1999 CarswellOnt 4488
Financial Services Commission of Ontario (Appeal Decision)

Royal Insurance Co. of Canada v. Ironside

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Royal Insurance Company of Canada, Appellant and James Ironside, Respondent

Makepeace Dir. Delegate

Judgment: November 30, 1999
Docket: P99-00011

Counsel: *Nestor A. Kostyniuk*, for Royal Insurance Company of Canada.
John R. McCarthy, for James Ironside.

Subject: Insurance

Headnote

Insurance --- No fault automobile insurance — No-fault benefits — Disability benefits (loss of income payments) — Calculation

Prior to motor vehicle accident insured worked as firefighter and in own boat business that had not shown profit since its inception eight years prior — Insured claimed additional earnings of $40,000 to $50,000 on cash basis that was not reflected in business's financial statements — Arbitrator found $14,000 loss on sales of $656,000 in year of accident showed activity was nearly profitable at time of accident and expectation of profit in near future was reasonable — Arbitrator calculated insured's loss of earning capacity benefits based on his income as firefighter and self-employment income of $22,000 — Insurer appealed inclusion of self-employment income — Appeal dismissed — Arbitrator's award represented fair and reasonable estimate of insured's pre-accident earning capacity from self-employment — Arbitrator considered all available evidence including actual self-employment income and business's increased expenses and losses attributable to accident — Arbitrator considered market value evidence of insured's skills as marine mechanic — As different calculations produced comparable figures, they represented additional assurance that pre-accident earning capacity reflected what insured could reasonably have earned.

Table of Authorities

Cases considered by *Makepeace Dir. Delegate*:

Angolano v. Liberty Mutual Insurance Co. (August 6, 1999), Doc. FSCO A97-001613 (F.S. Trib.) — considered

Canadian General Insurance Group v. Tustin (August 13, 1999), Doc. FSCO P-00213 (F.S. Trib.) — considered

Lehman v. GAN Canada Insurance Co. (1998), 1998 CarswellOnt 6256 (F.S. Trib.) — considered

Lehman v. GAN Canada Insurance Co. (October 27, 1997), Doc. OIC A96-001417 (Ont. Insurance Comm..) — considered

Statutes considered:

Insurance Statute Law Amendment Act, 1993, S.O. 1993, c. 10
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Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8
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APPEAL by insurer from decision of arbitrator awarding insured loss of earning capacity benefits.

***Makepeace Dir. Delegate*:**

I. Nature of the Appeal

1 Royal Insurance Company of Canada ("Royal") appeals from the decision of the arbitrator dated January 19, 1999. Royal calculated James Ironside's loss of earning capacity benefit based on his income from employment as a firefighter. Mr. Ironside claimed he also earned self-employment income of $40,000 to $50,000 from his boat business. The arbitrator held that in determining Mr. Ironside's pre-accident earning capacity for the purpose of calculating his loss of earning capacity benefit, Royal must also include self-employment income of $22,000. The arbitrator denied Mr. Ironside's claim for a special award. Mr. Ironside does not cross-appeal.

II. Issue and Submissions

2 The following facts are undisputed. Mr. Ironside was injured in a motor vehicle accident on October 25, 1994. He was employed full-time as a firefighter for the Midland Fire Department. About eight years before the accident, he started a business, Georgian Bay Performance Boats ("Georgian Bay"), in his spare time. He and his wife incorporated the business in February 1994 as equal shareholders. Mr. Ironside's shifts allowed him to devote considerable time to the business.

3 While Mr. Ironside started working on marine motors as a hobby, the business had expanded its sales considerably by the time of the accident. However, it had never shown a profit. In the year before the accident, the financial statements prepared by the Ironsides' accountant showed a net loss of about $14,000. Mr. Ironside claims that he earned an additional $40,000-50,000 on a cash basis that is not reflected in the financial statements.

4 The arbitrator found that Georgian Bay's labour costs and net losses increased after the accident. On July 17, 1997, Mr. Ironside returned to work as a trainer for the fire department. His business losses increased further because his new schedule did not leave much time to devote to the business. At the time of the arbitration hearing in December 1998, the business continued to operate, but on a much smaller scale than before the accident.

