

**BETWEEN:**

**Mrs. S**

**Applicant**

**and**

**NON-MARINE UNDERWRITERS, MBR'S OF LLOYD'S**

**Insurer**

## **REASONS FOR DECISION**

**Before:** Beth Allen

**Heard:** March 15, 16, 17 and 18, 2004, at the offices of the Financial Services Commission of Ontario in Toronto. Written submissions were received by May 17, 2004.

**Appearances:** Jeffrey Raphael for Mrs. S  
David José for Non-Marine Underwriters, Mbr's of Lloyd's

**Issues:**

The Applicant, Mrs. S, was injured in a motor vehicle accident on July 9, 2001. She applied for and received statutory accident benefits from Non-Marine Underwriters, Mbr's of Lloyd's ("Lloyd's"), payable under the *Schedule*.<sup>1</sup> Lloyd's terminated weekly income replacement benefits on June 25, 2002. The Applicant claims entitlement to income replacement benefits during the 104-week period after the accident and during the post-104 week period, massage therapy, prescription and transportation expenses, housekeeping and home maintenance expenses, the cost of medical assessments, a special award and arbitration expenses. Lloyd's denies these claims and seeks its

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

arbitration expenses. 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.

The issues in this hearing are:

1. Is the Applicant entitled to income replacement benefits from June 26, 2002 to July 9, 2003, pursuant to section 4 of the *Schedule*?
2. Is the Applicant entitled to income replacement benefits from July 9, 2003 and onwards, pursuant to subsection 5(2)(b) of the *Schedule*?
3. Is the Applicant entitled to medical benefits, pursuant to section 14 of the *Schedule*, for the following items: \$350.00 for massage treatment under a March 16, 2002 treatment plan by Ms. Susan Scott; prescription expenses of \$1,043.47; and taxi transportation expenses of \$142.69?
4. Is the Applicant entitled to housekeeping and home maintenance expenses of \$6,950.00, pursuant to section 22 of the *Schedule*?
5. Is the Applicant entitled to the costs of assessment reports by Dr. Khadivi in the amount of \$735.70, by Dr. Celinski in the amount of \$2,412.85 and by Dr. Ogilvie-Harris in the amount of \$1,926.00, pursuant to section 24 of the *Schedule*?
6. Is Lloyd's liable to pay a special award, pursuant to subsection 282(10) of the *Insurance Act*?
7. Is the Applicant entitled to her arbitration expenses, pursuant to subsection 282(11) of the *Insurance Act*?
8. Is Lloyd's entitled to its arbitration expenses, pursuant to subsection 282(11) of the *Insurance Act*?
9. Is the Applicant entitled to interest on any overdue amounts, pursuant to subsection 46(2) of the *Schedule*?

**Result:**

1. The Applicant is entitled to income replacement benefits from June 26, 2002 until July 9, 2003, pursuant to section 4 of the *Schedule*.
2. The Applicant is not entitled to income replacement benefits from July 9, 2003 and onwards, pursuant to subsection 5(2)(b) of the *Schedule*.
3. The Applicant is entitled to \$350.00 for massage treatment under the March 16, 2002 treatment plan by Ms. Susan E. Scott; prescription expenses of \$1,043.47, and taxi transportation expenses of \$142.69, pursuant to section 14 of the *Schedule*.
4. The Applicant is entitled to housekeeping and home maintenance expenses of \$6,950.00 pursuant to section 22 of the *Schedule*.
5. The Applicant is entitled to the full costs of assessment reports by Dr. Khadivi of \$735.70 and by Dr. Celinski of \$2,412.85, and \$1,000.00 of the cost of Dr. Ogilvie-Harris's report, pursuant to section 24 of the *Schedule*.
6. Lloyd's is liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* in the amount of \$10,000 inclusive of interest.
7. The parties made no submissions as to expenses. I remain seized of this matter should the parties not settle this issue.
8. The Applicant is entitled to interest on any overdue amounts, calculated pursuant to subsection 46(2) of the *Schedule*.

## **EVIDENCE AND ANALYSIS:**

### **The Accident**

The Applicant, 53 years old at the time, was involved in a motor vehicle accident on July 9, 2001. The Applicant was driving at 50 to 55 kilometres per hour through a green light when a car made a left turn in front of her vehicle, resulting in her vehicle impacting the other vehicle in a T-bone collision. The air bag in her car deployed with impact. The Applicant testified that she did not recall the collision and that her last memory before impact was of seeing the other car in front of her. Her next memory was of the air bag in front of her face and of seeing an unknown woman approaching to assist her.

An ambulance arrived and transported her to the hospital where she was examined and released in two or three hours.

### **Pre-accident Employment and Other Activities**

Before the accident, for about seven years, the Applicant worked from home sewing leather bags for a company called Globecraft Inc. which position she claims she cannot do since the accident. The Applicant also argues that due to her physical, emotional and cognitive problems, she is completely disabled from performing any employment for which she is suited by education, training or experience. I will detail the particulars of the tasks of her sewing position below where I deal with income replacement benefit entitlement.

The Applicant's daughter, age 31, who resides with her mother, testified on her behalf. Concerning her daily activities, the Applicant testified, and her daughter confirmed, that since the accident she experiences pressure feelings in her head and poor concentration when she watches television or reads and, consequently, she can only do these activities for short periods at a time. She no longer drives

because of her fear of getting into another accident. The Applicant testified that she has difficulty walking since the accident, but she attempts to do so when she can.

The Applicant testified, and her daughter confirmed, that she has bad days and occasionally, good days. She stated that on bad days, she stays in bed crying, not able to do anything. On good days, she gets out of bed, gets dressed, has something to eat, goes to doctors' appointments, watches television or takes a short walk. The Applicant added that it is always a good day when she decides to take a walk.

### **The Applicant's Medical Conditions, Assessment and Treatment**

#### ***The Applicant's and Daughter's Testimony***

The Applicant testified that since the accident, she experiences constant headaches; persistent noises in her right ear; pain in her neck; pain in her shoulders, especially her right shoulder down to her right hand, rendering her arm numb; and pain in her lower back and knees, especially her right knee. The Applicant also complained that, since the accident, her right jaw occasionally locks when she is tired.

The Applicant stated that she has also experienced emotional problems since the accident. She testified that she is always dizzy, that "everything bothers her", and she "has trouble listening to people talking." She complained that she is fatigued and has problems concentrating since the accident. The Applicant also indicated that because of her pain, she has problems sleeping, often only sleeping for one hour a night when she takes medication. Her daughter testified that the crying, sad and helpless person that her mother has become since the accident, is not the active, proud mother she knew before. The daughter also stated that, since the accident, her mother calls her and her brother at work with complaints three and four times a day.

The Applicant testified that since the accident she has been prescribed numerous medications for pain, depression, insomnia and stomach discomfort that she did not take before the accident; namely: Amitriptyline (for depression and insomnia); Fluoxetine (for depression); Ibuprofen (for pain); Olanzapene (for depression); Lorazepam (for anxiety); Tylenol III (for pain), Acetaminophen (for pain); and Esomeprazole (for relief of stomach discomfort caused by other medications).

Regarding her pre-accident health, the Applicant stated that she did not experience noises in her ears, persistent headaches, pain in her jaw, dizziness, or neck, shoulder, arm or knee pain and numbness before the accident. She testified that she was "okay" emotionally before the accident, although she stated that she occasionally got upset. The Applicant conceded that she had problems with nervousness before the accident since the death of her brother in a car accident 27 years ago. From then until the present she has been prescribed Bromazepam to calm her down. She testified, however, that she had never received psychological or psychiatric treatment before the accident.

### ***Physical Assessments***

The Applicant underwent extensive medical assessments at the request of Dr. Kachooie, her counsel and Lloyd's.

Following the accident, the Applicant saw her, now retired, family doctor of 15 years, Dr. Dobrila Vujnovic. Dr. Vujnovic sent the Applicant to Dr. A. Kachooie, a physiatrist, who first saw the Applicant on July 18, 2001. In his initial report of July 18, 2001, Dr. Kachooie diagnosed "whiplash, complications with greater occipital neuralgia headaches, mechanical low back pain, patello femoral syndrome, query early degree of osteoarthritis of the knees." He recommended active physiotherapy, massage therapy, and strengthening and conditioning exercises.

Dr. Kachooie prepared a report dated September 18, 2001 in which he reported pain in her neck, shoulder and back; right hip, groin, buttock and lower extremity pain; as well as memory problems, dizziness, poor balance and fatigue. He reported that an EEG of her right lower extremity was normal. He diagnosed mild closed head injury, whiplash, mechanical low back pain and a sacroiliac joint disorder. In a report dated August 30, 2001, Dr. Kachooie indicated that a neurological examination revealed no detectable wasting or weakness. His diagnosis remained unchanged. He recommended active treatment, massage and strengthening, and a series of lumbosacral steroid injections for pain management.

Lloyd's commissioned an FAE by Functional Assessments Impartial Reports ("FAIR") which conducted an assessment on October 9, 2001 and prepared a report dated October 16, 2001, the purpose of which was to assess the Applicant's ability to return to her pre-accident sewing position. Mr. Ziyaad Khan, the kinesiologist who conducted the assessment, concluded that because the Applicant's efforts were submaximal during the assessment, he was not able to determine her ability to return to her pre-accident sewing and housekeeping duties or her need for transportation assistance.

