by the same vehicle models tested at other Drive Clean facilities. These mismatches led Mr. Petherick to conclude that clean scanning had occurred at Bombay Auto through the utilization of a simulator device. Mr. Petherick identified 187 instances of fraudulent testing at the facility out of a total of 770 Drive Clean tests (24% of all tests conducted at Bombay Auto). Mr. Vrinder Chaudhary (inspector ID 26334) was the inspector associated with all of the suspect tests.

[17] On December 20, 2013, the Director of the DCO terminated Bombay Auto's Performance Contract through a Termination Notice, as a result of this information and analysis. The cover letter to the Termination Notice indicated that "a recent record audit of your facility's actions reveals its non-compliance with the Performance Contract" and the Termination Notice indicated that sections 2.2, 2.3, 2.4, 7 and 15.6 of the Performance Contract and sections 5.1 and 5.2.1 of the SOP had been breached. These sections of the Performance Contract provide, in relevant part, as follows:

- (a) **2.2** – The DCF agrees to equip and operate the facility in accordance with the Standard Operating Procedures established by the Province for Drive Clean Facilities, as amended from time to time by the Province.
- (b) **2.3** – The DCF agrees to operate the facility in a safe, reasonable and prudent manner using qualified and experienced staff including certified Drive Clean inspectors for light duty vehicles and Certified Drive Clean Repair Technicians and in accordance with good business practices.
- (c) **2.4** – The DCF agrees to operate in compliance with all federal, provincial and municipal laws and regulations [...]
- (d) **7.1** – The DCF agrees to issue an approved Drive Clean Emissions Inspection Pass Report (a "Pass Report") only for each vehicle that passes an emissions test.
- (e) **15.1** – The DCF agrees that in the event that it breaches any provision of this Contract, the Province may in its sole discretion [...] (b) issue a termination notice immediately terminating this Contract and revoking the accreditation of the Facility [...]
- (f) **15.6** – For certainty, the DCF acknowledges that it is responsible for and can be suspended or terminated in respect of the actions of its partners, directors, officers, employees, and agents including certified inspectors and/or repair technicians.

[18] The Termination Notice further identified 20 separate events or instances of clean scanning between April and September 2013. These were a subset of the 187 cases of clean scanning identified at the facility and were chosen as a representative sample covering a broad range of vehicle manufactures. Termination occurred, however, as indicated in the Termination Notice, following the first instance of falsified test results.

THE ISSUE

- [19] The Province and Bombay Auto agree that the only issue in this arbitration is whether Bombay Auto was properly and validly terminated under the Performance Contract and pursuant to any applicable legislation. The only order that the Arbitrator may make is to uphold or overturn the termination.

THE EVIDENCE

- [20] There were two witnesses called on behalf of the Province: Glenn Dunphy, the Manager of Drive Clean Facility Operations, and David Petherick, Senior Program Advisor to the Drive Clean Program and the only expert called to testify at the arbitration by either of the parties. Vrinder Chaudhary, the only witness for Bombay Auto, testified as the owner/operator of Bombay Auto.
- [21] In addition to the oral evidence, both parties submitted a Statement of Case and other documents that were made exhibits at the arbitration.
- [22] Mr. Dunphy and Mr. Petherick presented background information on the Drive Clean Program and the history of events culminating in the termination of Bombay Auto's accreditation on December 20, 2013. Bombay Auto did not contest this evidence. It did, however, deny the allegations and events of falsification of emission results leading up to the termination of the Performance Contract.

EVIDENCE OF DAVID PETHERICK

- [23] As a Senior Program Advisor to the Drive Clean Program, Mr. Petherick provides expertise to the Ministry on Drive Clean Program design and implementation, and conducts ongoing data analysis to identify fraudulent testing within that program. He was qualified as an automotive engineer with expertise in vehicle emissions, testing and maintenance programs and technology, and gave opinion evidence as an expert witness explaining his analysis and conclusions that led to the termination of Bombay Auto's Performance Contract. Bombay Auto did not object to his qualification as an expert witness.
- [24] Mr. Petherick testified that he used the DCIS database to compare OBD parameter data gathered at Bombay Auto, with data collected at other DCFs to reach the conclusion that

Bombay Auto engaged in clean scanning. He stated that, as the Drive Clean OBD test database contains over 3 million records, confidence in verifying vehicle parameter mismatches is extremely high and in many cases irrefutable. He stated that he uses extreme care in conducting data analysis and double and triple checks his findings to ensure that he has not made an error.

[25] According to Mr. Petherick, the OBD parameter mismatches identified in the test data from Bombay Auto include the following:

- (a) Incorrect Vehicle Speed Sensor – for all of the 187 fraudulent test results at Bombay Auto the value of 158.4 MPH was recorded. Since the vehicle is stationary in the test bay while the test is being conducted the value should be 0.0. This is suggestive of a simulator device having been used which either has functional limitations with respect to this parameter, or where this parameter was improperly programmed into the simulator by the user.
- (b) Incorrect Calibration Verification Numbers (“CVNs”) – since the 20 vehicles included in the Termination Notice represent a wide variety of vehicle manufacturers, they were chosen; but there are only 5 different CVNs amongst the 20 vehicles whereas each make and model of vehicle should have a different CVN. Further, different manufactures would not use the CVN as they appear to do in these 20 cases, including, a Nissan Altima, Dodge Caravan, Audi 4 and Mazda 6 which all indicated the same CVN (\$02F0DB14) when tested at Bombay Auto. If properly tested, these vehicles would not have reported the same CVN. Moreover, the 5 CVNs indicated in these 20 test results do not match any vehicle tested at any other DCF in Ontario. Of these CVNs, for these vehicles to correspond to the CVNs of other vehicles of the same makes and models, none do. In consequence, it must be concluded that these CVNs are completely invalid and do not come from any known vehicle. According to Mr. Petherick, this is conclusive evidence that each of these tests were fraudulent and an OBD simulator was used to generate this incorrect data.