5 Royal calculated Mr. Ironside's income replacement benefits ("IRBs") based on his pay as a firefighter. The amount and duration of IRBs is not in dispute. After 104 weeks of disability, Mr. Ironside was entitled to an offer of loss of earning capacity benefits ("LECBs") under Part VI of the *SABS-1994*. The *Statutory Accident Benefits Schedule - Benefits after December 31, 1993 and before November 1, 1996*. LECBs are intended to compensate an insured person for long-term impairment resulting from the accident. The benefit is calculated as 90 percent of the difference between the insured person's pre-accident earning capacity ("PEC") and his residual earning capacity ("REC"). In this case, Royal made a "zero" offer because when Mr. Ironside returned to work at modified duties, his wages were protected under his collective agreement. However, Mr. Ironside claims that his PEC should also include an amount based on self-employment income from the boat business.

6 The arbitrator heard this matter over two days in December 1998. Mr. Ironside and Shelly Ironside, his wife, testified about the business. The arbitrator also heard from five friends and business associates who testified about Georgian Bay's reputation and about the boat business generally. Documentary evidence included Georgian Bay's financial statements, Mr. Ironside's income tax returns and three reports from Hrycko & Associates, chartered accountants retained by Royal.

7 At the arbitration hearing, Royal submitted that Mr. Ironside operated the business as a hobby and should not be treated as "self-employed." Royal relied on Mr. Ironside's determination to keep the business going despite its losses, and his testimony that he got into the business because he enjoys working with motors. The arbitrator rejected this argument, finding that "a loss of $14,000 on sales of $656,000 shows that his activity was nearly profitable at the time of the accident and ... that an expectation of profit in the near future was reasonable." Accordingly, he concluded that the activity was carried on "with a reasonable expectation of profit" and therefore qualified as a "business" under Commissioner's Guideline No. 4/96. The arbitrator next considered whether Mr. Ironside should be treated as an employee of the corporation or as self-employed. He concluded that although the business took corporate form after February 1994, in substance, Mr. Ironside continued to carry on business as a self-employed person. There was ample evidence for both findings and Royal does not challenge them on appeal.

8 The sole issue before me is whether the arbitrator erred in ordering that self-employment income of $22,000 be included in Mr. Ironside's pre-accident earning capacity. Subsection 29(2) of the *SABS-1994* says that an insured person's PEC is based on the income 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." "Personal and vocational characteristics" is defined in section 1 of the *SABS-1994* to 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.

9 In concluding that Mr. Ironside could reasonably have earned self-employment income of $22,000 at the time of the accident, the arbitrator considered the company's income and expenses before and after the accident. He also considered evidence about the earnings of marine mechanics employed by other marinas in the area.

10 Royal argues that the arbitrator erred in finding that Mr. Ironside "could reasonably have earned" $22,000 in *self-employment* income because the business never turned a profit. Alternatively, Royal submits that the arbitrator should have recognized the Ironsides' income-splitting in recognizing any additional self-employment income.

11 Royal also says the arbitrator erred in considering what Mr. Ironside could have earned as a marine mechanic working for someone else. Royal submits that Mr. Ironside could not reasonably have earned *employment* income as a marine mechanic because he never expressed any interest in working for anyone else, his schedule at the fire department would not allow it, and he was not a certified mechanic. Royal submits that the arbitrator gave the words "could reasonably have earned" an overly broad interpretation that ignored Mr. Ironside's personal and vocational characteristics at the time of the accident.

12 As Mr. Ironside submitted his application for arbitration after November 1, 1996, this appeal is restricted to questions of law.

III. Analysis and Findings

13 The scope of the enquiry under subsection 29(2) was considered in *Lehman v. GAN Canada Insurance Co.* (August 10, 1998), Doc. FSCO P97-00064 (F.S. Trib.) confirming (October 27, 1997), Doc. OIC A96-001417 (Ont. Insurance Comm.) That case concerned a telephone repairer/installer who was laid off about a year before the accident. He was recalled to work four months after the accident, but could not return to work because of his accident-related injuries. As Mr. Lehman was unemployed at the time of the accident, his PEC was to be determined under subsection 29(3), the operative words of which are the same as in subsection 29(2). Mr. Lehman submitted that his pre-accident earning capacity should be determined on the basis of the high income he could have received if he had been able to accept the recall. He argued that "the term 'capacity' itself connotes a future-looking perspective rather than a retrospective or backward-looking one." GAN submitted that Mr. Lehman's PEC should be determined solely on the basis of his actual income in the three-years before the accident, subject to subsection 29(4), which allows the insured person to choose the 52-week period during the three years before the accident in which he or she earned the highest income.

14 The arbitrator rejected both of these approaches, saying:

> 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.

15 The arbitrator characterized her approach to the evidence as retrospective rather than prospective.

16 However, the arbitrator did not fully accept Mr. Lehman's position as to the amount of his PEC, which represented full-time earnings plus overtime. She awarded a reduced amount that took into account his history of lay-offs in that job.