Dr. Kachooie diagnosed closed head injury, cognitive difficulties, depression, post whiplash myofascial pain, mechanical low back pain and rotator cuff tendinitis in his December 20, 2001 report. He recommended active treatment, nerve blocks for her headaches and lumbosacral steroid injections.

Lloyd's retained Dr. Paul H. Grant, a general practitioner, to assess the Applicant. In a number of documents, including Explanations of Benefits Payable by Insurance Company, correspondence, and Lloyd's counsel's written submissions, Dr. Grant's reports are referred to as orthopaedic assessments. On Dr. Grant's reports, under his signature is "Orthopaedics & Sports Medicine" and he entitles supplementary reports as "Orthopaedic Addendum." The Applicant's counsel submitted, and I accept, that this is misleading since Dr. Grant is not an orthopaedic surgeon. Dr. D.J. Ogilvie-Harris, an orthopaedic surgeon, confirms this in his July 19, 2002 report. I therefore regard Dr. Grant as a general practitioner and do not accept Dr. Grant's opinions as orthopaedic opinions.

In his October 5, 2001 report, Dr. Grant noted the Applicant's headaches, neck, shoulder, low back and right arm and leg pain and numbness on the right side of her body. He reviewed background medical documents, including a physiotherapist report and treatment plan by The Rehab Centre, and a psychological report by Dr. Davila. Dr. Grant diagnosed WAD II whiplash and lumbar strain and stated that maximal recovery had been reached in these areas. He expressed concern about the Applicant's right shoulder condition, stated that he could not rule out a partial rotator cuff tear and recommended an ultrasound in this area, and pointed to the need for an orthopaedic assessment. In spite of the concern about the shoulder, Dr. Grant stated that the Applicant could return to most of her pre-accident activities, if she avoided prolonged overhead activities.

Dr. Grant did subsequent reports dated December 18, 2001 and January 25, 2002 in which he commented on the results of an ultrasound, dated November 5, 2001, and an MRI, dated January 5, 2002, conducted on the Applicant's right shoulder. Despite the MRI disclosing a rotator cuff tear, Dr. Grant maintained his opinion that the Applicant could return to her pre-accident activities, avoiding repetitive or prolonged overhead activity with her right upper extremity. He did not address the chronic pain and traumatic head injury diagnoses. Dr. Grant concluded that with pacing, the Applicant should be able to resume her housekeeping and activities of daily living and that she did not require taxi service.

As a result of Dr. Grant's opinion, Lloyd's terminated the Applicant's housekeeping and transportation benefits.

In his January 12, 2002 and March 15, 2002 reports, Dr. Kachooie disagreed with Dr. Grant's opinion. He pointed out that Dr. Grant's report is limited to "an orthopaedic assessment" of the Applicant's conditions under circumstances where, in Dr. Kachooie's opinion, the dominant problem is "traumatic brain injury syndrome, chronic pain and soft tissue pain disorder." Dr. Kachooie went on to say, "She has a constellation of functional difficulties arising from these injuries." Regarding the

Applicant's right shoulder condition, he noted that the ultrasound was negative for rotator cuff tear but indicated that her symptoms are consistent with rotator cuff tendinitis. (Dr. Kachooie had apparently not received the MRI report by the time of his report).

In January 2002, Dr. Kachooie pointed out that the Applicant continued to receive treatment for her injuries and requested that Lloyd's reinstate the housekeeping and transportation benefits until the Applicant attains maximum recovery. He recommended continued active treatment for pain management, nerve blocks for her headaches and cervical steroid injections. He opined that the Applicant "is limited, disabled at this point in time to return to any gainful employment."

In accordance with Dr. Kachooie's treatment recommendations, Ms. Scott, a registered physiotherapist with The Rehab Centre, submitted a treatment plan dated March 16, 2002, which requested massage treatment at a cost of \$350.00. Ms. Scott stated in a letter dated August 26, 2002 that the Applicant's range of motion of the cervical and lumbar spines continues to be limited in all directions with muscle tightness in the lumbar and cervical spines and shoulder muscles, bilaterally.

In response to Dr. Grant's report, the Applicant's counsel sent the Applicant to see Dr. Ogilvie-Harris, an orthopaedic surgeon who conducted an assessment on July 10, 2002 and prepared a report dated July 19, 2002. Dr. Ogilvie-Harris reviewed background medical documents including: emergency records, Dr. Kachooie's, Dr. Davila's and Dr. Vujnovic's notes, records and reports; Dr. Grant's October 5, 2001 and January 25, 2002 reports; an October 2001 functional capacities evaluation ("FCE"), and Dr. Marek J. Celinski's neuropsychological report dated June 14, 2002.

Dr. Ogilvie-Harris diagnosed soft tissue injuries to the cervical and lumbar spine and a possible rotator cuff tear of the shoulder which limited the Applicant's function. He noted however that the predominant pain in her shoulder is referable from the cervical spine. It appears that Dr. Ogilvie-Harris did not have the January 5, 2002 MRI report. Dr. Ogilvie-Harris concluded that because of the chronic nature of the

Applicant's symptoms, she did not have the physical capacity to carry out her housekeeping duties and pre-accident sewing tasks. He recommended house cleaning services and transportation assistance because of her difficulty driving.

Dr. Ogilvie-Harris pointed out, and the Applicant's counsel submitted, that Dr. Grant arrived at his opinion that the Applicant had reached maximum recovery without considering the chronic pain diagnosis or the significant functional limitations.

Lloyd's refused to fund Dr. Ogilvie-Harris's report.

In Dr. Kachooie's September 2003 report, he noted that the Applicant's condition seemed to have plateaued from both neuro-cognitive and physical standpoints and he recommended a maintenance treatment program.

### ***Psychological, Neuropsychological and Psychiatric Assessments***

Dr. Kachooie referred the Applicant to Dr. Rafaela Davila, a psychologist, to assess and treat the Applicant's psychological condition. She first saw the Applicant on July 23, 2001. Dr. Davila administered depression, anxiety and pain assessment tests. In a report dated July 30, 2001, Dr. Davila identified the following symptoms: headaches, back, arm, knees and pelvic pain; tightness in the jaw area; sleeping difficulties and nightmares; anxiety; depression; irritability; dizziness; fatigue; memory difficulties; problems with attention and concentration; and an inability to drive. Dr. Davila stated that her report is based on the Applicant's self-report and that she did not have the opportunity to review other professional opinions on the Applicant's condition.

Based on the Applicant's complaints, Dr. Davila diagnosed post traumatic stress disorder secondary to the accident. She recommended psychological intervention designed to assist the Applicant to cope

with pain, to reduce or eliminate her anxiety and depression, and to improve her cognitive function and sleep pattern. The Applicant attended 28 one-hour psychological treatment sessions with Dr. Davila from July 10, 2001 to February 22, 2002 to assess and treat any emotional and psychological issues that might interfere with the Applicant's rehabilitation. Dr. Davila recommended a neuropsychological assessment of the Applicant's cognitive complaints.

In response to Dr. Davila's assessment, Lloyd's sent the Applicant for an insurer's psychological assessment with Dr. Jonathan E. Siegel, a psychologist, who conducted an assessment on October 2, 2001 and prepared a report dated October 12, 2001. He disagreed with Dr. Davila's assessment and concluded the Applicant somatized her emotional conflicts. Dr. Siegel pointed to the medical evidence of the Applicant's pre-accident prescription for nerve medication and suggested that events other than the accident might be the source of her emotional problems.

Dr. Siegel concluded that the Applicant was not substantially disabled on an emotional level from performing her pre-accident activities of normal living or her pre-accident employment tasks and would not require transportation assistance. In Dr. Siegel's view, further therapy might have the effect of reinforcing perceptions of disability.

On Dr. Davila's recommendation, the Applicant's counsel sent the Applicant to see Dr. Celinski, a neuropsychologist, who conducted an assessment on May 7 and 17, 2002 for about four hours on each day and prepared a report dated June 14, 2002. Dr. Celinski did an extensive review of background medical documents including: the emergency hospital records; a disability certificate; physiatrist reports requested by the Applicant; psychological assessments requested by both the Applicant and Lloyd's; a dental assessment requested by the Applicant; an FAE and orthopaedic assessment requested by Lloyd's; and diagnostic testing reports. Dr. Celinski administered a number of standard neuropsychological measures and tests to assess her emotional functioning, her adjustment and motivation and her self-rating on the Rehabilitation Survey of Problems and Coping.

Dr. Celinski noted that shortly after the accident, the Applicant complained of constant crying; fear about her head feeling "like wood"; and tingling in her head, along her right side and in her arm and leg. Dr. Celinski reported that at the time of the assessment, the Applicant spoke of feeling pain, tingling, numbness and "electric shock feelings" in her head, and pain, tingling and numbness along her right side. The Applicant also reported pain in her neck, shoulder and lower back. Her cognitive complaints were tiredness; "fogginess" when she "puts pressure on herself"; noise sensitivity; poor concentration and memory; sleep interruption; poor appetite; loss of senses of taste and smell; and fear of driving. Dr. Celinski also interviewed the Applicant's daughter who confirmed the Applicant's report of cognitive and pain complaints. The daughter contrasted her mother's post-accident state with her view of her mother as a "sharp" person before the accident.

