Financial Services Commission

Ontario

Commission des services financiers de l'Ontario

Appeal P97-00064

OFFICE OF THE DIRECTOR OF ARBITRATIONS

GAN CANADA INSURANCE COMPANY

Appellant/Respondent

and

DAVID LEHMAN

Respondent/Appellant

BEFORE: David R. Draper, Director's Delegate

COUNSEL: Ralph D'Angelo (for GAN Canada)
Stephen B. Abraham (for David Lehman)

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that**:

1. The appeal brought by David Lehman is dismissed.

2. The appeal brought by GAN Canada Insurance Company is allowed in part. Paragraphs 1 and 2 of the arbitration order dated October 27, 1997 are rescinded and the following paragraphs are substituted:

    1. Subject to paragraph 2, GAN Canada Insurance Company shall pay David Lehman loss of earning capacity benefits of $153.41 per week, plus interest, from May 22, 1996, onwards.

2. GAN Canada Insurance Company is entitled to credit for any weekly benefits paid for the period from May 22, 1996, onwards, including benefits paid pursuant to the arbitration order dated October 27, 1997, plus interest.

3. David Lehman is entitled to his reasonable appeal expenses related to both appeals, payable by GAN Canada Insurance Company.

August 10, 1998

David R. Draper
Director's Delegate

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Both parties appeal the arbitrator's decision of October 27, 1997. The dispute involves the calculation of David Lehman's loss of earning capacity benefits ("LECBs") under section 28 of the *Statutory Accident Benefits Schedule - Accidents after December 31, 1993 and before November 1, 1996* ("the *SABS-1994*"), and whether GAN Canada Insurance Company ("GAN") is obliged to continue paying income replacement benefits ("IRBs") until the LECB question is resolved.

The appeals raise the following novel and important questions:

1. Did the arbitrator err in concluding that the 1995 amendments to subsection 23(8) of the *SABS-1994* do not apply to Mr. Lehman because his right to the benefits, including interim benefits, crystallized at the time of his accident in 1994?

2. Did the arbitrator err in her determination of Mr. Lehman's LECBs? More specifically, did she err:

   (a) in determining Mr. Lehman's pre-accident earning capacity by considering a recall notice from his previous employer, Bell Canada, that did not take place until approximately four months after the accident?

   (b) in determining Mr. Lehman's residual earning capacity by taking his personal preferences into account in deciding which type of employment best satisfied the criteria in subsection 30(2) of the *SABS-1994*?

II. BACKGROUND

Mr. Lehman was injured in a snowmobile accident on January 29, 1994, just after the *SABS-1994*

came into force. At the time of the accident, he was 37 years old and had not been working for just over one year. His previous employment was with Bell Canada, where he worked as a temporary part-time installation/repair technician.

GAN paid Mr. Lehman IRBs under Part II of the *SABS-1994*, which are based on the insured person's employment situation at the time of the accident. The parties agreed that Mr. Lehman did not fit under the job offer or layoff provisions in paragraphs 3 and 4 of subsection 7(1). As a result, he was considered under paragraph 2 of subsection 7(1) as unemployed at the time of the accident, but employed at some point during the 156 weeks before the accident. This is important since benefits are calculated differently depending on the category under which the person qualifies.

Because he qualified under paragraph 7(1)2, Mr. Lehman had to decide whether his IRBs should be based on his income during the 4, 52, or 156 weeks before the accident. My understanding is that he chose 156 weeks and that based on his income over this period, GAN paid him $310.21 per week.

According to section 20 of the *SABS-1994*, IRBs are to be replaced after 104 weeks (in certain circumstances) by LECBs. For example, where an insured person continues to qualify for IRBs more than 104 weeks after the onset of his or her disability, the insurer is required to pay LECBs instead of IRBs [s.21(1)1]. The parties agreed that this provision applied to Mr. Lehman. Because his disability arose on the date of the accident, January 29, 1994, he qualified for LECBs 104 weeks later - in early 1996.