That a simulator device was used where this value was only reprogrammed on occasion may be inferred from the fact that CVN remained constant amongst the fraudulent tests for a period of time and then it changed, then remained constant for a period of time, before it changed again. In the 20 cases included in the Termination Notice, and among all 187 cases of suspected test fraud, this pattern can be seen.

- (c) Incorrect Communication Protocols (“Protocol ID”) – in respect of the 10 additional case studies examined by David Petherick, these vehicles reported a

communications protocol that the vehicle is not equipped with when tested at Bombay Auto. As explained in Appendix A of Mr. Petherick's Witness Statement, Cases 1-6 involve a Protocol ID reported at Bombay Auto (ISO15765-4) or Controller Area Network ("CAN") (Protocol) that could not have been installed in these vehicles because it was not in existence at the time the vehicle was manufactured. These vehicles are all 2002 or earlier models whereas CAN Protocol was only installed on 2003 and later models. Mr. Petherick stated that it is not feasible to convert a non - CAN system to CAN, nor is there any rationale for doing so. Cases 7-10 concerned Protocol IDs never used on those vehicle models when compared with other vehicles of the same make and model within the extensive DCIS Database. According to Mr. Petherick, this is further conclusive proof that these test results are falsified.

In addition, Mr. Petherick examined OBD parameter test data for these same vehicles when they were tested at other facilities and compared this data with OBD parameter test data purportedly generated at Bombay Auto. These vehicles had at least one previous failing Drive Clean test result from another facility, where the expected Protocol ID and other expected parameters including Module ID, PID1C response, and vehicle speed signal and throttle position signal, were reported for the vehicle. These parameters changed, however, and became values that would not be expected for particular makes and models when the vehicle was purportedly tested at Bombay Auto - and passed. Mr. Petherick stated that these values should have remained constant across tests, and should not have changed when the vehicles were tested at Bombay Auto. The only rational explanation for this is that the vehicle was properly tested at the other facilities, and then an OBD simulator was substituted to produce a passing test result at Bombay Auto, and incorrect OBD parameters were programmed into the simulator.

- (d) Throttle Position Sensor - across all of these suspected fraudulent tests, the Throttle Position Sensor parameter remained constant for a period of time, then changed, then remained consistent for a period of time, then changed again. Mr. Petherick explained that this value should have changed with every vehicle that was tested since it represents the percentage that the throttle is open, which varies from vehicle to vehicle. Within the subset of fraudulent tests, this pattern of repeating throttle positions defies coincidence, and is conclusive proof that a simulator was used for these tests, and that this particular parameter was changed only occasionally.

All of these mismatches in data parameters at Bombay Auto led Mr. Petherick to the inevitable conclusion that clean scanning was occurring at this facility through the use of an OBD simulator device. In his opinion, based on his extensive

knowledge of motor vehicles, and his review of the data in the DCIS database, it is impossible for these vehicles reported to have been tested at Bombay Auto to have generated the OBD parameter data uploaded by the OTU. The fact that the CVNs do not match any vehicles in the DCIS database; that the vehicle speed signal reported was 158.4 MPH for all of these vehicles; and that the pattern of certain parameters remained fixed over periods of time, is conclusive evidence that no vehicle, but rather an OBD simulator, with functional limitations, was used to produce these fraudulent test results.

- (e) In cross-examination, Mr. Petherick stated that he was aware of wireless devices that could read OBD data but not ones that could be used to manipulate OBD data remotely. He further explained that a scan tool can only read, but cannot be used to change OBD parameter data, other than to reset DTCs.
- (f) As to whether or not performance reflashes could explain OBD data anomalies, Mr. Petherick explained in cross-examination, that performance reflashes cannot explain the data anomalies given the wide variety of vehicles involved. Performance reflashes are typically only available for “hot rods”, and for many vehicles such as a Dodge Caravan (mini-van) there would be no market for a performance reflash since the vehicle could not benefit from one.
- (g) In response to the suggestion made in cross-examination that one of the mechanics bringing vehicles to Bombay Auto for Drive Clean testing could have installed a simulator under the dashboard and concealed it so that Mr. Chaudhary was not aware of its use when conducting the tests, Mr. Petherick explained that, in his opinion, this was extremely unlikely due to the close timing between some of the falsified tests and the amount of time that would be required to switch the device between vehicles, reprogram and conceal it in a manner that the inspector would not suspect the use of a simulator. Reference was made to patterns of falsified tests that were conducted in rapid succession on August 27, 2013, May 18, 2013, and on June 11 and 26, 2013.

EVIDENCE OF VRINDER CHAUDHARY

- [26] Mr. Vrinder Chaudhary is the owner and operator of Bombay Auto Centre, which provides automotive service and maintenance in addition to Drive Clean testing. Bombay Auto operates out of a single bay garage at 151 Nantucket Blvd. in Scarborough, Ontario, which is a building with 20 bays each of which contains an automotive business. Bombay Auto is located in an area with several different automotive businesses,

including other DCFs. Mr. Chaudhary stated that most of his Drive Clean clients are other mechanics.