Dr. Celinski diagnosed pain disorder associated with both psychological factors and a general medical condition; chronic post traumatic stress disorder; probable mild brain trauma resulting in cognitive, emotional and personality changes; emotional stress caused by cognitive problems and a high pain and disability focus. He concluded that her high pain and disability focus are ongoing major barriers to her return to her former household activities and her job as a sewer. Dr. Celinski opined that, "Given the lack of treatment success in both physical and psychological domains and her resulting protracted recovery, her prognosis must remain poor."

Lloyd's refused to fund Dr. Celinski's report.

In 2002 and 2003, the Applicant attended at the Centenary Health Centre. She complained of dizziness, fatigue, sleeplessness, nightmares, headaches and electricity in her brain. Dr. C.M. Cruz, a psychiatrist with the Mental Health Department of the Centre, saw her in May 2002 and advised her to continue her Lorazepam and diagnosed anxiety disorder with hyperventilation. Dr. Cruz referred the Applicant to see Dr. E. Okyere, another psychiatrist, who saw her on April 16, 2003 and diagnosed post traumatic stress disorder, major depressive disorder and post traumatic headaches and increased her prescription for Amitriptyline and prescribed Gapapentin.

### ***The Disability DAC***

A Disability DAC, involving chiropractic, orthopaedic, neurological, psychiatric, occupational therapy and kinesiologist assessments, was conducted in April and May 2002 and prepared a report dated June 14, 2002. The purpose of the assessment was to assess whether the Applicant was substantially disabled from performing the essential tasks of her pre-accident job as a sewer. The assessors were unanimous that the Applicant was not substantially disabled from performing the essential tasks of this position.

Dr. E. English, an orthopaedic surgeon, found she was very pain-focussed and self-limiting during his assessment and that she demonstrated inconsistent outcomes during testing. He found from a musculoskeletal perspective, no objective findings of disability and concluded that she was not disabled from doing her sewing job. Dr. R. Finkel, a psychiatrist, noted the Applicant suffered from adjustment disorder and a depressed mood and found her not to be disabled from returning to her sewing tasks. Dr. F. Tyndel, a neurologist, found no objective neurological findings. Dr. Tyndel reported that he was aware that a right shoulder MRI report existed, but that he did not have the report. He, however, went on to state his assumption that the MRI did not disclose significant lesions or abnormalities. The FAE conducted by Ms. Sharon Pellow, an occupational therapist, and Mr. Jason McLachlan, a certified kinesiologist, concluded that the Applicant was self-limiting during the assessment and consequently they could not "determine whether a true impairment existed which would render her substantially disabled from performing her pre-accident job as a sewing machine operator."

As a result of the findings of the Disability DAC, Lloyd's terminated the Applicant's income replacement benefits effective June 25, 2002.

The Applicant's counsel raised a number of concerns about the Disability DAC, including questions about Lloyd's relationship with Dr. English and his involvement in the assessment process, and the DAC's failure to consider certain diagnoses in arriving at its conclusions.

At the commencement of the hearing, the Applicant's counsel objected to Lloyd's attempt to file a "supplemental report" by Dr. English dated March 10, 2004. The report was requested by Lloyd's counsel without the knowledge of the Applicant and her counsel. Dr. English directed that report solely to the attention of Lloyd's counsel. The Applicant's counsel pointed out that, in contrast to this, the June 14, 2002 DAC report was directed to the Applicant, her counsel, her medical practitioner and to Lloyd's, as required by subsection 43(4) of the *Schedule*.

Lloyd's counsel asked Dr. English to comment in the report on surveillance conducted on the Applicant in February 2004. The substance of the March 10, 2004 report deals with Dr. English's assessment of the Applicant's disability in view of her activities on the surveillance videotape. The Applicant's counsel argued that Dr. English's March 10, 2004 report was prepared in non-compliance with the Disability Designated Assessment Centre Guideline<sup>2</sup> ("the Disability DAC Guideline") and should not be admitted into evidence. The Applicant's counsel pointed to clause 2.3 of the Disability DAC Guideline which addresses the best practice of multi disciplinary DAC teams. Clause 2.3 states in part:

To the extent possible, this team should be a "constant" team who, over time, refines and perfects this joint decision-making process. Although each member of the team contributes assessment outcomes from his/her unique clinical perspective, disability determination requires the integration of assessment outcomes so that the combined impact of the claimant's disability can be considered.

The Applicant's counsel argued that the neutrality of the March 10, 2004 report is compromised by the fact it was requested by, prepared for and directed solely to Lloyd's counsel. He further submitted that the purpose of the Disability DAC Guideline is to discourage a multidiscipline team assessor from preparing assessments outside the team and, accordingly, Dr. English's report, and Lloyd's conduct in requesting the report, are in breach of the Commission's Disability DAC Guideline.

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<sup>2</sup>Prepared by the Minister's Committee on the Designated Assessment Centre System, April 2000.

Lloyd's counsel responded that he requested the report in response to three assessments the Applicant served on the Insurer one week before the hearing. He argued that I can admit the report, consider Dr. English's comments about the surveillance, and attribute to the report the weight I find it deserves.

I decided not to allow Dr. English's March 10, 2004 report into evidence. I find that Lloyd's conduct in requesting the report and Dr. English's conduct in preparing the report are in clear non-compliance with the Disability DAC Guideline and subsection 43(4) of the *Schedule*. The Disability DAC Guideline requires that the various assessors work as a "constant team", to the extent possible, to jointly refine and perfect the assessment decision-making process. Even assuming that the report met other requirements of the Disability DAC Guideline and the *Schedule*, Lloyd's counsel provided no persuasive evidence of why Dr. English had to prepare a report separate of the team. Clearly, Lloyd's counsel's and Dr. English's conduct break with the proper DAC assessment protocol.

Clause 6.3 of Appendix C of the Disability DAC Guideline reflects the intent of the DAC system to be fair and unbiased:

DACs conduct assessments for automobile accident claimants when claimants and their insurance company cannot agree and need an unbiased opinion. This means the assessment must be fair to both you (the insurance claimant) and your insurance company and give an opinion that is based on an appropriate and thorough assessment.

I therefore did not accept Dr. English's March 10, 2004 into evidence.

The Applicant's counsel also challenged the Disability DAC assessors' conclusions on the basis that the DAC assessors failed to consider the chronic pain diagnosis made by several of the Applicant's treating practitioners and assessors and the traumatic brain/head injury diagnosis made by Dr. Kachooie in January 2002 before the May 2002 DAC, and by Dr. Celinski in June 2002, just after the Disability DAC. The Applicant's counsel stated that he had faxed Dr. Kachooie's January 2002 report to the

Disability DAC on April 12, 2002, but the DAC assessors did not acknowledge or refer to this report in their assessment.

I accept that there is a reasonable concern around the Disability DAC assessors' failure to address the chronic pain diagnosis, since Dr. Kachooie made that diagnosis before the DAC assessment was conducted. However, since Dr. Celinski's diagnosis of traumatic head/brain injury post-dated the DAC assessment, the assessors could not have reviewed it. And since the Disability DAC was conducted in April and May 2002, and the Applicant's counsel faxed Dr. Kachooie's report containing the head/brain injury diagnosis on April 12, 2002, it is reasonably possible that the DAC assessors were not aware of and did not have this report for their review. I find therefore that it would not be reasonable to expect the Disability DAC assessors to have considered the head/brain injury diagnosis.

### ***MED/Rehab DACs***

A medical rehabilitation designated assessment centre ("MedRehab DAC") report, dated November 8, 2002, noted that the Applicant complained of headaches, neck pain, low back pain, right-sided arm and leg pain. Dr. Thomas John, a physiatrist, concluded that the Applicant was pain-focussed and de-conditioned with ongoing soft-tissue pain in her neck, right shoulder and low back with restricted movement in her right shoulder. The assessors further concluded that the disputed massage treatment recommended by Ms. Scott would have been reasonable and necessary for the Applicant's rehabilitation.

An oral maxillofacial MedRehab DAC assessment was conducted on May 9, 2002 to investigate the Applicant's jaw complaints. Dr. Kachooie had referred the Applicant to Dr. Vali Khadivi, a dentist/prosthodontist, who prepared a treatment plan dated September 24, 2001, and diagnosed temporomandibular disorder ("TMD"), tinnitus and headaches. He noted bilateral jaw pain, more pronounced on the right, and restricted mouth opening and recommended a stabilizing appliance,

physiotherapy, application of a heating pad, pain and muscle relaxant medication and stress management. He concluded that the condition is posttraumatic, secondary to the motor vehicle accident.

Lloyd's refused to fund Dr. Khadivi's report.

In response, Lloyd's sent the Applicant to be assessed by Dr. Joseph Friedlich, a specialist in oral and maxillofacial surgery, who conducted an assessment on October 31, 2001 and noted complaints of pain on the entire right side of the face with eating, exacerbated by chewing; clicking in the right temporomandibular joint; bilateral closed locks and headaches. Dr. Friedlich failed to identify any objective impairment of the maxillofacial region including the temporomandibular joints or muscles of mastication and found only dental neglect. He concluded that the Applicant was not disabled in any fashion as a result of a maxillofacial condition.

