OIC A96–001417

BETWEEN:

DAVID LEHMAN

Applicant

and

GAN CANADA INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, David Lehman, was injured in a motor vehicle accident on January 29, 1994. He applied for and received Income Replacement Benefits ("IRBs") under section 7(1), paragraph 2 of the *Schedule*[1] from GAN Canada Insurance Company ("GAN Canada"). GAN Canada paid benefits from February 7, 1994 until May 22, 1996. After mediation, the parties resolved a number of issues. They settled the rate of IRBs payable to Mr. Lehman. GAN Canada also conceded Mr. Lehman's entitlement to IRBs during the 104-week period following the accident. It paid Mr. Lehman IRBs at the rate of $310.21 until May 22, 1996.

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[1]The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993, and before November 1, 1996*, called "the *Schedule*" in this decision. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94.

GAN Canada's initial offer of Loss of Earning Capacity Benefits ("LEC benefits") was "nil" since it had assessed Mr. Lehman's residual earning capacity to be greater than his pre-accident earning capacity. Mr. Lehman rejected GAN Canada's "nil" offer. At the hearing, GAN Canada conceded that Mr. Lehman qualified for LEC benefits. However, the parties failed to resolve the issue of the amount of the LEC benefit as determined under sections 28, 29 and 30 of the *Schedule*.

The parties also disagreed whether Regulation 776/93 (the "*Schedule*"), or its successor, Regulation 781/94, which amended the *Schedule* effective January 1, 1995,[2] applies to Mr. Lehman's accident. Mr. Lehman claims he is entitled to receive IRBs pending the resolution of the dispute, whereas GAN Canada disagrees. Mr. Lehman proceeded to arbitration on these issues in accordance with the *Insurance Act*, R.S.O. 1990, c.I.8, as amended (the "*Act*").

The issues in this hearing are:

1. What is the correct amount of Mr. Lehman's LEC benefit as determined under section 28 of the *Schedule*?

    (a) In determining Mr. Lehman's pre-accident earning capacity under section 29(3) of the *Schedule*: What could he have reasonably earned at the time of the accident having regard to his personal and vocational characteristics at the time?

    (b) In determining Mr. Lehman's residual earning capacity under section 30 of the *Schedule*: What type of employment best satisfies the criteria set out in section 30 (2) of the *Schedule*?

2. Is Mr. Lehman entitled to IRBs from the benefit termination date, May 22, 1996, until the date of this decision, under section 23(8) of the *Schedule* (Regulation 776/93)?

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[2]Part VI, section 23 of Regulation 776/93 is attached to the decision as Schedule B and Part VI, section 23 of Regulation 781/94 is attached as Schedule C.

Mr. Lehman also claims interest on any amounts owing and his expenses incurred in the hearing.

Result:

1. Mr. Lehman is entitled, pursuant to section 23(8) of the *Schedule* (Regulation 776/93), to a weekly income replacement benefit of $310.21 with interest from the benefit termination date, May 22, 1996, until the date of this decision.

2. The correct amount of the LEC benefit, as determined pursuant to section 28 of the *Schedule*, is $153.41 with interest, payable to Mr. Lehman from the date of this decision.

3. Mr. Lehman is entitled under section 282(11) of the *Insurance Act* to his expenses incurred in respect of the arbitration.

Hearing:

The hearing was held in Burlington, Ontario, on July 15, 1997, before me, Beth Allen, Arbitrator. Written submissions were filed by the parties by July 25, 1997.

Present at the Hearing:

Applicant:	David Lehman
Mr. Lehman's Representative:	Stephen B. Abraham Barrister and Solicitor
GAN Canada's Representative:	Ralph D'Angelo Barrister and Solicitor
GAN Canada's Officer:	Dwight Robinson Claims Examiner

Court Reporter: Maureen Biscak
Mark Nimigan Court Reporting Services

Witnesses:

For the Applicant: David Lehman
Linda Baker

The Applicable Regulation

Section 28(3) of the *Schedule* was amended on January 1, 1995, nearly one year after Mr. Lehman's accident on January 29, 1994. Mr. Lehman seeks benefits at the IRB rate until a new rate of LEC benefit is determined by this decision. He relies on the original wording of section 23(8) which was passed on January 1, 1994 and reads as follows:

23-(8) Subject to subsections (5) and (6) and to subsection 281(4) of the *Insurance Act*, the insurer shall continue to pay benefits *under Part II*, section 15, Part IV or Part V pending resolution of a dispute under subsection (3) or (4), if the person continues to qualify for those benefits. [emphasis added].

GAN Canada's position is that the amendment of January 1, 1995 applies to the effect that the insurer is not required to pay benefits at the IRB rate after the 104-week period; but rather should pay benefits at the rate of its LEC offer until the date of this decision. GAN Canada has paid neither IRBs nor LEC benefits during this period, since its initial offer (before its verbal offer made during submissions at the hearing) was "nil." The January 1, 1995 amendment reads:

23.-(8) Subject to subsection (6) and to subsection 281(4) of the *Insurance Act*, the insurer shall continue to pay benefits under Part IV or V pending the resolution of a dispute under subsection (3) or (4), if the person continues to qualify for those benefits.