- [27] Mr. Chaudhary stated that he is always onsite during operating hours, which are Monday to Friday from 9:00 a.m. to 6:00 p.m., and Saturdays from 10:00 a.m. to 5:00 p.m., but occasionally he works later. He does not have any employees at Bombay Auto. Mr. Chaudhary allows three other mechanics, namely, Santok, Alex Butu, and Balan to use his garage. He does not have formal rental agreements with any of these individuals. Mr. Chaudhary's daughter also worked at Bombay Auto occasionally on Saturdays in 2013. He testified that he did not allow anyone else to perform Drive Clean tests using his equipment and he kept his inspector ID and password secret.
- [28] Mr. Chaudhary admitted that he performed the 30 Drive Clean tests that were examined in detail by Mr. Petherick and confirmed that his signature was on the 30 VIRs relied upon by the Province as falsified test results. Mr. Chaudhary denied clean scanning and using a simulator in performing these Drive Clean tests. He further stated that these 30 cars were vehicles brought in by other mechanics with shops located in close proximity to Bombay Auto and that they provided invoices with respect to these 30 tests.

POSITIONS OF THE PARTIES

The Province's Submissions

- [29] The Province's position is that the Appellant, Bombay Auto, has the onus of proving, on a balance of probabilities, that the Performance Contract was improperly terminated. It has failed to do so.
- [30] The Province contends that Bombay Auto's Performance Contract was terminated because it falsified Drive Clean test results. The evidence that Bombay Auto falsified tests results is overwhelming. The Province's evidence clearly demonstrates that rampant test fraud occurred at the Bombay Auto facility in 2013 through the use of a simulator device which enabled the facility to issue passing test results for vehicles that were not tested in accordance with the Drive Clean Program's SOPs. It argues that the evidence adduced by Bombay Auto provides no compelling explanation for the anomalous test data that was generated at this facility. As a result, the only conclusion that can be reached on the evidence is that Bombay Auto engaged in rampant Drive Clean test fraud in 2013.
- [31] The Province submits that falsifying test results breaches a number of different provisions of the Performance Contract which provides that the Province can terminate the contract,

at its sole discretion, if Bombay Auto breaches any provision of that contract. Even one falsified test result is grounds for termination and, in this case, the Province contends that there are up to 187 instances of falsification. In consequence, the Province submits that Bombay Auto's Performance Contract was properly terminated in accordance with its terms, and the Province's decision to terminate the Performance Contract must be upheld.

- [32] The Province further submits that Mr. David Petherick is a highly qualified and reliable expert witness and his evidence is highly credible and should be given considerable weight.
- [33] As regards the evidence of the Vrinder Chaudhary, the Province contends that Mr. Chaudhary has not provided any credible explanation for the anomalous test results generated at his facility.
- [34] His willingness to circumvent the SOP and the spirit and intent of the Drive Clean program through using a scan tool to clear DTCs seriously undermines his credibility and his assertion that he did not engage in test fraud. The Province argues that Mr. Chaudhary's flat denial that he engaged in clean scanning should be treated with caution and should be given limited weight given Mr. Chaudhary's direct interest in the outcome of this proceeding, namely, Bombay Auto's future as a DCF.

Bombay Auto's Submissions

- [35] Bombay Auto takes the position that the party who alleged the breach of the Performance Contract and terminated it – the Province – has the onus to prove such breach. Bombay Auto concedes that the civil standard of proof on a balance of probabilities is applicable in this proceeding.
- [36] Bombay Auto contends that the Province has failed to discharge such onus.
- [37] Bombay Auto submits that this case should be decided on the basis of the contrast between the Witness Statements and the oral evidence of the parties.
- [38] Bombay Auto submits that no motive or incentive has been imputed to DCFs for falsifying test results. Specifically, there is no statement that "the incentive for DCFs is likely that they can charge a fee for this illegal service that is greater than the cost for a legitimate Drive Clean test". Neither is the fact that the Province's Drive Clean Services Contractor ("Parsons") has a simulator for testing purposes contained in the Witness Statements of either Mr. Dunphy or Mr. Petherick.
- [39] With respect to the evidence of Mr. Petherick, Bombay Auto submits that:

- (a) The Province's submissions are misleading in characterizing Mr. Petherick's evidence as purely expert opinion evidence;
- (b) Since Mr. Petherick's evidence relates to the credibility of Mr. Chaudhary, it should be excluded as collateral and of secondary materiality;
- (c) Mr. Petherick's evidence regarding his analysis of data from the DCFs database is inadmissible without authentication of the data in accordance with the procedure set out in section 34.1 of the *Evidence Act* (Ontario). Hence, Mr. Petherick's analysis of data and alleged identification of OBD parameter mismatches have no evidence to rest upon;
- (d) As there is uncertainty regarding whether the last audit at Bombay Auto occurred on December 19 or 20, 2013, this establishes that the data relied upon by Mr. Petherick in reaching his conclusions is unreliable;
- (e) Based on several secondary sources, including OBD2 Automotive Code Encyclopedia and Cross Reference Guide – Mandy Conception, On-board diagnostics – Wikipedia, and EPA United States Environmental Protection Agency, On-board diagnostics, Bombay Auto contends that Mr. Petherick's opinion evidence is not supported by empirical evidence and is wrong;
- (f) Mr. Petherick admitted that it is possible that a test vehicle may have an OBD simulator installed to the vehicle OBD computer by the person who brings the car into the test bay;
- (g) Mr. Petherick made assumptions based on data that were not authenticated, analyzed and disclosed. Further, his Reply Witness Statement is a clear indication that Mr. Petherick had "taken on the role of advocate as propounded in *Deemar v. College of Veterinarians of Ontario*, 2008, ONCA 600.

[40] With respect to the 50 audits and during the period from November 12, 2012 to December 20, 2013, the Province should have used other means of detecting fraud at Bombay Auto other than conducting a records audit, and it provided "no plausible explanation in that regard".

[41] Bombay Auto submits that there is simply no evidentiary basis for the submissions of the Province made in respect of the 50 audits and Mr. Chaudhary's knowledge that he was being audited.