The Applicant requested a MED/Rehab DAC to address the jaw problem. Dr. H.I. Holmes, an oral maxillofacial surgeon, assessed the reasonableness and necessity of the oral appliance, lab fee, and the follow up 12-week course of adjustments recommended by Dr. Khadivi. Dr. Holmes also noted complaints of pronounced, constant, right-sided jaw pain, when talking, chewing with wide mouth opening and cracking and locking of the jaw and right ear pain. He diagnosed TMD leading to arthralgia, cervical myalgia, myalgia within the masticatory muscles as well as psychological problems influencing her symptomatology. He concluded that the jaw problem was likely secondary to the accident and supported as reasonable the treatment recommended by Dr. Khadivi involving orthotics.

### ***Post-104 Week Assessments***

The Applicant's counsel sent the Applicant for a neurological assessment on November 27, 2003 with Dr. Keith Meloff, a neurologist, who prepared a report dated December 4, 2003. He diagnosed

chronic pain syndrome with soft tissue pain, leading to disabling anxiety and depression. Dr. Meloff concluded that the Applicant is disabled emotionally from chronic pain and noted that he would not be able to recommend that she work. He also recommended assistance with her housekeeping activities.

Dr. Kachooie prepared a further report dated September 3, 2003, addressing post 104-week income replacement benefit entitlement, in which he concluded that the Applicant's injuries on both neurological and musculoskeletal levels are significant, causing her ongoing impairment and functional limitation "which are severe, prolonged and will persist throughout her life span." His prognosis for the Applicant was guarded to poor and he concluded that her symptoms would gradually deteriorate and that she "is limited, totally disabled and unemployable in any capacity." He recommended assistance for household activities.

In a letter dated March 1, 2003<sup>3</sup>, Dr. Vujnovic (the Applicant's then retired family doctor who treated her from July 10, 2001 to February 22, 2002) opined that during her treatment of the Applicant, she was totally disabled as a result of her accident.

Dr. Davila prepared a report dated February 7, 2004 to address post 104-week disability. She concluded that despite her 28 one-hour treatment sessions with the Applicant, the Applicant's condition did not improve since she continued to complain of pain in the same areas of her body and of the same emotional and cognitive symptoms. Dr. Davila concluded that the Applicant's condition is severe and chronic in nature and that the Applicant's emotional stress, anxiety and depression render her completely disabled from engaging in any employment for which she is reasonably suited by education, training or experience.

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<sup>3</sup>This letter contains a typographical error in that it indicates the date of the letter is "March 1, 2003." It is apparent from the contents of the letter that the date ought to be "March 1, 2004."

## REASONS FOR DECISION

### Income Replacement Benefits

#### ***Employment Tasks and Entitlement during the 104-week Post-Accident Period***

The Applicant claims entitlement to income replacement benefits during the period 104 weeks after the accident, pursuant to subsection 4, paragraph 1 of the *Schedule*, at the established rate of \$178.84 per week. This provision states:

4. The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications:
  1. The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment.

As noted earlier, the Applicant indicated that since the accident she is not able to do many of the activities required to do her sewing job. The Applicant testified that she worked about eight hours per day, five days per week, for a total 40 hours per week. Her employer provided her with a sewing machine and the materials to make leather bags. Globecraft would deliver two weeks' worth of work at a time and pick up the finished items every two weeks, leaving the next two weeks of work with the Applicant. The Applicant testified that she would complete 10 to 12 dozen pieces daily and would be paid \$5.00 to \$7.00 per dozen depending on the type of item.

The Applicant testified that she would be required to lift boxes of materials weighing approximately 35 pounds. While the Applicant was not required to pick up or deliver to the employer the boxes of materials and finished products, she had to carry them to the basement of her house, requiring her to

walk up and down stairs. The Applicant also testified that she had to frequently stoop, kneel and bend to pick up materials and the boxes, and that she had to untie the bundled materials and cut threads on items with scissors, which requires hand dexterity. The numbness, weakness and lack of flexibility in her right hand and fingers, and the numbness and pain in her right shoulder and arm, she testified, would affect her ability to perform those tasks.

The Applicant stated that when the employer came to pick up her work, she would always have the work completed. Mr. Bill Getsos, her employer, testified on her behalf. He confirmed in testimony and in a letter dated February 4, 2004, and the daughter confirmed, that before the accident, the Applicant was a very hard worker, never turned down work and had no difficulty completing tasks on time. The Applicant testified that this changed after the accident in that she was no longer able to do her sewing job. Mr. Getsos testified that there was work for the Applicant after the accident which she could not do because of her injuries.

The Applicant testified that her dizziness and headaches would be aggravated if she lowered her head as she was required to do when sitting at the sewing machine sewing the bags. She testified that she has therefore not attempted to sew for Globecraft, or to do any other job because of her depression and pain. The Applicant also testified that she cannot sit for long periods or work at the speed required to complete her work.

Lloyd's counsel raised a causation issue. He referred to Dr. Vujnovic's notes and records for 1999, 2000 and 2001 and questioned the Applicant about pre-accident stressors in her life unrelated to the accident, including her husband's unemployment, anxiousness about her unmarried children, the death of her brother and her problems with dependency on the drug Bromazepam. The Applicant downplayed the stress caused by worries about her husband and children, stating that these matters concerned her but were not overly stressful. The Applicant testified about suffering from depression and nervousness over the death of her brother 27 years ago, stating that since his death, she took

Bromazepam, a half tablet about three times per week for 23 years to calm her down during the day if she gets nervous. Lloyd's counsel pointed to concerns expressed in Dr. Vujnovic's notes about dependency on Bromazepam and the Applicant's resistance to accepting Dr. Vujnovic's recommendation to see a psychiatrist for this. The Applicant admitted to taking the medication on a regular basis because she had grown "so used to them", but stated that this did not interfere with her job.

Lloyd's counsel raised questions from pre-accident medical records about leg and lower back pain. The Applicant explained that she suffered from leg pain due to a varicose vein condition and once she had an operation, the problem resolved. Concerning her lower back pain, she testified that her doctor prescribed a back brace and a chair cushion which she used when she sewed to alleviate her back pain. The Applicant stated, and her daughter confirmed, that the pre-accident stress, lower back and leg pain did not prevent the Applicant from performing the tasks of her sewing job or her housekeeping activities.

Lloyd's counsel also pointed to video surveillance commissioned by Lloyd's that captures the Applicant on February 5, 2004 performing household duties; and on February 7, 2004, leaving her home, entering a car as a passenger with her daughter, and approaching and leaving a clinic. The first videotape depicts the Applicant going into and out of her house several times to retrieve several blankets which she shakes, one at a time, on the front porch of her house at about 9:46 a.m. She testified that her husband and children were at home at the time. The second videotape shows the Applicant enter the front passenger's seat of the car and leave the car when it arrives at the clinic. The Applicant then leaves the car and unassisted by her daughter, walks into the clinic and climbs the stairs apparently not holding onto the railing.

Lloyd's counsel submitted that the surveillance reveals that the Applicant has much greater physical capacity and mobility than she admits. The Applicant's counsel argued that the video surveillance does not refute the evidence of the Applicant's disability.

***Findings and Conclusion on Entitlement during the 104-Week Period***

After a careful review of the evidence, I conclude that the Applicant suffers a substantial inability on physical, psychological and cognitive levels to perform the essential tasks of her sewing job.

I accept that the Applicant's job entails sewing 10 to 12 dozen leather purses and other articles daily. I accept the job involves the following tasks and activities:

- working at quick speeds to meet her quotas;
- lifting and carrying 35 pound boxes from shelf to shoulder level;
- climbing up and down the basement stairs to store and retrieve these boxes;
- frequently stooping, kneeling and bending to pick up materials from the boxes;
- sitting for prolonged periods of time at the sewing machine while sewing;
- sitting with her head lowered while sewing;
- frequent use of her right hand to untie bundled materials; and
- frequent use of her right hand to use scissors to cut threads.

The evidence is that the Applicant was involved in a relatively high-impact accident where her vehicle struck the front right of the other vehicle, causing her air bag to deploy in her face. She reported being very disoriented and dizzy following the accident, although hospital emergency records note no loss of consciousness. Following the accident, medical reports indicate the Applicant reported headaches, back, neck, right jaw and knee pain, sleeping problems; nightmares, depression and anxiety. She also reported a right shoulder problem and right side extremity numbness and weakness. Dr. Kachooie diagnosed traumatic brain injury syndrome, chronic pain and soft tissue pain disorder and referred her to a psychologist, who recommended a neuropsychologist to assess any psychological or cognitive barriers to her rehabilitation.

The Applicant's oral testimony about her physical, emotional and cognitive conditions was basically consistent with the complaints she made to her doctors over the years. Dr. Kachooie has seen the Applicant from immediately after the accident to the present regarding her post-accident health.

