Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A06-001227

BETWEEN:

EJAZ BUTT

Applicant

and

LOMBARD GENERAL INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: Arbitrator Suesan Alves

Heard: The hearing was held in Hamilton on November 26, 27, 28 and 29, 2007. The hearing was re-opened at the parties' request; both parties were permitted to file further exhibits by March 28, 2008

Appearances: Allen J. Wynperle for Mr. Butt
Dave A. Messam for Lombard General Insurance Company of Canada

Issues:

Mr. Butt was injured in a motor vehicle accident on October 3, 2003. He applied for statutory accident benefits from Lombard General Insurance Company of Canada ("Lombard"), payable under the *Schedule*.[1] Mr. Butt applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, in relation to his claims for post 104-week income replacement benefits, the amount of those benefits, interest, expenses and a special award. Lombard disputed Mr. Butt's claims and claimed its arbitration expenses.

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

The issues in this hearing are:

1. Is Mr. Butt entitled to post 104-week benefits pursuant to section 5(2)(b) of the *Schedule*?

2. What is the amount of Mr. Butt's income replacement benefit pursuant to section 6 of the *Schedule*?

3. Is Mr. Butt entitled to interest pursuant to section 46(2) of the *Schedule*?

4. Is Lombard liable to pay a special award pursuant to section 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payment of benefits?

5. Which party is entitled to its expenses pursuant to section 282(11) of the *Insurance Act*?

Result:

1. Mr. Butt is entitled to post 104-week benefits pursuant to section 5(2)(b) of the *Schedule*.

2. The amount of Mr. Butt's income replacement benefit is to be recalculated on the basis set out in this decision. I remain seized of the amount of Mr. Butt's income replacement benefit.

3. Mr. Butt is entitled to interest on overdue benefits commencing November 29, 2003 pursuant to section 46(2) of the *Schedule*.

4. Lombard is liable to pay a special award because it unreasonably withheld or delayed payment of benefits pursuant to section 282(10) of the *Insurance Act*. I remain seized of the amount of the special award pending the recalculation of Mr. Butt's income replacement benefit.

5. If the parties are unable to agree on expenses, that issue may now be addressed.

Re-opening the hearing

The hearing was re-opened on March 14, 2008 at the request of both parties. Each party was permitted to file additional Exhibits and given the opportunity to adduce *viva voce* evidence or make submissions with respect to the further Exhibits. However, neither party took either step.

EVIDENCE AND ANALYSIS:

Background

On October 3, 2003, Mr. Butt was working as a taxi cab driver when his vehicle was rear-ended by a pick-up truck. Mr. Butt had been a self-employed taxi driver since 1991. Although he was injured in two earlier motor vehicle accidents in 1988 and 2001, he enjoyed a complete recovery from those injuries. At the time of the accident Mr. Butt worked shifts which lasted between fourteen and sixteen hours per day, six days per week and involved prolonged sitting. He worked 84 to 96 hours a week.

Mr. Butt developed low pack pain immediately after the October 2003 accident and his pain increased significantly within a few hours. He saw his family physician, Dr. Fried, who opined that he had nerve root irritation and sciatica as a result of the accident and consequently had difficulty sitting and working for any length of time. Dr. Fried prescribed painkillers and anti-inflammatories, chiropractic, massage and physiotherapy treatments. Dr. Fried anticipated that Mr. Butt's recovery would be prolonged because nerve root irritation heals slowly.

In Dr. Fried's opinion, Mr. Butt was substantially unable to perform the essential tasks of his employment, but would be able to work three to four hours per day as a taxi cab driver. Mr. Butt attempted to return to work a week after the accident, but was unable to continue because of his back pain. On November 1, 2003, about a month after the accident, Mr. Butt returned to part-time work two to three hours per day. Following a work-hardening program to increase his sitting tolerance, Mr. Butt was able to handle the pain for a maximum of 20 to 24 hours per week. Despite a range of treatment modalities, Mr. Butt has been unable to further increase his sitting tolerance.