Although the parties agreed that Mr. Lehman should receive LECBs, they had to determine the amount. According to section 28 of the *SABS-1994*, LECBs are calculated based on 90 per cent of the difference between the insured person's pre-accident earning capacity (determined according to section 29) and his or her residual earning capacity (determined according to section 30).

Part VI of the *SABS-1994* provides detailed procedures for the transition from IRBs to LECBs. The insurer is to provide a written offer to the insured person for the payment of LECBs. If the offer is not accepted with respect to residual earning capacity, the insurer is to arrange an assessment at a designated assessment centre ("REC-DAC").

GAN's initial LECB offer was "nil." This was based on its view that Mr. Lehman's residual earning capacity was greater than his pre-accident earning capacity. Mr. Lehman rejected this offer and, therefore, a REC-DAC assessment was scheduled. In the interim, GAN did not pay any weekly benefits, relying on the January 1995 amendments to the *SABS-1994*. Mr. Lehman claims that GAN had to follow the rules in place at the time of his accident, which required the insurer to continue paying IRBs pending resolution of a dispute about LECBs.

III. SUBSECTION 23(8) - BENEFITS PENDING RESOLUTION

When the *SABS-1994* came into effect on January 1, 1994, subsection 23(8) read 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.

IRBs are paid under Part II of the *SABS-1994* and, therefore, subsection 23(8) required the insurer to continue paying IRBs pending resolution of the LECB issue (unless the person no longer met the test for IRBs). However, the *SABS-1994* were amended by Ontario Regulation 781/94. Effective December 31, 1994, this regulation revoked subsection 23(8) and substituted the following:

> **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.

This new section does not include IRBs in the pay-pending-resolution requirement. Instead, the insurer is allowed to pay benefits based on the offer it made with respect to pre-accident earning capacity and the REC-DAC's assessment of residual earning capacity.

At arbitration, GAN argued that by the time Mr. Lehman's entitlement to LECBs arose in 1996, the *SABS-1994* no longer required it to continue paying IRBs pending resolution of the dispute about LECBs. The arbitrator rejected this position. She held that GAN could not rely on the amendments because Mr. Lehman's right to benefits, including interim benefits, crystallized at the time of his accident. In the arbitrator's view, the amendments were not merely procedural and, therefore, should not be applied retroactively to "prejudicially affect Mr. Lehman's rights as they existed on the date of his accident." As a result, she ordered GAN to continue paying IRBs at $310.21 per week until October 27, 1997, the date of the arbitration decision.

Since the release of this decision, it has been followed by other arbitrators.[1]

On appeal, GAN contends that the arbitrator erred in applying the old version of section 23(8). For the following reasons, I agree.

In considering this issue, I was greatly assisted by the analysis in *Driedger on the Construction of Statutes*.[2] At page 552, the author sets out the following rules for the temporal application of legislation:

> 1. It is presumed that legislation is not meant to have a retroactive

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[1] For example, see *Harper and Liberty Mutual Insurance Company*, (December 19, 1997, OIC A96-001257), under appeal; *Fox and Economical Mutual Insurance Company*, (February 17, 1998, OIC A96-002040); *Martin and Liberty Mutual Insurance Company*, (April 15, 1998, OIC A96-001158); and, *Z.T. and Missisquoi Insurance Company*, (December 31, 1997, OIC A96-000735).

[2] Ruth Sullivan, *Driedger on the Construction of Statutes*, (Third Edition), (Toronto: Butterworths 1994), chapter 19 ("*Driedger*").

> application. This presumption applies to all legislation, including procedural provisions, beneficial provisions and provisions designed to protect the public interest. The presumption is strong, but may be rebutted either expressly or by necessary implication.
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> 2. It is presumed that legislation is meant to apply immediately and generally to on-going facts unless its application would interfere with vested rights. This presumption applies to all legislation, including procedural provisions, beneficial provisions and provisions designed to protect the public interest.
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> 3. It is presumed that legislation is not meant to interfere with vested rights. Where the impact of legislation on a protected interest or expectation is arbitrary or unfair, the legislation is presumed not to apply. The greater the unfairness, the stronger the presumption. By definition, provisions that are purely procedural or beneficial do not interfere with vested rights.