Where his evidence and opinions differ from Lloyd's assessors and the DAC assessors on the Applicant's condition during the 104-week period, I prefer the opinions of Dr. Kachooie. Lloyd's assessors and the DAC examiners saw the Applicant for only a few hours, each on one occasion, and I find their conclusions are limited by this reality

I accept the opinions of Dr. Kachooie, a physiatrist, over that of Lloyd's assessor Dr. Grant, a general practitioner, and those of the Disability DAC assessors. I find that Dr. Kachooie's opinion – that the Applicant suffers from a disabling chronic soft tissue pain disorder which prevents her from performing her sewing machine operator job and her housekeeping chores – is consistent with other medical evidence and the Applicant's and her daughter's oral evidence. I therefore accept the chronic pain diagnosis. Regarding the head/brain trauma diagnosis, I find Dr. Kachooie, as a physiatrist, is not qualified to render an opinion on brain impairment. However, I accept Dr. Celinski's neuropsychological diagnosis of probable mild brain trauma.

I find Dr. Grant's and the Disability DAC's reports flawed by their failure to consider the chronic pain diagnosis in view of this diagnosis having been made early on in her treatment.

It is not clear from Dr. Grant's reports which background medical documentation he referred to in arriving at his opinion. Whether Lloyd's failed to provide Dr. Kachooie's diagnosis to Dr. Grant, or he had the diagnosis and failed to consider it, I find is not clear. However, the value of his report is reduced by the lack of consideration of this diagnosis.

I come to a similar conclusion with respect to the Disability DAC report. It appears that the assessors reported having only Dr. Kachooie's earlier August 30, 2001 report and treatment plan which do not contain the chronic pain diagnosis. Dr. Kachooie did several subsequent reports and treatment plans that contain that diagnosis. Again, whether the Applicant and Lloyd's failed to provide the diagnosis to the DAC assessors or the assessors had the diagnosis and failed to consider it, is not apparent. Earlier I found it was not clear whether the Disability DAC assessors received Dr. Kachooie's January 2002

report, which the Applicant's counsel indicated he had faxed. According to the Applicant's assessors and treating practitioners, chronic pain is a central aspect of the Applicant's disability. I therefore find the value of the Disability DAC's report is limited by not having considered this diagnosis.

The Disability DAC assessment is also weakened by the fact that the assessors were aware of, but did not have the January 5, 2002 MRI of the Applicant's right shoulder, again, a condition that other medical documentation, and the Applicant's self-report, indicate is a feature of her disability.

The Guidelines for Designated Assessment Centres<sup>4</sup> ("Guidelines for DACs") provide that both the insured person and the insurer have a responsibility to ensure the DAC assessors have complete and up-to-date medical documentation on which to base their assessment of an insured person's disability. The Guidelines for DACs, however, also place a responsibility on DACs to: "[e]nsure that the information in the referral package is complete, up-to-date and accurate. If information is missing, the insurance company or the claimant must be notified quickly and asked to provide it."

I find it incumbent on DAC assessors to request documentation it is aware is missing and to inquire about the existence of documentation that might be helpful in completing the insured person's health picture in view of their responsibility to provide accurate and complete assessments. However, that the DAC has a responsibility to request missing documentation, I find, does not excuse any dereliction on the part of an insured person or insurer for not providing critical documentation.

Regarding the testimony of the Applicant and her daughter, I find they testified consistently and credibly about the physical barriers to the Applicant performing her sewing job. I therefore accept the evidence that the Applicant's chronic pain condition, her back, right arm pain and headaches would significantly

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<sup>4</sup>Ontario Insurance Commission Guidelines for Designated Assessment Centres to Conduct Assessments for Accidents on or after November 1, 1996

limit her ability to sit for prolonged periods of time with her head bent down and would prevent her from doing the constant bending, kneeling, and stooping to pick up materials. I also accept that the numbness and weakness and pain in her right shoulder, hand, arm and leg would hamper the tasks requiring hand dexterity, carrying boxes and climbing stairs.

I also prefer the opinion of Dr. Davila, a psychologist, over the opinions of the DAC psychiatrist and the psychologist who assessed the Applicant on Lloyd's behalf, because these assessors each saw the Applicant only on one occasion. I give Dr. Davila's opinion more weight on the basis that she arrived at her opinion after assessing and treating the Applicant over 28 one-hour sessions from July 10, 2001 to February 22, 2002. I accept Dr. Davila's opinion on the Applicant's disability in her February 7, 2004 report only insofar as it relates to the Applicant's functional abilities during the 104-week period after the accident.<sup>5</sup> She stated, consistent with the Applicant's self-report, that due to her psychological and emotional problems, the Applicant is disabled from resuming her sewing position. Further support for the Applicant's position is found in Dr. Okyere's assessment conducted on April 16, 2003 in which he opined that the accident was the principal cause of her post traumatic stress disorder, major depressive disorder and post traumatic headaches.

I also accept Dr. Celinski's neuropsychological opinion that the Applicant suffers from a pain disorder associated with both psychological factors and a general medical condition; a chronic post traumatic stress disorder; a probable mild brain trauma resulting in cognitive, emotional and personality changes; emotional stress caused by cognitive problems and a high pain and disability focus. I give some weight to Dr. Celinski's opinion because he conducted an eight-hour assessment over two days, during which he interviewed the Applicant and her daughter, administered tests and did an extensive review of the Applicant's medical background. I accept Dr. Celinski's opinion, supported by the Applicant's

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<sup>5</sup>Dr. Davila prepared a report dated February 7, 2004 (which I discuss below in relation to the Applicant's post-104 week ability) where she opines that the Applicant meets the "complete inability test." It logically flows from this that Dr. Davila's opinion would be that the Applicant would be disabled from doing her sewing job.

testimony, that the Applicant's high pain and disability focus present major barriers to her return to her former household and occupational activities as a sewing machine operator. I find it stands to reason that her dizziness would be aggravated by bending her head down while sewing; that her fatigue due to sleeplessness, anxiety and depression would affect her motivation and hence the speed required to meet her quotas.

I did not find Lloyd's causation arguments very persuasive. Lloyd's argued that the Applicant's pre-accident physical and emotional conditions prevented her from returning to her job and not her injuries from the car accident. I do not accept this submission. I was persuaded by the evidence that the Applicant was able to do her sewing job for many years before the accident. She testified and her daughter supported her evidence, that despite her pre-existing back, varicose vein, and nervous conditions, she could always do her job and meet her sewing quotas. Her employer supported that evidence, testifying that before the accident, the Applicant was a very hard-working and efficient worker who never turned down work. The Applicant's evidence is, and I find, that her accident-related injuries changed her circumstances so that she could no longer perform the essential tasks of her pre-accident sewing job.

I also do not put a great deal of weight on the video surveillance evidence. I find that it shows the Applicant's activities during a very short time on two different days. Although the Applicant appeared more active in these videos than how she described most of her days, she did say she had some good days, which the activity on the video could reasonably reflect. In any event, I do not find the video evidence to be sufficiently weighty as to overcome the substantial evidence of her disability.

The medical evidence establishes that the Applicant continued to be substantially unable to perform the essential tasks of her sewing job up to July 9, 2003, the 104-week point after the accident.

As a result, I find the Applicant is entitled to income replacement benefits at the rate of \$178.84 per week, pursuant to section 4 of the *Schedule*, from the date of termination, June 25, 2002, until July 9, 2003, the end of the 104-week period.

### ***Entitlement After the 104-Week Post Accident Point***

The Applicant also claims entitlement to ongoing income replacement benefits after the 104-week point after the accident. Lloyd's submits that the Applicant does not satisfy the post 104-week test. The Applicant claims entitlement pursuant to subsection 5(1) and 5(2)(b) of the *Schedule* which states as follows:

5. (1) Subject to subsection (2), an income replacement benefit is payable during the period that the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 4.
- (2) The insurer is not required to pay an income replacement benefit,  
...  
(b) for any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience;...

The Applicant, who was 53 years of age at the time of the accident, testified that she completed grade 12 before emigrating from Macedonia to Canada about 15 years ago. She took "English As a Second Language Courses" for about six or seven months after arriving in Canada. She speaks some English but used the services of a Macedonian interpreter during the hearing. The Applicant testified that the only work experience she has had in her working life has been as a sewing machine operator.

The Applicant testified that she cannot do any other type of work because she is not qualified to do anything but sewing. The Applicant's counsel sought opinions from a number of medical practitioners on this issue which I find did not succeed in advancing the Applicant's case.

As noted earlier, the Applicant's past family doctor, Dr. Vujnovic, provided an opinion on the Applicant's eligibility for income replacement benefits under the complete inability test. In a very brief letter dated March 1, 2004, Dr. Vujnovic (the Applicant's family doctor from July 10, 2001 to February 22, 2002) opined that the Applicant was totally disabled during that period. I did not find this opinion very helpful. From a very basic level, it failed to even identify the aspects of the Applicant's medical status that led to her opinion. Dr. Vujnovic's letter did not consider the employment barriers created by the Applicant's functional limitations.

As well, I did not find Dr. Okyere's February 2, 2004 psychiatric report particularly persuasive. He provided a prognosis of poor and concluded the Applicant met the complete inability test. He focussed briefly on her ability to do some tasks of her sewing job, and simply added that she would not be able to engage in any other type of employment.

In her February 7, 2004 psychological report, Dr. Davila concluded that from 2001 the Applicant has continued to suffer from chronic, severe anxiety, depression and poor pain coping skills and found the Applicant psychologically, completely disabled. I also did not find Dr. Davila's opinion very helpful because she also briefly reviewed the Applicant's medical status and simply added the conclusion that she meets the complete inability test without consideration of how her psychological limitations would prevent her from doing any type of work.