Mr. Lehman submits that his right to claim LEC benefits flows from the injuries suffered as a result of the accident and that his rights, including his right to LEC benefits, crystallized on that date. Accordingly, the governing legislation is that which was in effect at that time, and not the later amendment. In making his argument, he relies on the Supreme Court of Canada case, *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation*[3] and the British Columbia Supreme Court case, *Canada (Attorney General) v. Lavery*.[4] The British Columbia Supreme Court case upheld the principle enunciated by the Supreme Court of Canada that statutes shall not be construed to have retroactive operation unless such a construction is express or arises by necessary implication from the statute and should not be interpreted to prejudicially affect an accrued right or an existing status.

GAN Canada submits that the amendment applies to Mr. Lehman's claim because it was in place by the time Mr. Lehman qualified to claim LEC benefits 104 weeks after his accident. GAN Canada argues that no substantive rights are affected since Mr. Lehman was not qualified to claim LEC benefits until after the amendment came into effect. In GAN Canada's submission, the change effected by the amendment is strictly procedural, intended to make the accident benefit scheme more efficient.

The law in this regard has long been settled. Previous arbitral decisions have dealt with the retroactive application of legislation. *Paulo Pinto and General Accident Assurance Company of*

[3][1933] S.C.R. 629.

[4][1989] B.C.J. No. 2175.

Canada[5] discussed the explanation for the presumption against the retroactive application of legislation as expressed in *Driedger On the Construction of Statutes*. The *Pinto* case states:

> It is presumed that legislation is not intended to have a retroactive application. The rationale is explained in *Driedger On the Construction of Statutes* as follows:
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> > Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible ... The fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. By definition, a retroactive law is unknowable until it is too late.
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> The authors of *Driedger on the Construction of Statutes* distinguish between the application of legislation to facts which have ended before it comes into force, to facts which begin after it comes into force and to facts which start before the legislation comes into force and continue after the legislation is in force.
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> > The application of legislation to ongoing facts is not retroactive because, to use the language of Dickson J. in the *Gustavson Drilling* case [1997] 1 S.C.R. 271, there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date. The application is prospective only to facts in existence at the present time. Such an application may affect existing rights and interests, but it is not retroactive.

I accept Mr. Lehman's position on this issue. When his accident occurred the statutory accident benefit scheme gave him a future right to receive IRBs pending the outcome of a dispute over LEC benefits. This right crystallized at the time of his accident. A decision in favour of GAN

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[5] *Pinto and General Accident Assurance Company of Canada* (April 10, 1997), OIC A96-001246 at page 13. See also *Bernicky and Guardian Insurance Company of Canada* (July 6, 1994), OIC A-006268; *Smith and General Accident Assurance Company of Canada & Smith and Allianz Insurance Company of Canada* (January 30, 1997), OIC A-012681 & A-013811; *Worthman and AXA Insurance (Canada)* (January 30, 1997), OIC A-96-000486.

Canada's position would lead to the retroactive application of the amendment so as to prejudicially affect Mr. Lehman's rights as they existed on the date of his accident.

In my view, the right involved is a substantive right. It is settled law that if a change contemplated by an amendment is procedural and does not affect substantive rights, the amendment can apply retroactively.[6] The amendment in this case affects the amount of benefit payable to an insured pending the outcome of a dispute. The right to a certain rate or amount of benefit is a substantive right. Under the predecessor legislation Mr. Lehman is entitled to a benefit at the rate for IRBs, whereas under the amendment, subsections 23 (5), (5.1) and (5.2), the insurer can pay benefits at the rate of its LEC offer — a rate which will most frequently be lower than the rate for IRBs.

For these reasons GAN Canada is obligated to pay Mr. Lehman IRBs at the rate of $310.21 weekly from May 22, 1996, the benefit termination date, until the date of this decision.

Factual Background:

Mr. Lehman was 37 years old when he was involved in an accident on January 29, 1994. He was driving a snow mobile which hit a rut on the lake where he was travelling. He suffered a number of injuries, the most disabling involving his left knee. GAN Canada concedes that this injury has disabled Mr. Lehman from returning to his pre-accident employment as a telephone repairer/installer.

Mr. Lehman completed grade 11 at high school. From 1970 to 1987 he was involved in the restaurant business. He worked part-time and full-time for his family's catering business from about 1970 to 1983. From about 1983 to 1987 he worked for Kelsey Restaurants, advancing to

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[6] *Driedger On the Construction of Statutes*, page 545.

an area manager position where he earned about $33,000. For about nine months, in 1987 and 1988, Mr. Lehman worked as a sales representative for Hamilton Store Fixtures selling food service wares and equipment to nursing homes and hospitals. He testified that he grew disinterested in the restaurant management and sales businesses and decided to return to school to train for a new job. In 1988 he entered and completed a 10-month community college program in micro-computer electronics. He testified that he never actually worked in this field but began working for Bell Canada ("Bell") the following year. I heard no evidence that Mr. Lehman's micro-electronics course aided him in obtaining the position at Bell.

From about 1989 to 1993, Mr. Lehman worked for Bell as a temporary part-time installation/repair technician. Approximately one year before the accident, on January 23, 1993, he was laid-off. His job at Bell required him to climb ladders and poles. Mr. Lehman estimated that before the accident he earned about $22.10 per hour, working a minimum four-day, 32-hour week, sometimes exceeding these hours with overtime. His employment with Bell was irregular since Bell laid him off periodically. Over the period he worked for Bell, he worked an average of 5.25 months and earned an average income of approximately $19,086[7] in the years 1990 to 1993.