As discussed in *Driedger*, there is a distinction between legislation that applies "retroactively" or "retrospectively," and legislation that applies only prospectively but affects existing or "vested" rights.[3] The former involves legislation affecting facts already in existence at the time the legislation comes into force. The latter applies only to ongoing or future events.

The classic Canadian judicial description of retroactive application is found in *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271, a case dealing with amendments to the *Income Tax Act*. At page 279, Dickson J., as he then was, states as follows:

> ... the repealing enactment in the present case, although undoubtedly affecting past transactions does not operate retrospectively [retroactively, as used in *Driedger*] in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of the parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to the enactment of the amending statute.

[3] *Driedger*, pp. 510-511.

The situation here is similar. The 1995 amendments to the *SABS-1994* do not purport to affect benefits already owing. While they apply to ongoing claims, the application of legislation to ongoing facts is a prospective, not a retroactive, application of law.[4] This is particularly striking for LECBs. In December 1994, when subsection 23(8) was revoked and replaced with a new version, no one in Ontario was receiving LECBs. Because LECBs are not payable until at least 104 weeks after the accident and the *SABS-1994* only apply to accidents on or after January 1, 1994, they did not come into play until January 1996. In my view, therefore, the question is not whether the new version of subsection 23(8) applies retroactively to Mr. Lehman, but whether it interferes with a vested right.

In *Driedger*, vested rights are described as follows:

> When new legislation comes into force or when legislation in force is repealed, the existing interests or expectations of individuals are often prejudiced. Vested or accrued rights are the interests and expectations that the law chooses to protect from the effects of new legislation or repeal.[5]

As I understand the arbitrator's decision, she refused to apply the 1995 version of subsection 23(8) because it would have interfered with Mr. Lehman's vested rights. This was based on her view that the rights and obligations in the *SABS-1994*, other than purely procedural provisions, crystallize or vest at the time of the accident.

GAN disputes the arbitrator's interpretation, citing court decisions holding that an individual has no vested right in the continuation of the law as it stood when he or she initially qualified for

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[4] See *Driedger*, pp. 510 and 517-518.

[5] *Driedger*, p.510.

benefits,[6] or organized his or her financial affairs.[7] While these decisions are helpful, they depend to some extent on their particular facts and the legislation involved. I agree with Mr. Lehman that the analysis applied to government programs such as income tax and unemployment insurance do not necessarily apply to benefits provided under an automobile insurance policy.

Mr. Lehman also referred me to a number of court decisions.[8] However, they all deal with somewhat different issues raised under different legislation. Like the decisions GAN relies upon, they provide guidance, but do not answer the specific issues in dispute here.

The only court decision dealing with section 23 of the *SABS-1994* is the recent decision in *Mihichuk and Allstate Insurance Co. of Canada*, [1998] O.J. No. 897 (No.97-0634). In that case, Mr. Justice Kozak applied the January 1995 amendments to a 1994 accident. It does not appear, however, that there was any issue about which version should be used, only how the new provisions should be interpreted. As a result, I do not view *Mihichuk* as deciding the issues raised in this appeal.

Again, I find the analysis in *Driedger* helpful. Based on a consideration of the specific legislation involved, the question is "whether the particular interest or expectation for which protection is sought is sufficiently important to be recognized as a right and sufficiently defined and in the control of the claimant to be recognized as vested or accrued."[9]

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[6] *Kowalchuk v. Canada (Employment and Immigration Commission)* (1990), N.R. 275 (F.C.A.); *Coté v. Canada Employment and Immigration Commission* (1986), 69 N.R. 126 (F.C.A.).

[7] *Gustavson Drilling(1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271.