[42] Bombay Auto contends that Mr. Petherick did not produce any documentary evidence relating to searches for the Bombay Auto Service Records; nor was any evidence tendered why remaining service issues were not relevant to the OBD test; and the

submissions of the Province pre-suppose the authenticity of the statistical data used for the analysis, and on that account cannot negate the direct testimony of Mr. Chaudhary.

- [43] Bombay Auto submits that Mr. Chaudhary's explanation of the Conditional Pass Regime as authorized by the Ministry and what the owner of the vehicle is expected to do to obtain a Conditional Pass has been taken out of context by the Province. Bombay Auto contends that Mr. Chaudhary explained that the inspector or mechanic is only allowed to plug into the OBD for test purposes, and this is not tantamount to temporarily manipulating the emissions – related or engine components of a vehicle prior to or during the emissions test.

THE PROVINCE'S REPLY SUBMISSIONS

- [44] In Reply, the Province agrees that the party who alleges the breach of contract bears the onus of proof. While the Province terminated the Performance Contract in accordance with its terms, Bombay Auto, as the Appellant, alleges that the contract was breached when it was terminated by the Province. In consequence, Bombay Auto bears the onus of proof in this proceeding.
- [45] The Province submits that, to the extent that there were differences between the Witness Statements and oral evidence of the Province's witnesses, the oral evidence simply expanded on and clarified the evidence in the Province's Witness Statements.
- [46] The Province contends that all of the facts cited in the Province's submissions were in evidence either through the Witness Statements or oral testimony of the witnesses. Specifically, Mr. Dunphy gave oral evidence with respect to the possible incentive for DCFs to engage in clean scanning, and, in cross-examination, Mr. Dunphy testified that Parsons has a simulator device.
- [47] The Province states that Mr. Petherick's evidence was not purely expert opinion evidence. Rather, Mr. Petherick gave both opinion and factual evidence. Further, although Mr. Petherick's evidence related indirectly to Mr. Chaudhary's credibility, Mr. Petherick did not comment specifically on Mr. Chaudhary's credibility as a witness.
- [48] With respect to the admissibility of Mr. Petherick's evidence regarding his analysis of data from the DCIS database, the Province submits that resort to section 34.1 of the *Evidence Act* (Ontario) is unnecessary, given that the parties agreed to arbitrate this matter in accordance with the *Arbitration Act*, 1991. Section 21 of the *Arbitration Act*, 1991, provides that section 15, *inter alia*, of the *Statutory Powers of Procedure Act* (Ontario) applies to this arbitration to the effect that any relevant evidence that is not

otherwise inadmissible by reason of privilege or statutory inadmissibility, is admissible in this proceeding whether or not it might be admissible in court pursuant to the strict rules of evidence. Accordingly, the Province submits that the procedures set out in the *Evidence Act* for the admission of electronic records did not need to be strictly followed in this case, provided that the evidence was relevant, and it clearly was. At all events, the Province contends that the data underlying Mr. Petherick's opinion was authenticated and admitted in a manner that conforms with section 34.1 of the *Evidence Act*. The Province further argues that, even in the context of formal rules for the admissibility of expert opinions, an expert can rely on hearsay evidence as the basis for his or her opinion. While the amount of hearsay relied upon by the expert may affect the weight of his or her opinion, it does not impact on the admissibility of that opinion. To the extent that Mr. Petherick's opinion relied on facts not directly in evidence, this at most affects the weight to be given to his opinions, but not their admissibility.

- [49] With respect to the alleged uncertainty whether the last audit at Bombay Auto occurred on December 19 or 20, 2013 as proof that the data relied upon by Mr. Petherick is unreliable, the Province contends that this is a red herring. Based on Mr. Petherick's evidence, the Province states that while this anomaly may at its highest, call into question the accuracy of the audit report, it certainly does not undermine the integrity of the DCIS database.
- [50] With respect to Bombay Auto's attempt to undermine and contradict the opinion evidence of Mr. Petherick with three secondary sources, including a Wikipedia page, the Province submits that none of these sources were put to Mr. Petherick in cross-examination, nor were they otherwise admitted into evidence at the arbitration. The Province contends that any reference to these secondary sources should be completely disregarded since it is trite that secondary sources which effectively amount to hearsay opinion evidence, cannot be adduced through written submissions when they were not entered as evidence at the hearing.
- [51] The Province submitted that, although Mr. Petherick indicated that it is possible that a simulator could be installed in a vehicle thereby bypassing the connection between the OTU and the vehicle's OBD computer, he testified that it was very unlikely that this could have been done without the inspector's knowledge in this case.
- [52] In reply to Bombay Auto's suggestion that Mr. Petherick made assumptions based on data that were not authenticated, analyzed and disclosed, the Province submits that there is no indication as to what assumptions Mr. Petherick is alleged to have made. Furthermore, as to Bombay Auto's contention that Mr. Petherick's Reply Witness Statement indicates that he has taken on the role of an advocate, the Province states that there is no explanation given by Bombay Auto as to how Mr. Petherick has done so. As

these bold assertions are completely without merit, they should be disregarded in their entirety.

- [53] As to whether the Province ought to have used other means of detecting fraud at Bombay Auto other than conducting a records audit, the Province submits that it is under no onus to justify its choice of fraud detection measures. In any event, and contrary to the assertion of Bombay Auto, the Province's witnesses did explain their decision to conduct a records audit as opposed to a covert audit.
- [54] The Province submits that it is incorrect to state that there is no evidentiary foundation for the Province's submissions made in respect of the 50 audits, and Mr. Chaudhary's knowledge that he was being audited, given that Mr. Chaudhary was cross-examined about these issues, Exhibit 7 indicates the test time and date of the 187 fraudulent tests, and the day of the week on which these days fell is a fact that may be judicially noticed.
- [55] The Province contends that Bombay Auto's submissions appear to confuse Repair Audits with OTU repairs. The Province submits that the evidence of Mr. Dunphy and the Expanded Audit Table, Exhibit 6, as well as the SOP, Exhibit 1, clarified this matter.
- [56] With respect to Mr. Chaudhary's explanation of the Conditional Pass Regime as authorized by the Ministry, the Province submits that the Ministry absolutely does not authorize the issuing of conditional passes through the mechanism described by Mr. Chaudhary. The method of obtaining a conditional pass described by him undermines the integrity of the program and is totally contrary to the purpose, spirit and intent of the Drive Clean Program.