It is common ground that the complete inability test is difficult to meet. Commission cases have held that the complete inability test is a stricter test than the substantial inability test applicable to the 104-week

period after the accident. I find an applicant cannot satisfy the weightiness of the post-104 week test by simply presenting bald, unsubstantiated medical opinions. A finding of complete inability to do any type of work (a person is qualified to do by education, training or experience), I conclude, should be supported by some vocational evidence that takes into account the person's educational background, skills, and employment experience in relation to the job market in the assessment of their medical status and abilities. I received no such evidence from the Applicant.

### ***Conclusion***

Although the Applicant testified that she was unable to do her sewing job or any other kind of work, I am not persuaded by the evidence before me that the Applicant meets the complete inability test. For these reasons, I find that the Applicant is not entitled to post 104-week income replacement benefits pursuant to subsection 5(1) and (2)(b) of the *Schedule*.

### **Medical Claims – Section 14**

The Applicant claims the cost of massage treatment, prescriptions, and transportation expenses related to medical appointments, pursuant to section 14 of the *Schedule*. The relevant parts of section 14 are as follows:

- 14. (1)** The insurer shall pay an insured person who sustains an impairment as a result of an accident a medical benefit.
- (2)** The medical benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,  
...  
**(b)** chiropractic, psychological, occupational therapy and physiotherapy services;

- (c) medication;
- ...
- (g) transportation for the insured person to and from treatment sessions, including transportation for an aide or attendant;

### ***Massage***

The Applicant claims \$350.00 for massage treatments recommended by Ms. Susan E. Scott, a physiotherapist, in a treatment plan dated March 16, 2002. The Applicant was diagnosed by both her physical, medical, psychological and psychiatric assessors with chronic pain syndrome affecting various parts of her body. The assessors have largely supported Ms. Scott's recommendation for massage treatments for this condition. As well, the Med/Rehab DAC report of November 8, 2002 also recommends Ms. Scott's March 16, 2002 treatment plan as reasonable and necessary. Further, the Applicant testified that while the massage did not cure her pain, it did alleviate it. Lloyd's did not present an opinion that specifically ruled this type of treatment out as unreasonable and unnecessary. I find the cost of this treatment plan reasonable.

The Applicant is therefore entitled under subsection 14 (2)(b) of the *Schedule* to the \$350.00 cost of massage treatments.

### ***Prescription Expenses***

The Applicant submitted prescription receipts for July, August and September 2002 totalling \$1,043.47 for Amitriptyline, Fluoxetine, Ibuprofen, Olanzapene, Lorazepam, Tylenol III, Acetaminophen, and Esomeprazole. In a letter dated February 8, 2002, Dr. Kachooie states that the Applicant's prescriptions for Lorazepam, Amitriptyline and Fluoxetine were prescribed for sleep management,

depression and anxiety as a direct result of the accident. Dr. Kachooie concludes that these medications are “necessary and essential” for the treatment and management of her pain and depression. The Applicant’s psychiatric medical practitioners also prescribed Olanzapene for accident-related depression; and those that treated her physical conditions also prescribed Ibuprofen and Acetaminophen for accident-related pain, and Esomeprazole for stomach relief from the effects of the other medications. Lloyd’s did not present an opinion that these prescriptions were not reasonable or necessary.

I therefore conclude that the Applicant is entitled to the full cost of \$1,043.47 for these prescriptions pursuant to subsection 14 (2)(c) of the *Schedule*.

### ***Transportation Expenses***

The Applicant submitted into evidence taxi receipts for February, March, April and May 2002 in the amount of \$142.69 for expenses she paid going to and from appointments at the rehabilitation facility, Scarborough Centenary Hospital, Dr. Davila’s office and insurer’s assessments. On behalf of Lloyd’s, Dr. Grant and Dr. Siegel opined that the Applicant did not need transportation service.

In arriving at my decision on this matter, I gave weight to: a note dated February 8, 2002 by Dr. Kachooie where he recommends the Applicant use taxi service to and from medical and rehabilitation appointments; Dr. Davila’s opinion in her July 30, 2001 report where she noted an inability to drive due to problems with attention and concentration; the Applicant’s evidence of her fear of driving since the accident; and her evidence of the barriers to taking public transportation caused by her accident-related emotional and physical problems. I found this evidence more persuasive than Dr. Grant’s and

Dr. Siegel's opinions. Based on the Applicant's evidence and the minimal amount claimed, I find the Applicant is entitled to full compensation for the taxi fares pursuant to subsection 14 (2)(g) of the *Schedule*.

### **Housekeeping and Home Maintenance Claim – Section 22**

The Applicant claims housekeeping and home maintenance expenses pursuant to section 22 of the *Schedule* for the period from November 5, 2001 until June 27, 2003. Section 22 provides in its relevant part:

- 22. (1)** The insurer shall pay for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains an impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident.
- (2)** The amount payable under this section shall not exceed \$100 per week.

In his February 8, 2002 note, Dr. Kachooie recommended housekeeping services for the Applicant from 12 to 19 hours per week for an indefinite period.

The Applicant testified, and her daughter confirmed, that she performed the greatest part of the housekeeping and home maintenance tasks before the accident. She stated that her pre-accident back and emotional problems never prevented her from doing her homemaking tasks. She described her home as having two storeys and a basement, four bedrooms, two bathrooms, with front and back yards with lawns, and a driveway. She testified that before the accident, she never paid for housekeeping and

home maintenance services. The Applicant is married with two children, a daughter, aged 31 and a son, aged 38. She stated that her children would help from time to time and her husband would do "a little bit." The Applicant stated that she cooked the meals, did laundry, vacuumed, cleaned the bathrooms and kitchen and did the grocery shopping – in her words, "I did everything." She stated that if her husband was not available to do snow removal, she would do that as well.

The Applicant testified that since the accident, apart from a little dusting, she has not been able to do any of those tasks. She testified that she hired Ms. Kathleen Trevor to do housekeeping chores, a woman to whom her daughter introduced her and whom she did not know before the accident.

The Applicant claims to have paid a total of \$6,950.00 to Ms. Trevor. At the hearing, she filed copies of receipts for this amount. According to the receipts, the Applicant paid Ms. Trevor \$100 per week from November 5, 2001 until September 2002 and \$50 per week from September 2002 until June 27, 2003. According to the Applicant's testimony, during the first period, Ms. Trevor cleaned the house, vacuumed, cooked and did laundry, five days per week, for about 15 hours per week from, 10:00 a.m. to 1:00 p.m. each day. During the second period, Ms. Trevor performed the same tasks that she did during the initial period, but she came to the house less often. Since June 27, 2003, according to the Applicant, her husband and children have performed these tasks.

Medical practitioners who assessed the Applicant from both physical and psychological standpoints concluded, and the Applicant and her daughter testified, that there were physical, psychological and cognitive obstacles to the Applicant doing household chores after the accident. Lloyd's provided the opinion of Dr. Grant that she did not require housekeeping services. I find the Applicant's evidence of her need for these services more persuasive than Dr. Grant's opinion. I also find the amount of Applicant's claim to be reasonable. The house is a substantial size, having two storeys and a basement,

four bedrooms and two bathrooms. I accept the Applicant's and her daughter's evidence that before the accident, the Applicant did substantially all of the housekeeping chores. For these reasons, and given the chronic and limiting nature of her medical conditions, I find charging for services at the maximum \$100 per month rate for about nine months, and then at half that rate for a further nine months to be reasonable.

I therefore find that the Applicant is entitled pursuant to section 22 of the *Schedule* to the \$6,950.00 amount she claims for housekeeping and home maintenance benefits for the period from November 5, 2001 until June 27, 2003.

### **Cost of Examinations – Section 24 Claims**

The Applicant claims benefits under section 24 of the *Schedule* for the cost of a prosthodontist assessment dated September 24, 2001 by Dr. Khadivi, the cost of a neuropsychological assessment dated June 14, 2002 by Dr. Celinski, and the cost of an orthopaedic assessment dated July 19, 2002 by Dr. Ogilvie-Harris.

Section 24 in its relevant part provides:

- 24. (1)** The insurer shall pay for all reasonable expenses incurred by or on behalf of an insured person for the purpose of this Regulation in obtaining and attending an examination or assessment or in obtaining a certificate, report or treatment plan, including,
- (a) fees charged by a person who conducts an examination or assessment or provides a certificate, report or treatment plan; ...

***Dr. Vali Khadivi's Report***

The Applicant claims the \$735.70 cost of the examination by Dr. Vali Khadivi. As noted earlier, Dr. Kachooie referred the Applicant to Dr. Khadivi, whom she saw once on September 24, 2001 for an assessment of her jaw condition. In his report of the same date, he assessed the Applicant and diagnosed temporomandibular disorder (TMD), tinnitus and headaches secondary to the motor vehicle accident.