After being laid-off by Bell for about one year and four months, Bell recalled him in May 1994 to start work on June 1, 1994, but he was unable to return due to his accident-related injuries. Bell recalled Mr. Lehman for a regular part-time position as an repairer/installer. Mr. Lehman presented evidence that he would have worked a minimum of 32 hours with six to seven overtime hours; at an hourly wage of $21.03 and a weekly wage of $672.96, amounting to an annual salary of $57,000. He referred for support to Mr. Andrew James', his accountant, report of July 3, 1997,

[7] Mr. Lehman worked for Bell during the periods from April 10, 1989 to October 30, 1990; from July 29, 1991 to March 7, 1992; and from June 1, 1992 to January 23, 1993. Therefore, he was laid-off for about two months in 1990; seven months in 1991, three months in 1992, and 11 months in 1993. His tax records reveal that his income was $24,390.93 in 1990; $19,587.41 in 1991; $29,367.45 in 1992; and $2,996.24 in 1993.

to letters from Bell's legal department dated November 26, 1996 and January 24, 1997, and to the oral evidence of one of his past Bell supervisors, Ms. Lynda Baker. Mr. Davidian of Bell's law department indicated in his January 24, 1997 letter that on Mr. Lehman's return in June 1994 he would have earned a "step eight" hourly wage of $21.03, and would have eventually progressed from there to higher wage steps. Mr. Lehman testified that if he had been employed at this job on January 29, 1994 (the accident date) he would have also been paid at the step eight wage. Ms. Baker confirmed Mr. Lehman's evidence that he could have earned $57,000, working about six to seven hours overtime.

In oral testimony, Mr. Lehman estimated that on the recall Bell offered him $22.10 per hour. Other evidence indicates that the hourly rate offered was $21.03. Under cross-examination about the hourly rate Mr. Lehman could not explain the discrepancy. The discrepancy is a small one. I accept the $21.03 rate since Mr. Lehman offered only an estimation of the recall wage rate and seemed to defer to the information in Bell's letters on this matter. He verified, however, that if he had been working at the time of the accident, Bell would have paid him at the rate offered in the May 1994 recall. Mr. Lehman testified he would have readily returned to work at Bell at this time were it not for his accident-related injuries. Following his accident, however, he expressed an interest in a sedentary position in the communications industry in 1995 discussions with Optimum Rehabilitation Services, a service provider retained by GAN Canada.

GAN Canada referred Mr. Lehman to a residual earning capacity assessment ("RECDAC") at Hamilton Hospitals Assessment Centre, which was conducted on September 9, 1996. Mr. Lehman submitted into evidence the RECDAC report dated November 4, 1996. The objective of the assessment was to match Mr. Lehman's physical, educational and intellectual capacities and his employment background, training and aptitude with prospective occupations. The report concluded that Mr. Lehman was competitively employable in two occupations with potential

earnings[8] as follows: Restaurant Equipment Sales Representative, from $29, 553 to $39,302 per year and Electronics Assembler/Fabricator, from $20,631 to $26,755 per year.

Analysis of Loss of Earning Capacity

Pre-Accident Earning Capacity:

Mr. Lehman's Position

The dispute mainly revolves around whether the evidence related to Mr. Lehman's May 1994 recall by Bell should be considered in determining his pre-accident earning capacity. Mr. Lehman argues that the May 1994 recall should be taken into consideration. The parties agree that the applicable provisions for determining his pre-accident earning capacity are subsections 29(3) and (4)(a), since at the time of the accident he was not employed. The parties also agreed, upon reviewing the recall terms of the collective agreement, filed into evidence by Mr. Lehman, that he be treated (for the purposes of section 7(1), paragraph 2(ii) of the *Schedule*) as not employed at the time of the accident.

The governing provision states:

> **29.-** (3) For the purpose of determining the amount of a weekly loss of earning capacity benefit under this Part, the pre-accident earning capacity of a person who is entitled to receive weekly income replacement benefits under paragraph 2 or 5 of subsection 7(1), weekly caregiver benefits under Part IV or weekly disability benefits under Part V shall be deemed to be the person's net weekly income determined in accordance with section 81 or

[8]See Exhibit 2, tab 3, pages 3 and 4. The occupations recommended by the RECDAC were selected from the National Occupational Classification, 1992 (the "NOC"). The NOC records wage ranges for each occupation in terms of experience of less than 36 months to experience of 36 to 120 months.

82 using the gross annual income from employment that the person *could reasonably have earned at the time of the accident, having regard to the person's personal and vocational characteristics at that time.* [emphasis added]

(4) The amount of a person's pre-accident earning capacity determined under subsections (1), (2) and (3) shall not be less than,

(a) the net weekly income determined in accordance with section 81 or 82 using a gross annual income from employment equal to the person's gross income from employment, including any temporary disability benefits and any benefits received under the *Unemployment Insurance Act* (Canada), for a period specified by the person of fifty-two consecutive weeks in the 156-week period before the accident, in the case of a person entitled to receive weekly income replacement benefits under paragraphs 1, 2, 3, 4, or 6 of subsection 7(1), or a person who was self-employed at the time of the accident;

The phrase "personal and vocational characteristics" is defined under section 1 of the *Schedule* and sets out factors to be considered in determining both pre-accident and residual earning capacities.