ANALYSIS

Standard of Proof

- [57] Since this is a contractual dispute, and not a prosecution, the standard of proof is a balance of probabilities in respect of this civil matter. As this Supreme Court of Canada clearly stated in *F. H. v. McDougall*, "...there is only one civil standard of proof at common law and that is proof on a balance of probabilities..."¹

¹ *F. H. v. McDougall*, [2008] SCJ No. 54, at para 40.

Burden of Proof

[58] The burden of proof rests with Bombay Auto in the present case. It is the obligation of the party who submits any particular argument to affirmatively prove that contention. As Sopinka J. states in *Snell v. Farrell*, in a civil case, the two broad principles are:

- (1) That the onus is on the party who asserts a proposition, usually the plaintiff;
- (2) That where the subject – matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.²

In *Robertson v. Can. Cannery Ltd.*, Steel J. said:

“The onus of proof is to impose an onus upon any party to adduce evidence establishing, by a balance of probabilities, the correctness of any contention upon which he relies...”³

[59] In my view, since Bombay Auto appealed from the Decision of the Director of the Drive Clean Office, Ministry of the Environment and Climate Change, to terminate the Performance Contract, it is the Appellant who has the onus of proving on a balance of probabilities that the Performance Contract was improperly and invalidly terminated under the Performance Contract and pursuant to any applicable legislation.

FINDINGS AND CONCLUSIONS

[60] I accept the substance of the evidence given by Glenn Dunphy and David Petherick. They testified in a straightforward manner and they were impressive witnesses. Their demeanors carried the conviction of the truth. Their evidence was in harmony with the preponderance of the probabilities of this case as a whole. I give their testimony in general considerable weight. I find that their oral evidence expanded on and clarified the evidence in their Witness Statements. I accept Mr. Dunphy’s evidence with regard to the possible incentive for DCFs to engage in clean scanning, and that Parsons has a simulator device.

[61] Mr. Petherick was qualified as an expert witness. I accept his evidence and accord it significant weight. His evidence is consistent with the preponderance of probabilities and is reasonable in the circumstances of this case. I was impressed with his expert

² *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289, at pp. 294-5.

³ *Robertson v. Can. Cannery Ltd.* (1978), 4 B.L.R. 290 (Ont. H.C.), at pp. 292-93.

qualifications, reputation, objectivity, demeanour, and his performance under cross-examination. His methodology, reasoning and analytical process by which he reached his conclusions were compelling. His expert opinion was founded on a factual foundation which was proved to my satisfaction according to the appropriate standard of proof. Bombay Auto did not challenge Mr. Petherick's qualifications as an expert witness.

During the cross-examination of Mr. Petherick, counsel for Bombay Auto suggested that Mr. Petherick is not an independent expert given that he is a Ministry employee. The Province takes the position that this suggestion is completely without basis in fact or law.

- [62] Generally, the issue of whether an expert lacks independence or impartiality is addressed as a matter of weight rather than admissibility. The court retains a residual discretion to exclude the proposed evidence if it is so tainted by bias or partiality as to render it of minimal or no assistance.
- [63] Based on the evidence before me, I am unable to find that Mr. Petherick's evidence is so tainted by bias or partiality as to render it of minimal or no assistance. To the contrary, the evidence establishes that although Mr. Petherick is an employee of the Ministry, he has no personal interest in the outcome of this appeal. His expertise in the subject area, and his independence as an expert are incontestable. He analyzed the data. That he is an employee of the government had no impact on this analysis, through which he identified Bombay Auto as a facility with anomalous OBD parameter data that led him to conclude that this facility engaged in clean scanning. Prior to identifying this facility in this manner and before his attendance at the hearing, Mr. Petherick had no dealings with Bombay Auto or Mr. Chaudhary. He did not have any quota to meet in respect of identifying facilities as fraudulent, nor did he receive any bonus for identifying fraud at Bombay Auto or for providing evidence in this proceeding.
- [64] The mere fact that Mr. Petherick was employed by the Ministry is not a sufficient basis on which to find him incapable of providing independent opinion evidence. Government experts can be qualified as expert witnesses in legal proceedings if they meet all of the criteria for qualification as an expert witness.
- [65] I find that Mr. Petherick was not retained by the Province to give an opinion in support of a particular position. Rather, his opinion evidence rearticulated his professional opinion on the underlying facts that culminated in the conclusion on the part of the Director to terminate Bombay Auto's Performance Contract.
- [66] I find that Mr. Petherick meets all of the criteria for qualification as an expert witness. He has been qualified and has testified as an expert witness for the Ministry on nine prior occasions. Although he was not a direct employee of the Ministry at the time he testified in those proceedings, but rather was a consultant, the work he performed for the Ministry

was substantially of the same nature as it is in his current position. I find that his ability to provide unbiased expert opinion evidence has not changed with his different employment status.