17 On appeal, the arbitrator's decision was confirmed on the PEC issue. Director's Delegate Draper affirmed 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....
>
> 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.

18 Director's Delegate Draper returned to the issue recently in *Canadian General Insurance Group v. Tustin* (August 13, 1999), Doc. FSCO P-00213 (F.S. Trib). Mr. Tustin had worked as a truck driver for more than 20 years at the time of his accident. Canadian General paid him income replacement benefits for more than two years, then made a "zero" offer of loss of earning capacity benefits based on a vocational evaluation report that identified truck driver instructor as a suitable employment alternative. As Mr. Tustin challenged Canadian General's assessment of his residual earning capacity, a REC DAC assessment was arranged. The REC DAC assessors were unable to identify any suitable employment for Mr. Tustin. Accordingly, the remaining issue was the assessment of Mr. Tustin's PEC.

19 The arbitrator found that Canadian General based its offer on the minimum PEC provided under subsection 29(4), without conducting the enquiry mandated under subsection 29(2). She found that Mr. Tustin's PEC should be based on his earning capacity as a truck driver instructor.

20 Director's Delegate Draper allowed the appeal. He made the following comment:

> While Canadian General can be criticized for its initial LECB offer, its actions do not make truck driver instructor an appropriate consideration in determining Mr. Tustin's pre-accident earning capacity.

21 The Director's Delegate found that the arbitrator interpreted s. 29(2) too broadly, considering that Mr. Tustin had never worked as a truck driver instructor, had no plans to do so and was not qualified to do so. He found that Mr. Tustin's PEC must be based on his earning capacity as a truck driver. Mr. Ironside also relied on *Angolano v. Liberty Mutual Insurance Co.* (August 6, 1999), Doc. FSCO A97-001613 (F.S. Trib.). That case involved a self-employed installer of residential aluminum who claimed that his PEC should recognize unreported income. I do not find this decision helpful because the arbitrator based Mr. Angolano's PEC on his *actual* pre-accident income. The issue was how to determine it, since Mr. Angolano provided no documentary evidence to substantiate the additional income. The arbitrator accepted Mr. Angolano's oral evidence that about 80 percent of his customers paid in cash and extrapolated from Mr. Angolano's reported income and expenses to determine Mr. Angolano's PEC.

22 The following principles emerge from these decisions. First, pre-accident earning capacity, as defined under s. 29(2), is not limited to actual pre-accident income, though the two figures may be identical. This is clear from the plain language of section 29(2) ("could reasonably have earned") and a comparison with 29(1), on the one hand, and s. 29(4), on the other.

23 Subsection 29(1) is the provision governing insureds who were employed at the time of the accident; entitled to start work after the accident under a contract made before the accident; on strike, lock-out or layoff; or on pregnancy leave, parental leave or unpaid leave. What these claimants have in common is that generally their pre-accident income

(or income under the contract) is readily ascertainable. Accordingly, s. 29(1) provides that in these cases, PEC "shall be deemed to be the person's net weekly income from employment."

24 Subsection 29(3) sets out the same test as s. 29(2) for certain insureds who were not employed at the time of the accident but who were employed at some point during the previous 156 weeks, including insureds who received caregiver benefits and then became entitled to income replacement benefits. This section also applies to insureds who are entitled to caregiver benefits or other (non-employed) disability benefits. In all these cases, a broader enquiry is required because of a less stable work history. A formula is provided for persons entitled to weekly education disability benefits, presumably because it would be very difficult to identify their "personal and vocational characteristics."

25 Subsection 29(4) provides that the PEC as calculated under s. 29(1)-(3) will not be less than the insured person's actual net weekly income, including any disability benefits and unemployment insurance benefits, for the best 52 weeks of the 156 weeks before the accident. A companion provision, s. 29(6), says that a temporary disability at the time of the accident shall not be considered in determining what the person could reasonably have earned. These provisions are intended to ensure that an insured person's lifetime LECB is not reduced because of a temporary work interruption at the time of the accident.

26 In my view, s. 29(2), considered in context, is intended to recognize that self-employment income may be irregular and difficult to ascertain. However, although the enquiry under s. 29(2) goes beyond actual pre-accident income, it is limited by three factors.