[8] *Ortved v. Bailey et al.* (1983), I.L.R. 1-1617 (Ont. S.C.), appeal to the Court of Appeal dismissed without reasons; *Lownds v. Kenley et al.* (1986), 43 M.V.R. 84 (N.S.C.A.); *Re Marciniak et al. and Royal Insurance Co. of Canada* (1979), 99 D.L.R. (3d) 180, 24 O.R. (2d) 477 (H.C.J.); *Re Tozzo and Excess Insurance Co. Ltd.* (1977), 17 O.R. (2d) 737 (H.C.J.).; *Gallop v. Co-operators Insurance Association (Guelph)* (1977), 16 O.R. (2d) 49 (O.C.A.); *Heney v. Ontario (Superintendent of Insurance)*, [1983] O.J. No. 332. (S.C.).

[9] *Driedger*, p.530.

Automobile insurance in Ontario is strictly regulated. While automobile insurance policies are contractual, the terms of the standard policy are set by provincial legislation. Subsection 268(1) of the *Insurance Act* provides that every automobile insurance policy includes statutory accident benefits set out in the regulation - the *SABS-1994* - **and any amendments to the regulation**":

> **268.**—(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.

This provision clearly contemplates amendments to the *SABS-1994* that will affect the coverage provided in existing policies. In other words, the terms of an automobile insurance policy are not fixed for its entire duration. For accidents after January 1, 1995, there is no question that the 1995 version of subsection 23(8) of the *SABS-1994* applies, even if the policy was issued in 1994. The harder question, raised in this appeal, is whether the 1995 amendments can affect ongoing claims arising from accidents that occurred before January 1, 1995.

In my opinion, the legislation creates a right to statutory accident benefits, but only those provided in the regulations - which may be amended from time to time. The Legislature chose to leave most of the details to the regulations. This suggests a desire for flexibility that is emphasized by the specific reference in subsection 268(1), set out above, to amendments. The need for flexibility may be explained by the significant changes to Ontario's automobile insurance system introduced in 1994, changes that followed relatively shortly after the major overhaul to the system in 1990.

The regulation-making authority given to the Lieutenant Governor in Council is extremely broad.[10] However, it is not unlimited. The *Insurance Act* includes some important limits that were part of the 1994 revisions. Subsection 268(1.1) lists the benefits that must be included in the

[10] *Insurance Act*, s.121(1).

SABS-1994. The list includes income replacement benefits and loss of earning capacity benefits, but says nothing about the payment of interim benefits pending the move from one type of benefit to another. In addition, subsection 268(1.5) provides that any indexing of periodic benefits in the *SABS-1994* can only increase benefits, not reduce them. In my view, however, there is nothing to suggest that a regulation made with the authority of the Lieutenant Governor in Council does not take effect immediately, as is the usual rule.[11]

I am also influenced by the fact that the 1995 changes were brought in as amendments to the *SABS-1994*, not as a separate regulation. Ontario now has three different regulations dealing with statutory accident benefits, reflecting the three statutory schemes enacted since 1990 and applying to accidents that occur during three different periods: O.Reg. 672, as amended, applies to accidents from June 22, 1990 to December 31, 1993; O.Reg. 776, as amended, applies to accidents from January 1, 1994 to October 31, 1996; and, O.Reg. 423/96 applies to accidents on or after November 1, 1996. In my view, it is significant that the 1995 amendments were done as amendments to O.Reg. 776, cited at that time as the *Statutory Accident Benefits Schedule - Accidents on or after January 1, 1994*, and not as a separate regulation applying only to accidents occurring on or after January 1, 1995.

Further, the 1995 amendments included one change that was specifically made applicable only to accidents on or after January 1, 1995. Section 91 of the *SABS-1994*, which deals with insurance coverage for company automobiles and rental automobiles, was amended. However, the old rules were left to apply to accidents occurring before January 1, 1995, with the new provisions applying to accidents occurring on or after January 1, 1995. The changes to subsection 23(8) were done quite differently. The old subsection was revoked and replaced by a new version that became part of the *Statutory Accident Benefits Schedule - Accidents on or after January 1, 1994*, as amended.