1.- "personal and vocational characteristics" include,
(a) employment history
(b) education and training
(c) vocational interests and aptitudes
(d) vocational skills
(e) physical abilities
(f) cognitive abilities
(g) language abilities

Mr. Lehman takes the position that the LEC benefit provision is forward-looking. He argues that the language in section 29 does not restrict the determination of his pre-accident earning capacity to an assessment of his circumstances up to and ending at the time of the accident. He argues that

this interpretation permits an assessment of an unemployed person's pre-accident earning potential under circumstances where the insured has a work history within the 156-weeks. It follows, Mr. Lehman submits, that account should be taken of a post-accident job opportunity frustrated by an accident-caused disability — an opportunity Mr. Lehman insists he would have seized but for the accident. In support of this interpretation, he submits that the term "capacity" itself connotes a future-looking perspective rather than a retrospective or backward-looking one.

Mr. Lehman argues that his pre-accident earning capacity should be determined based on the income he might potentially have earned were he to have returned to Bell when recalled in May 1994. Based on his evidence that he could have earned $57,000, he submits that his net weekly income[9] and therefore his pre-accident earning capacity would be $725.10.

Section 29(4)(a) provides that what a person might reasonably have earned at the time of the accident is capped, at the lower end, by the person's income during the best consecutive 52 of the 156 weeks before the accident. The parties do not dispute that the period from July 29, 1991 to July 26, 1992 represents Mr. Lehman's best 52 weeks and that his annual salary was $34,656 for this period, resulting in a net weekly income of $478.07. Mr. Lehman submits that section 29(4) permits this figure to be indexed to $489.07 to represent present value. Since that figure is less than his net weekly income as calculated by his approach, Mr. Lehman's position is that his pre-accident earning capacity would be $725.10.

GAN Canada's Position

GAN Canada submits that the May 1994 Bell recall should not be considered in assessing Mr. Lehman's pre-accident earning capacity. It argues that the concept of pre-accident earning

[9] "Net weekly income, as used throughout this decision, refers to net weekly income as prescribed under the *Schedule* by the Net Weekly Income Table — Other Than Self-Employment.

capacity is intended to be retrospective in its application. That is, Mr. Lehman's pre-accident earning capacity is deemed to be his earning capacity capped at the time of the accident. In GAN Canada's view, Mr. Lehman's "personal and vocational characteristics" at the time of the accident can be derived from an examination of his employment and educational history dating back from the date of the accident. The factors set out in the definition of "personal and vocational characteristics," GAN Canada submits, suggest a backward-looking perspective. In particular reference to the "employment history" factor in the definition, "prospects for employment" and future opportunities are not contemplated.

GAN Canada compares Mr. Lehman's situation to claimants who at the time of the accident were somehow attached to the work force: the employed, those entitled to start work under an employment contract, on strike, lay-off or on maternity leave, etc. The calculation of pre-accident earning capacity for these claimants, argues GAN Canada, is based, subject to the best 52 week rule, on their earnings at the time of the accident, not potential or future earnings (except in the case of those entitled to start work under a contract starting in the future). GAN Canada takes the position that for the accident benefits scheme to be consistent in its treatment of unemployed claimants and those attached to the workforce at the time of the accident, it must be interpreted retrospectively.

For the calculation of Mr. Lehman's pre-accident earning capacity, GAN Canada relies on a memorandum and worksheet prepared by its accountant, Mr. James A. Forbes of Cooper & Lybrand dated March 21, 1994. GAN Canada also submitted into evidence Mr. Lehman's income tax records for the five-years from 1989 to 1993. According to GAN Canada's interpretation of section 29, regard should be had to Mr. Lehman's actual income in the three-year period before the accident and then a determination made of whether this amount exceeds his income in the best 52 weeks.

GAN Canada concluded, based on a review of Mr. Lehman's pre-accident earnings and his educational and vocational background, that his earnings during his best 52 weeks exceeded his annual income looking back over the three years. GAN Canada pointed out that Mr. Lehman's annual salaries were about $3,000 in 1993, and 20,000 and 29,000 in 1991 and 1992 respectively. Based on Mr. Lehman's gross annual income of $34,656 during the best 52 weeks, his net weekly income during this period would be $478.07. However, GAN Canada argued that, while Mr. Lehman's accountant indexed this figure to $489.07 to reflect present value, the *Schedule* does not contemplate indexation under section 29(4). Therefore, Mr. Lehman's pre-accident earning capacity would be $478.07.

Findings on Pre-Accident Earning Capacity:

I conclude that the May 1994 recall evidence is relevant to the calculation of Mr. Lehman's pre-accident earning capacity; however, I apportion the annual recall salary to reflect Mr. Lehman's intermittent work history with Bell. I arrive at my decision for the following reasons:

The statutory accident benefits legislation which came into effect on January 1, 1994 established methods to evaluate the difference, if any, between insured persons' earning capacities before an accident and their capacities two years after the accident and at various points into the future. The scheme provides for the assessment of pre-accident and residual earning capacities for insured's who were involved pre-accident in both employed and non-employed situations — assessments based on both personal and income quantification criteria.

The terms "capacity" and "earning capacity" are not defined in the legislation, but English dictionaries define "capacity" as "mental power, faculty, talent"[10] and "mental ability, faculty."[11] Although the definition in *Black's Law Dictionary* focuses on post-injury capacity, it defines "earning capacity" as the:

> capability of a worker to sell his labour or services in any market reasonably accessible to him, taking into consideration his general physical functional impairment resulting from his accident, any previous disability, his occupation, age at the time of the injury, nature of the injury and his wages prior to and after the injury.[12]

The ordinary English meaning of "capacity" emphasizes the "mental" aspect of the term, but viewed legally from the perspective of earnings, there is also a functional component. As discussed earlier, "personal and vocational characteristics" is defined under the *Schedule* and takes into account employment history, educational/training/vocational background, physical, cognitive/aptitude and language abilities. An assessment of a loss of earning capacity, therefore, requires consideration of any decrease in an insured person's earning capability that is attributable to injuries sustained in an accident, taking into account the prescribed criteria.