I considered that the Applicant began complaining about jaw pain, headaches and ear problems shortly after the accident and for this reason, I find it was reasonable for Dr. Kachooie to have sent her for the assessment. Ultimately, Dr. Khadivi diagnosed an ear condition caused by the accident. Lloyd's offers the opinion of Dr. Friedlich who disagreed that the Applicant has a jaw condition. Subsequently, in a Med/Rehab DAC conducted on May 9, 2002, Dr. Holmes, in his report of July 29, 2002, diagnosed TMD and concluded that the jaw problem was likely secondary to the accident. Dr. Holmes agreed with the orthotics treatment recommended by Dr. Khadivi. I also find the amount charged for Dr. Khadivi's report to be reasonable.

I find that Dr. Khadivi's report was valuable to developing an understanding of the Applicant's jaw complaints, and I find, therefore, that the Applicant is entitled to the \$735.70 cost of Dr. Khadivi's report under section 24 of the *Schedule*.

***Dr. Marek Celinski's Report***

The Applicant claims the \$2,412.85 cost of the assessment by Dr. Marek Celinski.

In arriving at my decision on this matter, I considered that the Applicant's psychologist, Dr. Davila, recommended a neurological assessment in view of the deployment of the air bag in the Applicant's face in the accident and her post trauma symptoms of a brief loss of consciousness, nausea and a nose bleed. Dr. Celinski's June 14, 2002 report addressed Dr. Davila's concerns and found accident-related chronic pain and psychological and cognitive problems. This was the only neuropsychological assessment conducted, since neither an insurer's examination nor a DAC assessment in this specialty was conducted to investigate the Applicant's symptoms. Dr. Celinski's assessment was therefore important to understanding many of the Applicant's symptoms and complaints.

I therefore find Dr. Celinski's report justifiable and reasonable under the circumstances and the Applicant is entitled to the \$2,412.85 cost of Dr. Celinski's report pursuant to section 24 of the *Schedule*.

***Dr. D. J. Ogilvie-Harris's Report***

The Applicant claims the \$1,926.00 cost of Dr. Ogilvie-Harris's orthopaedic report of July 19, 2002. The Applicant's counsel sent the Applicant for an orthopaedic assessment by Dr. Ogilvie-Harris in response to Dr. Grant's reports. This was the first orthopaedic assessment conducted on the Applicant's behalf to investigate her headaches and back, right shoulder, knee and arm complaints. I therefore find it was reasonable for the Applicant to request the assessment and she is therefore entitled to the reasonable cost of this report.

However, I find the cost of the report to be somewhat excessive. The duration of the assessment is not evident from the report. I find the report reflects a rather cursory review of the Applicant's complaints and medical background, and his examination of the Applicant's right shoulder, spine and knees lacks

detail and depth which, I find, detracts from its medical value. I therefore find the cost charged for this report to be unreasonable.

For these reasons I find that the Applicant is entitled to \$1,000.00 for Dr. Ogilvie-Harris's report pursuant to section 24 of the *Schedule*.

**SPECIAL AWARD:**

The Applicant claims a special award under subsection 282(10) of the *Insurance Act*. The Applicant's counsel first made the claim for a special award at the commencement of the arbitration hearing. Lloyd's counsel objected to the Applicant's counsel introducing this issue without prior notice to the Insurer. I therefore gave the parties time to prepare written submissions on the issue. Lloyd's counsel provided written submissions dated April 19, 2004 and, in a letter dated May 17, 2004, the Applicant's counsel declined to add to the oral submissions he made at the hearing.

Subsection 282(10) of the *Insurance Act* provides arbitrators with the authority to consider an insurer's conduct in deciding whether to impose an award under certain circumstances.

- 282. (10)** If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

## **The Applicant's Submissions**

The Applicant claims a special award on several bases, namely Lloyd's unreasonable refusal to pay income replacement benefits and to fund expenses for massage treatment, prescriptions, transportation and housekeeping and home maintenance.

The Applicant's counsel made several submissions regarding Lloyd's conduct in withholding income replacement benefits.

First, he argued that in the face of opinions, both before and after benefit termination, from the family physician, a physiatrist, a psychologist, psychiatrists, a neurologist and a neuropsychologist – collectively finding the Applicant disabled physically, emotionally and cognitively from performing her sewing job – Lloyd's maintained its refusal to pay or reinstate benefits.

Second, the Applicant argues that Lloyd's preferred to rely on Dr. Grant's opinion that the Applicant is not disabled and terminated benefits, despite the suspicion Dr. Grant expressed in his reports that the Applicant had a partial rotator cuff tear which he stated required an orthopaedic assessment. The Applicant's counsel raised the question as to how Dr. Grant could recommend termination of benefits, while seemingly disqualifying himself by pointing to the need for a follow up orthopaedic assessment. As it turns out, the January 5, 2002 MRI report confirms a rotator cuff tear and Lloyd's still terminated income replacement and housekeeping benefits.

Third, the Applicant's counsel also submitted that Lloyd's conduct in unilaterally requesting Dr. English, the Disability DAC orthopaedic assessor, to prepare an opinion on the Applicant's disability based on the surveillance, should also attract a special award. As noted earlier, the Applicant's counsel

submitted, and I accepted, that this conduct was in non-compliance with the Commission's Disability DAC Guidelines. He argued that this conduct tainted the Disability DAC assessment.

Concerning Lloyd's withholding of funding for massage treatment, the Applicant argued that Lloyd's ignored the opinions of the Applicant's medical practitioners, who treated the Applicant for physical and emotional conditions, that she would benefit from massage. He also submitted that Lloyd's failed to acknowledge the November 8, 2002 opinion of the Med/Rehab DAC assessors who found that the massage treatment would have been reasonable and necessary for the Applicant's recovery. The Applicant's counsel submits that this conduct should attract a special award.

Regarding the refusal to pay the Applicant's \$1,043.47 claim for prescriptions, the Applicant's counsel submitted that the Applicant submitted three notes from Dr. Kachooie prescribing the claimed medication for accident-related conditions. The Applicant's counsel submitted that Lloyd's is liable to pay a special award for failing to fund this expense when it lacked an opinion that the medication was not reasonably required because of the accident.

The Applicant's counsel makes a similar argument with respect to the Applicant's \$142.69 claim for taxi expenses. He pointed out that the Applicant submitted opinions to Lloyd's from several medical assessors and treating practitioners that she required taxi service to and from medical appointments. For instance, Dr. Kachooie, Dr. Davila and Dr. Celinski recommended taxi transportation. The Applicant's counsel also pointed out that Dr. T. John, a physiatrist assessor with the Med/Rehab DAC, and Dr. Cruz, a treating psychiatrist, noted emotional problems associated with driving. Based on this evidence, the Applicant's counsel argues that Lloyd's is also liable to pay a special award.

Regarding the housekeeping claim of \$6,950.00, the Applicant's counsel submitted that Lloyd's also inappropriately terminated these benefits. He argued that Lloyd's had several opinions from the Applicant's doctors – Dr. Kachooie (a physiatrist) in January 2002 and September 2003, Dr. Ogilvie-Harris (an orthopaedic surgeon) in July 2002 and Dr. Meloff (a neurologist) in December 2003 – who, after Lloyd's terminated housekeeping benefits, recommended housekeeping services as a result of the Applicant's accident-related injuries. The Applicant's counsel also pointed to the Applicant's self-report of the obstacles preventing her resuming her tasks as sole housekeeper of her two-storey with basement, four-bedroom, two bathroom home. Lloyd's failure to take this information into account in its decision as to the Applicant's entitlement to housekeeping benefits, according to the Applicant's counsel, should attract a special award.

The Applicant's counsel also challenged the basis of Lloyd's termination of benefits, based as it was on the October 5, 2001 opinion of Dr. Grant (a general practitioner who refers to himself as an orthopaedic and sports medicine specialist) that the Applicant did not require these services. According to the Applicant, Lloyd's inappropriately referred to Dr. Grant's assessment as an orthopaedic examination on Explanations of Benefits Payable by Insurance Company and other documents. Based on this, the Applicant's counsel submitted that Lloyd's founded the termination of the Applicant's income replacement and housekeeping benefits on faulty information and it should be liable to pay a special award.

### **The Insurer's Submissions**

Lloyd's counsel argued that the Applicant was treated fairly and reasonably in the administration of her claims. In his written submissions, he argued that the insurer's medical examinations by Dr. Grant, Dr. Siegel, and the findings of the Disability DAC, provided a reasonable basis for Lloyd's to terminate income replacement benefits as these assessments concluded the Applicant was not significantly disabled as a result of the accident.

Lloyd's counsel pointed to the conclusions in a number of the assessment reports that the Applicant showed submaximal effort and routinely failed the control tests. He pointed out that the Applicant's neuropsychological assessor, Dr. Celinski, could not rule out either deliberate attempts by the Applicant to present as more disabled than she was or the possible effect of secondary gain. Lloyd's counsel argued that the video surveillance provides a "poignant" illustration of the Applicant's attempt to hide her level of physical capacity.

Regarding the section 24 claims, Lloyd's counsel argued that the Applicant's lack of candour and submaximal effort should result in these claims not being payable. He argued that since the TMJ problem was ruled out by the Med/Rehab DAC, there has been no unreasonable denial of benefits in relation to Dr. Khadivi's assessment. He further argued that there is no evidence that the section 24 reports were requested by the Applicant to establish a treatment plan.

### **Findings and Conclusion on Entitlement to the Special Award Claim**

On a number of bases, I find Lloyd's is liable to pay a special award.