Just before the 1995 amendments came into effect, the Commissioner issued Bulletin Number

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[11] *Regulations Act*, R.S.O. 1990, Chapter R.21, s.3.

29/94, stating that "[t]hese changes are housekeeping amendments that will make the system more efficient by simplifying processes and clarifying terminology set out in this regulation." While not determinative of the legal question, I agree with GAN that this reflects an intention to enact regulations with immediate effect, applying to both new and ongoing claims. Except for the coverage provided for company cars and rental vehicles, the amendments were not meant to create separate regimes for 1994 and 1995 accidents.

I am also not persuaded that it is unjust to apply the new provision to Mr. Lehman. In December 1994, GAN was meeting its obligation under the *SABS-1994* to pay IRBs. The obligation to pay LECBs would not arise for another year. If Mr. Lehman had any expectation about future benefits, it was that GAN would continue paying IRBs and if he remained eligible in January 1996, it would then pay LECBs. The amendments did not change that. They only changed the process for dealing with disputes about LECBs.

In my view, it cannot be said that Mr. Lehman relied on the old subsection 23(8) in a manner that would make it unfair to deprive him of its operation. This distinguishes this case from previous arbitration and appeal decisions dealing with changes to the *Insurance Act* and regulations affecting appeals and expenses.[12]

The Commissioner described the 1995 revisions to the LECB process as follows:

> . . . The Loss of Earning Capacity Benefit (LECB) is the benefit paid after two years for persons with a permanent economic loss. Claimants who dispute the amount offered by their insurer continue to receive their initial benefit until dispute is resolved under the current process. The proposed change is to base the benefit pending the outcome of the dispute on the difference between the benefit payment prior to the LECB offer and the Designated Assessment Centre (DAC) assessment of residual earning

[12] See for example, *Pinto and General Accident Assurance Co. of Canada*, (November 26, 1997, OIC P97-00031); *Henriques and Motor Vehicle Accident Claims Fund*, (August 21, 1997, OIC P97-00002).

capacity.[13]

In my opinion, this type of revision is allowed. The legislation is structured to allow modifications designed to improve the system. Treating accident benefits, including the kind of interim benefits involved here, as a package of rights that all crystallize at the time of the accident is not required by the legislation or common law principles, and would unduly restrict the ability to effect change.

Finally, the *Interpretation Act*, R.S.O. 1990, Chapter I.11, must be considered. Paragraph 14(1)(a) provides as follows:

> **14.-** (1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided,
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked;

While different words are used, I am not convinced that this provision affects the analysis above. Just as Mr. Lehman did not have a vested right to receive IRBs pending resolution of the LECB issue, he did not have an acquired, accrued, or accruing right or privilege to them.

For these reasons, GAN's appeal on this issue is allowed.

IV. LOSS OF EARNING CAPACITY BENEFITS

By the time of the arbitration hearing, GAN accepted Mr. Lehman was entitled to LECBs. However, the parties still were unable to agree on the calculation of either his pre-accident earnings capacity or residual earning capacity.

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[13] Commissioner's Bulletin No. 29/94.

A. Pre-accident Earning Capacity

The parties agreed that because Mr. Lehman was unemployed at the time of the accident, his pre-accident earning capacity is determined under subsection 29(3) and paragraph 29(4)(a) of the *SABS-1994*, which state:

> **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 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.**
>
> (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;
>
> [emphasis added]

The phrase "personal and vocational characteristics" is defined in section 1 of the *SABS-1994*, setting out the factors to be considered in determining both pre-accident and residual earning capacities:

> "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, and
(g) language abilities

At the time of his accident in January 1994, Mr. Lehman had been off work for just over a year. He was previously employed by Bell Canada as a temporary part-time installation/repair technician, working during the following periods.

April 10, 1989 - October 30, 1990
July 29, 1991 - March 7, 1992
June 1, 1992 - January 23, 1993

Based on Mr. Lehman's tax records, the arbitrator found that his income was $24,390.93 in 1990, $19,587.41 in 1991, $20,287.45 in 1992 and $2,996.24 in 1993 (up to January 23, 1993).