The *Schedule* offers a more straightforward method of assessing pre-accident earning capacity for persons more or less attached to the work force at the time of the accident than for those who are not. The pre-accident earning capacity of employed persons, persons on strike, lay-off, holding an employment offer or on pregnancy/parental/unpaid leaves, is deemed to be 90% of their *actual* pre-accident net weekly income, the same formula used to determine their income replacement benefit. However, for persons who are less attached to the workforce such as those who are:

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[10] *The Concise Oxford Dictionary*, 7th edition 1988.

[11] *The New Lexicon Webster's Dictionary*, 1991 edition.

[12] *Black's Law Dictionary*, 5th edition, 1980.

unemployed (but employed within the pre-accident 156 weeks), unemployed (but not employed within the 156 weeks), self-employed, caregivers or students, arriving at a pre-accident earning capacity determination is more difficult because the income quantification tests are subject to interpretation and more based on individual fact situations.

Mr. Lehman had been unemployed for one year at the time of the accident, but had been employed within the pre-accident 156 weeks.The *Schedule* requires that I determine his pre-accident earning capacity based on the net weekly income from employment he "could reasonably have earned *at the time of the accident*, having regard to [his] personal and vocational characteristics *at the time*." [my italics] I agree with GAN Canada's position that the language in section 29(3) requires that a person's pre-accident earning capacity be viewed as it was before the accident up to the time of the accident. I also accept GAN Canada's position that the LEC provisions are intended to be consistently and fairly applied to all persons qualified to claim these benefits. As I see it, the time of the accident is a point of departure for two periods during which earning capacity is to be assessed — the first period beginning a reasonable period before the accident and ending at the accident, and the second period starting two years after the accident and extending into the future. A loss in earning capacity then, having regard to an insured's particular qualities and qualifications, is a measure of the difference in income earning capacities between these two periods.

What a person could have reasonably earned at the time of the accident is a question of fact to be decided based on an examination of the circumstances of each case. GAN Canada based its calculation of what Mr. Lehman could have reasonably earned on a review of his actual earnings during several years before the accident. However, as distinct from the provisions governing those attached to the workforce, the test in section 29(3) is not restricted to a review of actual earnings. This test requires a broader inquiry since persons covered by this provision will most likely have had periods of unemployment or irregular earnings within the 156 weeks. Consequently, their

actual income may not reflect their earning capacity or capability as contemplated by the test. Section 29(2) applies the same test to self-employed persons whose employment and income may also be irregular.

Mr. Lehman's history reveals that he completed grade 11 and, during the ten years before the accident: he was involved in the restaurant business for the first four years; in a community college micro-computer electronics course for ten months; and then worked intermittently, part-time for Bell for four years until his lay-off one year before the accident. His employment with Bell was his employment closest in time to the accident and, I find that the income, qualifications and experience acquired through this position provide a reasonable and realistic gauge to assess his pre-accident earning capacity.

Although I find that the May 1994 recall evidence is relevant, I disagree with the view espoused by both parties that to consider this evidence is necessarily to adopt a prospective interpretation of the section 29(3) test. In my opinion, it depends on how one employs the post-accident evidence whether a prospective or retrospective approach has been adopted. For instance, if the evidence reveals that a person could have earned a particular income at a certain time, it would not be unreasonable to infer, everything being equal, that this evidence might be relevant to establish income capacity at a point four months earlier. In my opinion, this is not a prospective approach to the evidence, but rather a retrospective one. Applying this to Mr. Lehman's case, the May 1994 recall evidence can be employed not to assess future, post-accident earning potential, but to assess his capacity, (i.e., what he would have been earning with Bell but for his final lay- off), looking back to the time of the accident. However, this is not to suggest that in all cases evidence that arises post-accident should be considered when assessing pre-accident earning capacity. The particular factual context in each case will determine this. The temporal proximity of the post-accident evidence to the accident, the particularities of that evidence and the person's pre-accident employment experience are factors that might be considered.

However, in light of Mr. Lehman's particular employment history, I do not accept his evidence that he could have reasonably earned $57,000 per year at the time of the accident. The $57,000 figure is stated as an annual salary. It is not clear from the evidence how Mr. Lehman arrived at this figure. It is reasonable to infer, in absence of evidence to the contrary, that this figure is based on a 52-week period. The $57,000 figure is greater than the figure ($42,649) arrived by using the the $21.03 hourly rate, maximum weekly overtime of 39 hours and a 52-week period. Although not obvious from the evidence, the difference between these figures might be explained by the manner in which overtime pay is calculated. The $42,649 figure is derived from overtime being calculated based on straight time, not time-and-a-half or double time.

Therefore, the $57,000 figure does not seem to take into account an important feature of his employment history — his periods of lay-off during each of his four years of employment with Bell. During the years 1990 to 1993 inclusive, he was laid-off for two months, seven months, three months and 11 months respectively. In coming to my determination, I averaged the number of months he worked over the four years and find that he worked an average of 5.25 months, having been laid-off an average of 6.75 months. I apportioned the $57,000 amount over the 5.25 months and arrived at an annual salary of $24,938 ($57,000 / 12 months X 5.25 months). I therefore find that he could have reasonably earned $24,938 annually or $479.58 per week ($24,938 / 52 weeks). His net weekly income, using the Commission's Net Weekly Income Table — Other Than Self-Employment, would therefore be $364.58. In accordance with section 29(4), since his earnings during his best 52 weeks ($478.07) is greater than $364.58, his pre-accident earning capacity would be $478.07. Contrary to Mr. Lehman's submission, section 29(4) of the *Schedule* does not provide for indexation of the best 52 week amount.