- [67] The evidence does not support a finding that Mr. Petherick demonstrated bias against Bombay Auto or Mr. Chaudhary. Neither were his conclusions undermined through cross-examination in respect of the data anomalies generated at the Bombay Auto facility. Mr. Petherick stated that he took great care when undergoing this data analysis and in reaching his conclusion that test fraud occurred at Bombay Auto. He testified that given the large amount of records in the DCIS – over 3 million – the confidence in verifying vehicle mismatches is extremely high and in many cases irrefutable.
- [68] I agree with the Province, and accept its submission, that Mr. Petherick's evidence is highly credible and reliable and should therefore be given considerable weight. In my view, the expert evidence of David Petherick proves that clean scanning occurred widely at the Bombay Auto facility in 2013. I find that OBD parameter mismatches generated at this facility likely could not have been produced by the vehicles that were allegedly tested and for which passing VIRs were generated. I am satisfied, and find, that the most likely plausible explanation for these results is that clean scanning occurred at the Bombay Auto facility through the use of a simulator device. Bombay Auto's Performance Contract was terminated on the basis of Mr. Petherick's analysis. Mr. Petherick's analysis survived a thorough cross-examination by counsel for Bombay Auto, and no contradictory expert evidence was adduced.
- [69] Mr. Petherick gave both opinion and factual evidence, and he did not comment specifically on Mr. Chaudhary's credibility as a witness. His evidence was adduced to establish that Bombay Auto engaged in clean scanning, which was the basis for the termination under the Performance Contract and at the heart of the subject dispute. I find that Mr. Petherick's evidence is clearly relevant to the issues in this proceeding and necessary to assist the Arbitrator in interpreting the data generated at Bombay Auto's facility.
- [70] I am unable to accept the argument of Bombay Auto that Mr. Petherick's evidence regarding his analysis of data from the DCIS database is not admissible without authentication of the data in accordance with the procedure set out in section 34.1 of the *Evidence Act*. In my view, broader rules of admissibility apply to this proceeding under section 21 of the *Arbitration Act*, 1991, which provides that section 15, *inter alia*, of the *Statutory Powers Procedure Act* applies to an arbitration. Although section 34.1 of the *Evidence Act* provides an alternative route by which Mr. Petherick's evidence might be admitted, his evidence is also admissible pursuant to section 21 of the *Arbitration Act*,

1991, given that it is relevant and not otherwise inadmissible by reason of privilege or statutory inadmissibility.

- [71] Furthermore, I find that the data supporting Mr. Petherick's opinion was authenticated and admitted in conformity with section 34.1 of the *Evidence Act*. Extensive evidence regarding the integrity of the DCIS database, the protocols that are in place to preserve the integrity of the data contained in them, and copies of the data generated at Bombay Auto and on which the Province relied in support of the termination of the Performance Contract, were admitted into evidence in the Arbitration. Mr. Petherick stated that this data was exported directly from the DCIS database and was not in any way manipulated.
- [72] I accept the argument of the Province that, even in the context of formal rules for the admissibility of expert opinion evidence, an expert can rely on hearsay evidence as the basis for his or her opinion, and that while the amount of hearsay relied upon by the expert may affect the weight of the opinion it does not impact on the admissibility of that opinion.⁴ I am unable to find, as contended by Bombay Auto, that the uncertainty regarding whether the last audit occurred on December 19 or 20, 2013, constitutes proof that the data relied upon by Mr. Petherick is unreliable. To the contrary, the evidence establishes that when Mr. Petherick reviewed the DCIS database, he was able to confirm that this audit occurred not on December 20, 2013, but on December 19, 2013 since there was a record of an aborted test on December 19, 2013, but not one on December 20, 2013. Mr. Petherick stated that there is no possibility of human error with respect to the DCIS database records unlike the audit report records. As a result, I find that this anomaly does not undermine the integrity of the DCIS database although it may call into question the accuracy of the audit reports.
- [73] I give little weight to the three secondary sources, including a Wikipedia page, relied upon by Bombay Auto to undermine and contradict the opinion evidence of Mr. Petherick. As these sources were not presented to Mr. Petherick in cross-examination, nor were they admitted into evidence at the hearing, they are given little weight.
- [74] I accept Mr. Petherick's evidence, and find, that it is possible that a simulator could be installed in a vehicle thereby bypassing the connection between OTU and the vehicle's OBD computer, but that it was very unlikely that this could have been done without the inspector's knowledge in the present case.
- [75] I do not accept Bombay Auto's argument that Mr. Petherick made assumptions based on data that were not authenticated, analyzed and disclosed, or that his Reply Witness Statement is a clear indication that Mr. Petherick had "taken on the role of advocate". I agree with the Province that there is no indication as to what assumptions Mr. Petherick

⁴ *R. v. Abbey*, (1982) 2 SCR 24, at p. 14.

is alleged to have made, and neither is there any explanation as to how Mr. Petherick has taken on the role of an advocate. I find that these assertions are bald, lack an evidentiary foundation, and are devoid of merit.

- [76] I find that the Province's witnesses did explain their decision to conduct a records audit as opposed to a covert audit. I accept the evidence of Mr. Petherick that covert audits are not always effective at detecting fraud, and records audits allow the Province to review a much greater number of test results and detect patterns in those results. I also accept the evidence of Mr. Dunphy that since there was such overwhelming evidence of fraud uncovered through the records audit, there was no need for a covert audit.
- [77] With respect to the 50 audits, and Mr. Chaudhary's knowledge that he was being audited, I reject the argument of Bombay Auto that there is simply no evidentiary basis for the submissions made by the Province. I find that the evidence supports the Province's submissions in that Mr. Chaudhary was cross-examined about these issues, Exhibit 7 indicates the test time and date of the 187 fraudulent tests, and the day of the week on which these days fell is a fact that can be judicially noticed by an arbitrator under section 21 of the *Arbitration Act*, 1991, and section 16 of the *Statutory Powers Procedures Act*. As the Supreme Court of Canada stated in *R. v. Find*:

“Therefore, the threshold for judicial notice is strict; a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy...”⁵

- [78] I find that the day of the week on which a date fell in the present case is capable of immediate and accurate demonstration by resort to a calendar and is not a matter that would be subject of debate among reasonable persons. As a result, I find that many of the falsified tests occurred on Saturdays and I judicially note that fact by reference to Exhibit 7 and a 2013 calendar.⁶ With respect to the apparent confusion between Repair Audits with OTU repairs, I find that Exhibit 6 identifies three “Service Call Audits”, which are audits performed during a service call, but it does not identify repairs performed on the OTU. It also identifies eight “Repair Audits” but these do not have anything to do with repairs to the OTU. These are audits of Bombay Auto relating to the repairs conducted on vehicles as a Drive Clean Repair Facility, as confirmed by Mr. Dunphy in his re-examination. In his Reply Witness Statement, Mr. Dunphy describes

⁵ *R. v. Find*, [2001] 1 SCR 863, at para. 48.