The parties agreed that Mr. Lehman's best income period was from July 29, 1991 to July 26, 1992, when his income was $34,656, resulting in net weekly income of $478.07. According to paragraph 29(4)(a), his pre-accident earnings capacity had to be at least this much. GAN argued that this figure - $478.07 per week - should be used. Mr. Lehman claimed that it should be higher.

At the arbitration hearing, the dispute focussed on a recall from Bell Canada that Mr. Lehman received in May 1994, approximately 16 months after being laid off and four months after the accident. The arbitrator found that he was offered a position starting June 1, 1994, as a regular part-time repairer/installer, but was unable to accept it due to his accident-related injuries.

Mr. Lehman argued that the recall was relevant to his pre-accident earning capacity. Based on his contention that he could have earned $57,000 a year if he had been able to return to work, he claimed that his pre-accident capacity was $725.10 per week. GAN disagreed. It maintained that the recall was irrelevant, arguing that pre-accident earning capacity is meant to be retrospective, based on factors such as employment history, not future opportunities.

The arbitrator agreed with GAN that pre-accident earning capacity is not based on future opportunities, but must "be viewed as it was before the accident up to the time of the accident." However, she held that in the particular circumstances of this case, the recall was relevant to Mr. Lehman's earning capacity at the time of the accident. While she accepted his income figure of $57,000 per year, the arbitrator took his sporadic work history into account. As a result, she divided $57,000 by 12 to establish a monthly rate, and then divided that figure by 5.52, the average number of months he worked in the four years before the accident. This resulted in a gross weekly income of $479.58. Using the Ontario Insurance Commission tables to convert this to a net rate, the arbitrator arrived at a pre-accident earning capacity of $364.58. Because this was less than the minimum of $478.07, calculated under paragraph 29(4)(a), the arbitrator concluded that Mr. Lehman's pre-accident earning capacity was $478.07 per week.

On appeal, GAN claims that the arbitrator erred in considering the recall. In the alternative, it contends that even if she was entitled to consider the recall, she erred in ignoring evidence that the employment situation at Bell Canada was uncertain, casting doubt on whether Mr. Lehman would have been able to earn $57,000 per year.

Since the arbitrator's calculation of Mr. Lehman's pre-accident earning capacity resulted in a figure below the minimum amount under paragraph 29(4)(a), GAN's appeal on this issue might be moot. However, Mr. Lehman also appeals the arbitrator's decision, claiming she erred in refusing to accept the full $57,000 figure.

I am unable to accept the objections of either party. In my opinion, the arbitrator's decision is a reasonable application of the legislation to the particular facts of this case.

Subsection 29(3) of the *SABS-1994*, the provision in issue here, must be interpreted within its context. Not only does section 29 set out different calculations for pre-accident earning capacity depending on the insured person's pre-accident employment situation, it is only one part of the calculation of LECBs. Loss of earning capacity benefits (LECBs) are based on a comparison

between the insured person's pre-accident earning capacity, determined under section 29, and his or her residual earning capacity, determined under section 30. These provisions must all be read together to sensibly interpret any particular part.

According to section 29(1), insured persons who were employed at the time of the accident, had a job offer, were on strike, locked out or laid off, or were on pregnancy or parental leave, have their pre-accident earning capacity calculated based on the same income that was used to calculate their IRBs. In other words, their pre-accident earning capacity is based on their past performance - it is a measure of demonstrated capacity, not theoretical capacity. This prevents someone who was underemployed in the three years before the accident from arguing that his or his pre-accident earning capacity is actually higher than his employment history suggests.

The calculation of pre-accident earning capacity is different for those who were unemployed at the time of the accident, but were employed at some point during the previous 156 weeks. According to subsection 29(3), it is based on "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." Unlike the other categories, the determination is not limited to the person's actual pre-accident earnings (or pre-accident job offer). The question is what the person could reasonably have earned at the time of the accident.