Residual Earning Capacity

Mr. Lehman's Position

Mr Lehman argues that his residual earning capacity should be assessed based on the assembler/ fabricator position designated by the RECDAC, not the restaurant sales position. He does not dispute the income figures arrived at by the RECDAC, nor its finding of his potential competitive employability in the designated positions. Mr. Lehman takes the position that section 30 permits his occupational preference to be taken into account in determining his residual earning capacity. Section 30 provides:

> **30.-** (1) For the purpose of this Part, the residual earning capacity of a person shall be deemed to be the net weekly income determined in accordance with section 81 or 82 using the gross annual income that the person could earn from the type of employment that best satisfies the criteria set out in subsection (2).
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> (2) The criteria referred to in subsection (1) are:
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> 1. The person,
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> i. is able and qualified to perform the essential tasks of the employment, or
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> ii. would be able and qualified to perform the essential tasks of the employment if the person had not refused to obtain treatment or participate in rehabilitation that was reasonable, available and necessary to permit the person to engage in the employment.
>
> 2. The employment exists in the area in which the person lives and is accessible to the person.
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> 3. It would be reasonable to expect the person to engage in the employment having regard to the possibility of deterioration in the person's impairment and to *the person's personal and vocational characteristics.* [emphasis added]

> (3) For the purpose of subsection (2), a person is able and qualified to perform the essential tasks of an employment if,
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> (a) the person does not have any impairment that permanently prevents the person from performing those tasks; and
>
> (b) the person has the job skills and any licence or other credentials required to perform those tasks, or could obtain those skills and the licence or credentials without significant effort.

Referring to section 30(2), Mr. Lehman submits that the language, "the person's personal and vocational characteristics," contemplates that an insured's personal preference and vocational path be considered, among other factors, in assessing the suitability of an occupation. Mr. Lehman submits that it would not be reasonable to expect him to undertake the restaurant sales job having regard to his personal and vocational characteristics. He argues that he left the restaurant business over nine years ago, returned to school in a different field and worked for Bell during the four years before the accident. These factors, in Mr. Lehman's submission, are personal and vocational characteristics that ought to be considered. In his submission, the restaurant sales position does not take into account these features of his personal and vocational history.

Mr. Lehman acknowledges his lack of training and experience in the area of electronics assembly/fabrication and, accordingly, argues that his earning capacity assessment should be based on the salary ($20,631) at the lower end of the wage scale for this position. Using this figure, Mr. Lehman calculates his net weekly income, and hence his residual earning capacity, to be $307.62.

GAN Canada's Position

GAN Canada takes the position that the RECDAC report dated November 4, 1996 provides a valid basis from which to assess Mr. Lehman's residual earning capacity. The report, it contends,

is based on a thorough, multidisciplinary assessment which concludes that two designated positions meet Mr. Lehman's current physical, psychological and vocational characteristics.

GAN Canada submits that under section 30 an insured person's residual earning capacity is to be notionally based on the net weekly income for an occupation which meets the criteria set out in section 30 (2). It argues that the insured is "deemed" to have the potential to earn the net weekly income for the designated occupation and hence the *Schedule* does not contemplate that the insured actually be prepared to accept the position. GAN Canada submits that a position in restaurant sales with one of Mr. Lehman's previous employers meets the occupation suitability criteria.

In support of its position GAN Canada submitted into evidence a labour market survey dated July 4, 1997, prepared by Crawford-THG. GAN Canada retained Crawford to survey local employers to determine the existence of positions in the two occupations designated by the RECDAC — Restaurant Equipment Sales Representative and Electronics Assembler/Fabricator — and to assess whether Mr. Lehman and the positions meet the legislative criteria. Section 30 provides that the insured person be capable of and qualified for the job and that the designated job exist and be accessible to the insured. Crawford concluded that cognitively, functionally, and in terms of his employment and educational background, the restaurant equipment sales position was more suitable. The Crawford survey reports at Appendix I that a restaurant sales position at one of Mr. Lehman's previous employers, Hamilton Store Fixtures Ltd., is currently hiring at an average annual salary of from $30,000 to $40,000.

Referring to the RECDAC report and its salary range for the restaurant sales position — $29,553 to $39,302 — GAN Canada submits that Mr. Lehman's residual earning capacity should be based on the salary at the lower end of the range. Based on a gross annual salary of $29,553 and a gross

weekly wage of $569.00, the net weekly income for this type of position would be $425.67. Mr. Lehman's residual earning capacity would therefore be $425.67.

Findings on the Residual Earning Capacity

After considering the evidence and hearing the parties' submissions on this issue, I accept Mr. Lehman's position that his residual earning capacity is $307.62, the net weekly income for the bottom level annual salary for the electronics assembler/fabricator position. I find that this occupation best satisfies the criteria set out in section 30. I have come to this conclusion for the following reasons:

Section 30 sets out a number of criteria to be met by the insured person and the designated occupation. It does not require, however, that the insured person and the position meet *all* the criteria. Residual earning capacity is based on the net weekly income for the type of employment "that *best satisfies* the criteria." [my italics]. The parties do not dispute that Mr. Lehman is able and qualified to perform the essential tasks of both the electronics assembler/fabricator and the restaurant sales positions. The parties agree that Mr. Lehman is able and qualified for both positions. The dispute centres on which designated occupation best fits the criteria set out in section 30.