⁶ *R. v. O'Leary*, [2011] OJ No. 5485, at para 33.

these two types of audits and confirms the total number of each of the types of audits that occurred at the facility during the pertinent timeframe.

- [79] Mr. Chaudhary speculated that one of his clients, another mechanic, may have been responsible for using an OBD simulator without Mr. Chaudhary's knowledge. I agree with the Province that this is not a plausible explanation for these fraudulent tests, let alone 187 suspected falsified tests. The invoices relied on by Bombay Auto are billed to 9 different auto body shops or mechanics, each having different addresses. In addition, the repeating pattern of vehicle speed signal, throttle position sensor and CVN within the falsified test results is suggestive that only one simulator was being used. Furthermore, it is very unlikely that another mechanic could have installed and hidden the OBD simulator on different vehicles without Mr. Chaudhary's knowledge given the short periods of time between several of the falsified tests.
- [80] As evidence that clean scanning did not occur at the Bombay Auto facility, Mr. Chaudhary attempted to rely on the approximately 50 audits of the facility between November 16, 2012 and December 20, 2013, none of which identified clean scanning. Mr. Dunphy, however, stated, and I find, that the decision to terminate Bombay Auto's accreditation was not based on these audits but rather on post-test data analysis, namely, a records audit performed by David Petherick, which was broader in scope and more comprehensive than these other audits.
- [81] Mr. Chaudhary suggested that the anomalous data could be attributable to problems he experienced with the OTU, including, that the "black box" had to be changed a number of times, and that it was a demo machine. He stated that it had problems connecting to the internet, problems with the signature pad and pen, and gas bench and camera table. On cross-examination, however, Mr. Chaudhary agreed that he was speculating that it was a demo model, and that he had no records of these alleged problems with the equipment. In this regard, Mr. Petherick, as the equipment services contract manager for the Drive Clean program, explained that, contrary to Mr. Chaudhary's contention, he found only one record of the OBD communication module being replaced, on April 9, 2013. Mr. Petherick stated that, if the OTU is not properly functioning, testing cannot occur and, hence, any problems with the OTU cannot explain anomalous test data. He further explained that other service issues mentioned by Mr. Chaudhary are irrelevant to the OBD test, and, as a result, could not have affected the results either. When cross-examined on this matter, Mr. Chaudhary agreed.
- [82] As to whether the OTU was functioning properly, I accept the evidence of Mr. Petherick, and find, that the device was properly functioning and is not responsible for the data anomalies; that data anomalies cannot be attributed to a particular unit; that the variable between the normal and the anomalous results was the use of an OBD simulator; that the

OTU was operating correctly, and that a simulator was used for the second test referred to in the Case Study in Mr. Petherick's Witness Statement, Exhibit 1.

- [83] I also find that the data anomalies are not attributable to the Drive Clean database. I accept the evidence of Mr. Petherick, and find, that the data mismatches cannot be attributed to the DCIS database, given that the OBD data is transmitted from the vehicle computer to the OTU using standardized SAE error – correction protocols. These messages are not subject to alteration or distortion and they are either sent and received successfully or not at all.
- [84] I agree with the Province that although Mr. Chaudhary flatly denied engaging in clean scanning, his statement should be treated with caution and should be given limited weight, especially since Mr. Chaudhary has a direct interest in the outcome of this proceeding – namely, Bombay Auto's future as a Drive Clean Facility – and, as a result, he has a vested interest in denying involvement in clean scanning.
- [85] Mr. Chaudhary testified that he has a scan tool than can read OBD parameter data and diagnostic test codes from a vehicle's computer and that he uses it regularly. He admitted that this scan tool can be used to clear DTCs which if done twice in a row can be used to get a drive clean "conditional pass" without having to repair the vehicle. This, according to Mr. Chaudhary, is the cheapest, simplest way of bypassing the requirements of the Drive Clean Program. He stated that he has cleared OBD diagnostic trouble codes on behalf of clients, and that he has explained to clients how to do this in order to obtain a conditional pass without having to undergo repairs. He charges clients \$20.00 - \$30.00 for this service. Mr. Chaudhary contended that if he can circumvent the requirements of the Drive Clean program so easily without a simulator, why should he bother using a simulator.
- [86] I am unable to accept the submission of Bombay Auto that Mr. Chaudhary's explanation of the Conditional Pass Regime as authorized by the Ministry and what the owner of a vehicle is expected to do to obtain a Conditional Pass has been taken out of context by the Province. Nor do I accept the submission of Bombay Auto that Mr. Chaudhary explained that the inspector mechanic is allowed to plug into the OBD computer for test purposes, and that this is not tantamount to temporally manipulating the emissions – related or engine components of a vehicle either prior to or during the emissions test. I accept the position of the Province, and find that the Ministry absolutely does not authorize the issuing of conditional passes through the mechanism described by Mr. Chaudhary. This method of obtaining a conditional pass undermines the integrity of the Program and is contrary to the purpose, spirit and intent of the Drive Clean Program.
- [87] I agree with the Province that this procedure is also contrary to the SOP and the spirit and intent of the Drive Clean program because it permits polluting vehicles to remain on the

road without undergoing repairs. As readiness conditional passes are intended for vehicles that have problems getting ready, to intentionally render a vehicle unready for the purpose of tricking the OTU into issuing a conditional pass report, is a form of test fraud that circumvents the requirements of the Drive Clean Program, like clean scanning. The SOP provides that:

“Vehicles are required to be tested in the operating condition they were in when the DCF accepted them for emissions testing. DCFs are not permitted to temporarily manipulate the emission – related or engine components of a vehicle either prior or during the emissions test: SOP, Exhibit 1, p. 25

- [88] I agree with the Province, and find, that Mr. Chaudhary’s willingness to circumvent the SOP and the spirit and intent of the Drive Clean program through using a scan tool to clear DTCs undermines his credibility, as a Drive Clean Inspector and as a witness in this proceeding, and his assertion that Bombay Auto did not engage in test fraud.
- [89] I have considered the generally accepted factors in assessing the credibility of Mr. Chaudhary in this case, including his demeanor, ability and opportunity to observe, power of recollection, interest, bias, prejudice, sincerity, inconsistency and the reasonableness of his testimony when considered in the light of all of the evidence.⁷ The last factor has been of considerable assistance to me in the present case.
- [90] Mr. Chaudhary denied engaging in clean scanning. He was perplexed by the allegations of anomalous data allegedly generated at his facility with complex explanations of OBD parameter mismatches provided by Mr. Petherick. He admitted to having conducted the 30 tests that were being considered in depth by Mr. Petherick. He provided no compelling alternative explanation for the gross anomalous test data generated at Bombay Auto’s facility. He did not adduce any positive evidence in support of the speculative alternative explanations proffered by himself including, malfunctions, other mechanics being responsible for clean scanning, or by his counsel, including, wireless devices being capable of altering parameter data and the use of performance reflashes. I agree with Mr. Petherick, and find, that these do not provide a satisfactory explanation for the anomalous data. I find that Mr. Chaudhary’s evidence lacks harmony with the preponderance of the probabilities disclosed by the facts and circumstances of the present case. I further find that his explanation is not reasonable in the circumstances disclosed in the evidence, and that it conflicts with other evidence in this case.

⁷ *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at pp. 356-8, per O’Hallorna, J.A. (B.C.C.A.).

- [91] In my view, when assessed against the overwhelming technical and expert evidence before me supporting the termination of Bombay Auto's Performance Contract, which I accept, Mr. Chaudhary's denial of having engaged in clean scanning, merits little weight, especially given the considerable weight of the evidence that establishes that clean scanning occurred at the Bombay Auto facility 187 times in 2013.

CLEAN SCANNING IS A BREACH OF THE PERFORMANCE CONTRACT AND A VIOLATION OF APPLICABLE LEGISLATION

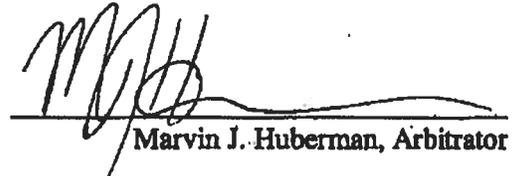
- [92] Based on the preponderance of the evidence, I find that Bombay Auto's Performance Contract was terminated because it falsified Drive Clean test results. The weight of the evidence establishes that rampant test fraud occurred at the Bombay Auto facility in 2013 through the use of a simulator device that enabled the facility to issue passing test results for vehicles that were not tested in accordance with the Drive Clean Program's Standard Operating Procedures. The evidence adduced by Bombay Auto failed to provide a compelling explanation for the anomalous test data generated at this facility.
- [93] By falsifying test results, Bombay Auto breached several provisions of the Performance Contract: sections 2.1, 2.2, 2.3, 2.4, and 7.1 thereof. Further, the submission of false information is a violation of section 184 of the *Environmental Protection Act* and constitutes an offence under section 186 of that Act. I find that Bombay Auto violated section 184 of the *Environmental Protection Act* and section 1.2 of O. Reg. 361/98 by indicating in a VIR that a vehicle meets the standards prescribed in section 9.0.1 of that regulation when the vehicle has not been tested in accordance with the regulation. I find that Bombay Auto breached this regulatory requirement and, as a result, section 2.4 of the Performance Contract.
- [94] By section 15 of the Performance Contract, the Province may immediately terminate the Performance Contract, at its sole discretion, if Bombay Auto breaches any provision of the contract.
- [95] I find that the Province terminated the Performance Contract in accordance with the contract's terms. By section 15.1 of the Performance Contract, the Province may in its sole discretion issue a Termination Notice immediately terminating the Performance Contract and revoking the accreditation of the Facility. A Termination Notice was issued by the Province, in accordance with the procedure for termination provided by the Performance Contract, on December 20, 2013.
- [96] I find that the Director exercised his discretion to terminate Bombay Auto's Performance Contract in a manner that was consistent with the Compliance Guidelines which provides

that the Drive Clean program has "a policy of zero tolerance from improper testing/repairing of vehicles; violations of the Performance Contract or submission of false information to the Ministry". A facility's accreditation will be terminated on a first occurrence of falsifying test results, in accordance with the escalating remedy schedule of the Compliance Guidelines.

CONCLUSION

- [97] For these reasons, I conclude that Bombay Auto was properly and validly terminated under the Performance Contract and pursuant to the applicable legislation.
- [98] Accordingly, the decision of the Director terminating Bombay Auto's Performance Contract is upheld and this appeal is dismissed.

Date: December 4, 2014



Marvin J. Huberman, Arbitrator