I agree with GAN, as did the arbitrator, that the focus is the time of the accident. However, any information relevant to the person's earning capacity at that time should be considered, including information that does not become available until after the accident. I do not accept that the arbitrator used the Bell Canada recall to calculate Mr. Lehman's loss of future income or opportunity. If she had, it would have been an error. Instead, she found that the recall provided information relevant to the question of Mr. Lehman's earning capacity at the time of the accident. In my opinion, this was proper.

While the issue is the person's earning capacity, I also agree with GAN that it cannot be capacity

in the broadest sense. That would be inconsistent with the treatment of those who were employed at the time of their accident. However, I do not accept GAN's arguments in this case, which seem to suggest that only Mr. Lehman's pre-accident earnings should be considered. That is not what the legislation says. The determination of pre-accident earning capacity under subsection 29(3) requires a realistic assessment of the insured person's earning capacity at the time of the accident. In my view, that is what the arbitrator did.

The remaining issues are essentially questions of fact. GAN contends that the arbitrator failed to take into account evidence that the employment situation at Bell Canada was uncertain, while Mr. Lehman argues that she should not have reduced the $57,000 figure. As stated in many previous decisions, my role on appeal is not to second-guess the arbitrator's assessment of the evidence. After reviewing the record, I am satisfied there was ample evidence to support the arbitrator's findings and, therefore, there is no reason to interfere.

As a result, the appeals of both GAN and Mr. Lehman on this issue are dismissed.

B. Residual Earning Capacity

This leaves the question of Mr. Lehman's residual earning capacity. The relevant legislation is found in section 30 of the *SABS-1994*, which states as follows:

> **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).
>
> (2) The criteria referred to in subsection (1) are:
>
> 1. The person,
>
> i. is able and qualified to perform the essential tasks of the employment, or
>
> 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.
>
> 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.
>
> (3) For the purpose of subsection (2), a person is able and qualified to perform the essential tasks of an employment if,
>
> (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.

The REC-DAC assessment was done in September 1996, leading to a report dated November 4, 1996. It concluded that Mr. Lehman was competitively employable as a restaurant equipment sales representative with earnings from $29,553 to $39,302, or as an electronics assembler/fabricator with earnings from $20,631 to $26,755.

GAN urged the arbitrator took to calculate Mr. Lehman's residual earning capacity based on the restaurant equipment sales representative, the higher paying position. Mr. Lehman argued that because he decided to leave the restaurant business some years before the accident, it would not be reasonable to expect him to return to work as a restaurant equipment sales representative.

The arbitrator held that section 30 allowed her to look at which position "best satisfies" the criteria. She accepted Mr. Lehman's evidence that he made a conscious decision to leave the

restaurant business and return to school, studying micro-computer electronics. Although he did not work in that field, he did not return to restaurant work. Instead, he accepted employment with Bell Canada. The arbitrator found that Mr. Lehman had a" *bona fide*, pre-established" preference for electronics work over restaurant work that should be taken into account. As a result, she calculated Mr. Lehman's residual earning capacity based on the electronics assembler/fabricator position, resulting in a figure of $307.62.

On appeal, GAN submits that the arbitrator erred in refusing to consider the restaurant equipment sales representative position. I do not agree. As stated by the arbitrator, the type of employment that "best satisfies" the criteria is to be considered. The criteria include a consideration of whether it would be reasonable to expect the person to engage in the employment having regard to his or her personal and vocational characteristics [s. 30(2)3], which include the person's employment history and vocational interests [s.1].

In my opinion, these provisions allowed the arbitrator to compare the two types of employment and choose the more appropriate one. If restaurant equipment sales representative were the only option, or the other employment paid far less, the outcome might be different. On the facts of this case, however, I find no error in the arbitrator's conclusion.

V. APPEAL EXPENSES

These appeals raised novel and significant issues of importance beyond this case. Mr. Lehman's involvement was helpful and, therefore, I conclude that he should receive his reasonable appeal expenses despite his lack of success in his own appeal.

August 10, 1998

David R. Draper
Director's Delegate