Reviewing the criteria, there is no evidence of a refusal by Mr. Lehman to cooperate in rehabilitation, of deterioration in his impairment, of an impairment that permanently prevents him from performing either job, or of any prerequisite skills or credentials for either job. Concerning the existence and accessibility of the designated positions, Mr. Lehman did not produce his own evidence. However, the Crawford report dated July 4, 1997 stated: "Based on the Labour Market research done for this report, <u>both</u> Restaurant Equipment Sales and Electronic

Assembler/Fabricator positions exist in the Burlington, Oakville and Hamilton areas." [Crawford's emphases]

I accept, however, Mr. Lehman's evidence that he made a conscious decision many years before the accident to leave the restaurant business. He did in fact leave that field and returned to school in an entirely different area— micro-computer electronics. Although he never worked in that area, he did not return to the restaurant field. He obtained a position with Bell where he remained until a year before the accident. In 1995, over a year before the September 9, 1996 RECDAC was conducted and the two occupations designated, Mr. Lehman communicated to Optimum that he was interested in remaining in the communications field in a more sedentary position. This suggests that Mr. Lehman did not merely decide against the restaurant business because the RECDAC designated a job in this area. He communicated his preference to a rehabilitation facility over a year previously and many years before, he had changed his career path. The evidence clearly reveals that he did not, after the fact, "pick and choose" the designated position which would render the lower residual earning capacity with the purpose of maximizing his LEC benefit. For this reason I find that Mr. Lehman's preference has a *bona fide*, pre-established basis. In my view, a failure to consider this particular aspect of Mr. Lehman's career and vocational history would neglect a significant personal and vocational feature in his background. Therefore, I have taken into account Mr. Lehman's demonstrated job preference in determining his residual earning capacity.

I therefore find that the electronics assembler/fabricator position best satisfies the criteria set out in section 30. In assessing the amount of the residual earning capacity, I accept Mr. Lehman's position that it should be based on the net weekly income for the annual salary at the lower end of the salary range for this job. The evidence reveals that Mr. Lehman has had no employment experience as an electronics assembler/fabricator. Although he took a micro-computer electronics course about nine years ago, it is reasonable to infer that any knowledge gained from this program

would be seriously outdated given the rapid developments in the electronics field. The net weekly income for the lower end of the salary range is $307.62. Hence, Mr. Lehman's residual earning capacity is $307.62.

Findings on Loss of Earning Capacity Benefit

Section 28 of the *Schedule* provides that the LEC benefit is calculated by taking 90 % of the difference between pre-accident earning capacity and residual earning capacity. The relevant portion of this provision states:

> **28.-**(1) The amount of a weekly loss of earning capacity benefit for an insured person shall be determined in accordance with the following formula:
>
> A = 0.90 x (B - C)
> where,
>
> A = the amount of the weekly loss of earning capacity benefit,
>
> B = the person's pre-accident earning capacity, determined in accordance with section 29,
>
> C = the person's residual earning capacity, determined in accordance with section 30.

Mr. Lehman's position is that his weekly LEC benefit would be $375.71 ($725.10 - $307.62 X .90). According to GAN Canada's argument, Mr. Lehman's weekly LEC benefit would be $47.16 ($478.07 - $425.67 X .90).

Based on my findings as to Mr. Lehman's pre-accident earning capacity and residual earning capacity, his LEC benefit is $153.41 ($478.07- $307.62 X .90).

Expenses:

In view of my decision and in light of the novelty of the issues, I exercise my discretion under section 282(11) of the *Insurance Act* to allow Mr. Lehman his expenses incurred in respect of the arbitration.

Order:

1. GAN Canada shall pay Mr. Lehman, pursuant to section 23(8) of the *Schedule* (Regulation 776/93), IRBs in the amount of $310.21 with interest from the benefit termination date, May 22, 1996, until the date of this decision.

2. GAN Canada shall pay Mr. Lehman, pursuant to section 28 of the *Schedule*, a weekly LEC benefit in the amount of $153.41 with interest from the date of this decision onwards.

3. GAN Canada shall pay to Mr. Lehman, pursuant to section 282(11) of the *Insurance Act*, his expenses incurred in respect of the arbitration.

October 27, 1997

Beth Allen
Arbitrator

Date

SCHEDULE "A"

Exhibits:

Exhibit 1	Report of Andrew James dated July 14, 1997 and Net Weekly Income Table, Other than Self-Employment
Exhibit 2	Medical Brief for the Applicant David Lehman
Exhibit 3	Employment and Other Documentation for the Applicant David Lehman
Exhibit 4	Insurer's Arbitration Document Brief
Exhibit 5	Report of Crawford - THG dated July 4, 1997
Exhibit 6	Mr. Lehman's 1996 T1 General Income Tax Return

Authorities:

Applicant's Case Brief (ten tabs)

Authorities submitted by the Insurer:

George Bernicky and Guardian Insurance Company of Canada (July 6, 1994), OIC A-006268, July 6, 1994
Vanderwal and State Farm Mutual Automobile Insurance Company, 20 O.R. (3d) 401 Ontario Court (General Division)
Bogdan v. Royal Insurance Co. of Canada, [1996] O.I.C.D. No. 19
Ontario Insurance Commission Bulletin No. 29/94 General "Changes to the Statutory Accident Benefits Schedule (SABS), December 30, 1994

Written Submissions:

Applicant's submissions on the O.E.F. 45, Excess Economic Loss Endorsement, dated July 18, 1997
Insurer's submissions on the O.E.F. 45, Excess Economic Loss Endorsement (with three attachments) dated July 23, 1997.