Regarding the termination of the Applicant's income replacement and housekeeping benefits, I agree with the Applicant's counsel, and find that Lloyd's terminated these benefits in the face of substantial medical evidence of the Applicant's physical and psychological/psychiatric disability. Lloyd's own assessor, Dr. Grant, reported the result of an MRI report that revealed a right rotator cuff tear. He had previously recommended an orthopaedic assessment, which Lloyd's never followed up on. Despite the MRI findings, Dr. Grant went on in his January 25, 2002 "Orthopaedic Addendum" to render the opinion that, with cortisone injections, the Applicant should be able to return to her job and housekeeping chores, but should guard against prolonged over-the-shoulder activity.

I find it was unreasonable in these circumstances for Lloyd's to rely on Dr. Grant's opinion. Lloyd's knew, or ought to have known, that Dr. Grant was not qualified to give an orthopaedic opinion, and should have sent the Applicant for an orthopaedic assessment, as Dr. Grant himself recommended. Instead, Lloyd's terminated income and housekeeping benefits without an expert opinion on the right shoulder where such an opinion was clearly needed. I find Lloyd's was reckless with the Applicant's health in relying on that opinion and ignoring the many assessments of the Applicant's disability and her consistent complaints of persistent, disabling right shoulder pain.

Commission adjudicators have held that insurers have an obligation to continue to adjust an insured person's claims even after termination, especially under circumstances where new medical information emerges that raises questions about the insurer's decision to terminate. Insurer's are obligated not to turn a blind eye to mounting evidence of an insured person's disability.

I find Lloyd's conduct in regard to the termination of the Applicant's income replacement and housekeeping benefits should clearly attract a special award.

I already found that Lloyd's conduct in unilaterally and surreptitiously retaining Dr. English (the disability DAC orthopaedic assessor) to prepare "a supplementary orthopaedic report", to be non-compliant with the Disability DAC Guideline. I also find that this conduct should attract a special award. It shows Lloyd's to have been bent on justifying benefit denial at any cost, even if it meant breaking with proper DAC assessment protocol to accomplish this. Rather than retain its own orthopaedic specialist, or fund a specialist recommended by the Applicant, to investigate the rotator cuff tear, Lloyd's attempted, behind the back of the Applicant, to use a DAC assessor, who is supposed to be neutral, to achieve the end of trying to disprove the Applicant's claim to disability.

Regarding the Applicant's claim for massage and prescription expenses, I find that Lloyd's treatment of these expenses should also attract a special award.

Lloyd's refused to fund Ms. Scott's March 16, 2002 treatment plan for massage treatments, despite a number of opinions by the Applicant's treating and assessing medical practitioners about the benefits of such treatment for her chronic pain condition. Lloyd's denied the treatment without commissioning its own assessment to address her need for this particular type of treatment. Although the Med/Rehab DAC report that reviewed that treatment plan was completed on November 8, 2002, after the effective time for the plan, the assessors were in accord with the Applicant's medical practitioners in concluding retrospectively that the treatment would have been helpful to the Applicant's recovery. I find Lloyd's turned a blind eye to the Applicant's need for this treatment and should be liable to pay a special award for this conduct.

Concerning the claim for prescriptions and transportation expenses, the Applicant presented Lloyd's with several medical opinions that support her claims for certain medications and benefits to cover taxi fares to and from medical appointments.

Lloyd's received no medical opinion that the Applicant's prescriptions claim was unreasonable or unnecessary. I find Lloyd's unreasonably denied the claim in the face of opinions by the Applicant's doctors that the medication is needed as a result of her accident-related impairments. I find for this conduct, Lloyd's deserves to pay a special award.

However, Lloyd's received opinions from Dr. Grant and Dr. Siegel that the Applicant did not need transportation assistance. For this reason, I do not find it was unreasonable for Lloyd's to refuse to pay this benefit, in spite of my decision to grant the cost of the claimed taxi fare. I find in the circumstances that the Applicant's evidence of her need for taxi transportation is stronger than Lloyd's evidence that it

is unreasonable. However, I find that a party is entitled to rely on the evidence they have generated to support their position at a hearing without fear of a punitive outcome by reason only that their evidence is found to be weaker than that of the other party. I do not find the denial of transportation expenses should attract a special award.

I find Lloyd's treatment of the Applicant's claims for funding of Dr. Khadivi's, Dr. Celinski's and Dr. Ogilvie-Harris's section 24 assessments to be substandard as well and deserving of a special award.

I find it was not reasonable for Lloyd's to refuse to pay for the investigation of the Applicant's jaw complaints which were medically documented shortly after the accident, particularly under circumstances where an air bag deployed in her face in the accident. Dr. Khadivi's assessment was the first assessment conducted on the Applicant's jaw. Lloyd's assessor, Dr. Friedlich, did not find a jaw condition. However, the MED/Rehab DAC assessor, Dr. Holmes, agreed with Dr. Khadivi that the Applicant had a jaw condition, and he recommended the orthotic appliance treatment Dr. Khadivi recommended. I find Lloyd's failure to fund the assessment to be another instance of Lloyd's not meeting its responsibility to assist the Applicant to identify her medical conditions and thereby with her recovery.

Again, given the impact to the Applicant's head by the air bag and her consistent complaints of emotional and cognitive problems, it was not reasonable for Lloyd's to decline to fund Dr. Celinski's neuropsychological assessment to investigate the cause of these complaints. As noted above, early on, the Applicant's psychologist, Dr. Davila, recommended such an assessment because of her concern about the Applicant's cognitive symptomatology. As it turns out, Dr. Celinski's assessment enhanced an understanding of the Applicant's medical conditions and served as a guide for her subsequent treatment. I find this conduct by Lloyd's should also attract a special award.

It was not reasonable for Lloyd's to refuse to fund Dr. Ogilvie-Harris's assessment, particularly because of the Applicant's doctors' concerns about the Applicant's right shoulder condition, and the fact that Dr. Grant actually recommended an orthopaedic assessment. As it turns out, Dr. Ogilvie-Harris's assessment was the first orthopaedic assessment conducted, since Dr. Grant's assessment does not qualify as such. At the point of Dr. Ogilvie-Harris's assessment in July 2002, there was a concern over the nature of and best treatment for the shoulder condition, among her other conditions, as to whether surgery was an option or not. It was important that an orthopaedic assessment be funded by Lloyd's in these circumstances, and its failure to facilitate this through funding was also in breach of the Insurer's obligation to assist with the diagnoses and treatment of the Applicant's accident-related injuries in order to foster recovery.

I find it is not enough for an insurer to refuse to fund services, treatment and assessments, as Lloyd's counsel argues, because some assessors have concluded that an insured person appears to be giving submaximal effort with some tests, particularly in the face of substantial medical evidence of physical problems and significant psychological and cognitive impairments. What appears to be a lack of candour by one assessor, can be seen as a sign of disability by another assessor. I find that an insurer must remain open to the development of medical evidence that might refute its original decision to terminate benefits and be prepared to reassess its position if warranted.

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

I will decide the amount of the special award in this case based on the amount of the Applicant's entitlement to income replacement benefits, the cost of the massage treatment and prescriptions, housekeeping and home maintenance services and the section 24 assessments.

Subsection 282(10) provides that if an arbitrator finds that an insurer unreasonably withheld or delayed benefit payments, they shall impose "a lump sum award of up to 50 per cent of the amount to which the person was entitled at the time of the award, together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*."

In the circumstances of this case, I find Lloyd's liable to pay the Applicant a total special award of \$10,000 inclusive of interest.

**EXPENSES:**

The parties did not make submissions as to expenses. I remain seized if the parties do not settle this issue.

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Beth Allen  
Arbitrator

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August 3, 2004

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Date

**FSCO A02-001635**

**BETWEEN:**

**Mrs. S**

**Applicant**

**and**

**NON-MARINE UNDERWRITERS, MBRS OF LLOYD'S**

**Insurer**

### **ARBITRATION ORDER**

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

1. Lloyd's shall pay the Applicant income replacement benefits at the rate of \$178.84 per week from June 26, 2002 until July 9, 2003 pursuant to section 4 of the *Schedule*.
2. Lloyd's shall pay the Applicant \$350.00 for massage treatment, \$1,043.47 for prescription expenses and \$142.69 for taxi expenses pursuant to section 14 of the *Schedule*.
3. Lloyd's shall pay the Applicant housekeeping and home maintenance expenses of \$6,950.00 pursuant to section 22 of the Schedule.
4. Lloyd's shall pay the Applicant the cost of an assessment by Dr. Khadivi in the amount of \$735.70; the cost of an assessment by Dr. Celinski in the amount of \$2,412.85; and \$1,000.00 towards the cost of Dr. Ogilvie-Harris's assessment, pursuant to section 24 of the *Schedule*.
5. Lloyd's shall pay a special award pursuant to subsection 282(10) of the *Insurance Act* in the amount of \$10,000 inclusive of interest.

6. The parties made no submissions as to expenses. I remain seized of this matter should the parties not settle this issue.
7. Lloyd's shall pay the Applicant interest on any overdue amounts pursuant to subsection 46(2) of the *Schedule*.

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August 3, 2004

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Beth Allen  
Arbitrator

Date