27 First, the PEC is based on gross annual income that the person "*could reasonably* have earned." I agree with Royal that "reasonably" qualifies "could." The PEC cannot be based on mere possibility or speculation. Secondly, what is reasonable is to be determined "having regard to the person's *personal and vocational characteristics*." These are defined to include subjective factors (vocational interests) as well as a number of objective factors (employment history, education and training, vocational skills and abilities). Finally, pre-accident earning capacity is to be assessed as "at the time of the accident." As Arbitrator Allen said in *Lehman*, s. 29 mandates a retrospective enquiry "beginning a reasonable period before the accident and ending at the accident."

28 The Bill 164 amendments that introduced loss of earning capacity benefits also barred claims for pecuniary damages arising out of motor vehicle accidents. Keeping this trade-off in mind, I am also mindful of the comments made by Director's Delegate Draper in *Tustin*:

> The legislation should be interpreted sensibly, assuming that its intention is to provide fair and reasonable compensation to accident victims. *Aramakis and Royal Insurance Company of Canada* (OIC P96-00081, January 7, 1998). As stated by the Court of Appeal in *Bapoo v. Cooperators General Insurance Company* (1997), 36 O.R. (3d) 616:
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> > The interpretation of a statutory provision should not only comply with the legislative text and promote the legislative purpose, it should
>
> produce a reasonable and just outcome. (p. 624)

29 Mr. Ironside testified that in the year before the accident, he earned cash income of $40,000-50,000 in addition to the self-employment income (net loss) he reported to Revenue Canada. He estimated the total benefit he received from the business in that year at about $75,000, including use of the company's boats and the value of passing personal expenses through the business. The arbitrator rejected this evidence. He found that the company's financial statements provided the best evidence of Mr. Ironside's income, and concluded that the business sustained a net loss of $16,770 in the year before the accident. Though there was no cross-appeal, Mr. Ironside's counsel challenged these findings on appeal. I find that the evidence provided ample evidence for the arbitrator's conclusion.

30 The arbitrator did not stop there. He went on to consider Mr. Ironside's business losses for the year after the accident. He concluded that as a result of the accident, Mr. Ironside's annual loss increased to $45,543 from $16,770, and his labour expenses increased to $68,695 from $53,419. He concluded that Mr. Ironside incurred replacement labour costs of about $15,000 as a result of the accident, and that the annual loss of profits attributable to the accident was $29,000.

31 Only then did he turn to what Mr. Ironside could reasonably have earned as an employed marine mechanic. He did several calculations. First, he noted that two marina operators testified that they pay an experienced mechanic an average of $23 an hour. He then calculated that Mr. Ironside's additional labour cost resulting from the accident - $15,000 - amounted to about 13 hours of work per week over 50 weeks. On the same basis, the arbitrator then calculated that Mr. Ironside's increased net loss of $29,000 amounted to about 25 hours a week over the year. The fourth step was to average the two calculations: "$22,000 income earned per year at approximately 19 hours per week." Finally, as a check, the arbitrator found that "Mr. Ironside's schedule with the fire department allowed him to work 19 hours per week as an employee or contractor." This was consistent with his earlier rejection of Mr. Ironside's evidence that he worked 40-50 hours a week on the business.

32 The arbitrator commented on the difficulty of quantifying earning capacity in this situation:

> I heard no evidence ... to lead me to conclude that the cost of replacement labour approach or the loss of profits approach is a more reasonable assessment of what Mr. Ironside could reasonably have earned at the time of the accident. I therefore average the two amounts....

33 As I read the decision, rather than finding that Mr. Ironside could have or would have sought employment as a mechanic, the arbitrator turned to the question of what Mr. Ironside could earn as an employed mechanic in an attempt to quantify the replacement labour costs attributable to the accident.

34 Having accepted that Mr. Ironside ran a growing business with a reasonable expectation of profit in the near future, the arbitrator considered all the available evidence of Mr. Ironside's pre-accident earning capacity at the time of the accident. He considered Mr. Ironside's actual self-employment income before the accident and the company's increased expenses and losses attributable to the accident. But because these figures did not allow him to precisely quantify Mr. Ironside's PEC, the arbitrator considered evidence about the market value of Mr. Ironside's skills as a marine mechanic. As those skills were crucial to the growth of the business, this approach made sense. That these different calculations produced comparable figures provides some additional assurance that the PEC reflects what Mr. Ironside "could reasonably have earned." I find that the arbitrator's award represents a fair and reasonable estimate of Mr. Ironside's pre-accident earning capacity from self-employment. While the arbitrator's approach may not be the only approach to earning capacity, I find no error in the arbitrator's interpretation of the *SABS-1994*, or his application of the law to the facts.

IV. Expenses

35 Royal shall pay Mr. Ironside's reasonable appeal expenses.

Appeal dismissed.