Schedule "B"

PART VI
LOSS OF EARNING CAPACITY BENEFITS

Procedure if No Agreement

23.-(1) An insured person who does not accept the insurer's offer within forty-five days after receiving it shall be deemed to have rejected the insurer's offer in respect of both residual earning capacity and pre-accident earning capacity.

(2) An insured person who rejects the insurer's offer in respect of residual earning capacity shall be assessed under section 27, and the insurer shall give the person notice of that requirement.

(3) If an insured person rejects the insurer's offer in respect of pre-accident earning capacity, the dispute may be resolved in accordance with sections 279 to 283 of the *Insurance Act*, based on section 29 of this Regulation.

(4) If an insured person rejects the insurer's offer in respect of both pre-accident earning capacity and residual earning capacity, the dispute may be resolved in accordance with sections 279 to 283 of the *Insurance Act*, based on sections 29 and 30 of this Regulation, but no steps shall be taken under sections 279 to 283 of the *Insurance Act*, other than the filing of an application for mediation, pending receipt of the report of the designated assessment centre under section 27.

(5) Forty-five days after receipt by the insurer of the report from the designated assessment centre under subsection 27(5), the insurer shall commence payment of weekly loss of earning capacity benefits based on the insurer's offer made under section 21 in respect of pre-accident earning capacity and the gross annual income determined by the centre in respect of residual earning capacity, unless the insured person disputes the report within thirty days of receiving it in accordance with sections 279 to 283 of the *Insurance Act* or has disputed the insurer's offer in respect of pre-accident earning capacity in accordance with those sections.

(6) If, six months after the centre notifies the insured person under subsection 27(2), no report has been submitted under subsection 27(5) and the centre has informed the insurer that the report has not been submitted because of the insured person's failure to cooperate, the insurer may, on notice to the person and until a report is submitted under subsection 27(5), pay the

person weekly loss of earning capacity benefits based on the insurer's offer made under section 21.

(7) By agreement between the insurer and the insured person,

(a) the forty-five-day period referred to in subsection (1) may be extended;

(b) the assessment referred to in subsection (2) may be delayed;

(c) the forty-five-day period referred to in subsection (5) may be extended;

(d) the thirty-day period referred to in subsection (5) may be extended.

(8) Subject to subsections (5) and (6) and to subsection 281(4) of the *Insurance Act*, the insurer shall continue to pay benefits under Part II, section 15, Part IV or Part V pending resolution of a dispute under subsection (3) or (4), if the person continues to qualify for those benefits.

Schedule "C"

PART VI
LOSS OF EARNING CAPACITY BENEFITS

Procedure if No Agreement

23.—(1) An insured person who does not accept the insurer's offer within forty-five days after receiving it shall be deemed to have rejected the insurer's offer in respect of both residual earning capacity and pre-accident earning capacity.

(2) An insured person who rejects the insurer's offer in respect of residual earning capacity shall be assessed under section 27, and the insurer shall give the person notice of that requirement.

(3) If an insured person rejects the insurer's offer in respect of pre-accident earning capacity, the dispute may be resolved in accordance with sections 279 to 283 of the *Insurance Act*, based on section 29 of this Regulation.

(4) If an insured person rejects the insurer's offer in respect of both pre-accident earning capacity and residual earning capacity, the dispute may be resolved in accordance with sections 279 to 283 of the *Insurance Act*, based on sections 29 and 30 of this Regulation, but no steps shall be taken under sections 279 to 283 of the *Insurance Act*, other than the filing of an application for mediation, pending receipt of the report of the designated assessment centre under section 27.

(5) Subject to subsection (8), if an insured person rejects the insurer's offer in respect of residual earning capacity or both residual earning capacity and pre-accident earning capacity, the insurer may commence paying weekly loss of earning capacity benefits to the insured person 14 days after receiving the report from the designated assessment centre under subsection 27 (5).

(5.1) The benefits paid under subsection (5) shall be based on,

(a) the insurer's offer made under section 21, in respect of the insured person's pre-accident earning capacity; and

(b) the determination made by the designated assessment centre of the insured person's gross annual income, in respect of the person's residual earning capacity.

(5.2) Subject to subsection (8), if an insured person rejects the insurer's offer in respect of pre-accident earning capacity but not residual earning capacity, the insurer may, upon receiving the rejection, commence paying weekly loss of earning capacity benefits to the insured person based on the insurer's offer made under section 21.

(6) If, after the centre notifies the insured person under subsection 27(2), no report has been submitted under subsection 27(5) and the centre has informed the insurer that the report has not been submitted because of the insured person's failure to cooperate, the insurer may, on notice to the person and until a report is submitted under subsection 27(5), pay the person weekly loss of earning capacity benefits based on the insurer's offer made under section 21.

(7) By agreement between the insurer and the insured person,

(a) the forty-five-day period referred to in subsection (1) may be extended;

(b) the assessment referred to in subsection (2) may be delayed;

(8) Subject to subsection (6) and to subsection 281 (4) of the *Insurance Act*, the insurer shall continue to pay benefits under Part IV or V pending the resolution of a dispute under subsection (3) or (4), if the person continues to qualify for those benefits.