Lombard agreed that Mr. Butt met the pre 104-week disability test up to the 103 week mark. That is to say, Lombard agreed that Mr. Butt was substantially unable to work at his pre-accident employment.

In this arbitration Mr. Butt claims entitlement to post 104-week income replacement benefits. He submits that he meets the test for entitlement due to his reduced physical and emotional tolerances and limited vocational options. Lombard submits that Mr. Butt is reasonably suited to carry out a number of occupations and is therefore not entitled to post 104-week benefits. For the reasons which follow, I conclude that Mr. Butt is entitled to post 104-week income replacement benefits.

Entitlement to post 104-week benefits

Law

In order to succeed in his claim for post 104-week benefits, section 5(2)(b) of the *Schedule* requires Mr. Butt to establish that he suffers a complete inability to engage in any employment for which he is reasonably suited by education, training or experience.

According to arbitral jurisprudence, "complete inability" is not to be interpreted literally. In *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO A99-000957, April 11, 2001) Arbitrator Sampliner held that: the phrase "complete inability" does not require the degree of impairment that is as high as a "catastrophic impairment" so as to preclude legitimate claims for ongoing disability, nor so low as a "substantial inability," as that would encourage specious claims after the first 104 weeks.

In *Terry and Wawanesa Mutual Insurance Company*, (FSCO A00-000017, July 12, 2001) Arbitrator Palmer reasoned as follows: "It is not my sense of the test of paragraph 5(2)(b) that the meaning of "complete inability" is that the applicant has to suffer an inability to do more than 50 percent of the job,...Real world jobs should not be broken down into their component parts such that if an applicant is able to do a little more than half of any suitable job, that he should be found to be disentitled from receiving income replacement benefits (and an employer should be obliged to hire him for that job.) As Arbitrator Sampliner pointed out in *Lombardi*, a literal reading of total disability clauses has been rejected in many previous cases and a literal reading of "complete inability" would mean an insured would have to be unable to perform any function of any job to qualify. Somehow the ability to engage in a reasonably suitable job, considered as a whole, including reasonable hours and productivity must be addressed."

I agree with the interpretation of the post 104-week test set out in the reasons of Arbitrator Sampliner in *Lombardi* and in the reasons of Arbitrator Palmer in *Terry*.

Education, training or experience

Mr. Butt was 51 years of age at the date of the accident which took place on October 3, 2003. He had been driving a taxi for 14 years and was 53 years of age on October 3, 2005, at the time the post 104-week test became applicable.

Mr. Butt immigrated to Canada at age 35 in about 1987. Before immigrating to Canada, he worked as a commissioned army officer for about 15 years and received a Bachelor of Arts degree. Mr. Butt testified that this was the equivalent of Grade 13 in Ontario.

Although Mr. Butt sought work in Ontario as a police officer, corrections officer and with the Canadian military, he was unsuccessful in obtaining such employment. He found the adjustment to Canada difficult. Since about 1991 he has been self-employed as a taxi cab driver working approximately 14-16 hours a day, six days a week on a regular basis.

Post-accident physical condition—the Applicant's evidence

Mr. Butt suffers from low back pain, present on a daily basis which travels down the sides of both legs to the middle three toes of both feet. At times his toes cramp and turn downward. His pain is aggravated by sitting and lifting heavy objects; however, he is unable to sit for more than a few hours at a time. His sleep is disturbed by pain and he sleeps restlessly.

Before the accident Mr. Butt worked shifts which lasted between fourteen and sixteen hours per day and involved prolonged sitting. His post-accident shifts averaged about one quarter of the duration of his pre-accident shifts.

Mr. Butt testified that when he resumed work in November 2003, he was able to work about 12-16 hours per week. Following a program to increase his sitting tolerance, he was able to handle the pain for a maximum of 20 to 24 hours per week. His pain worsens after driving for a few hours and particularly with loading and unloading groceries for his customers. Due to his pain, he avoids beer and liquor deliveries, heavy parcel deliveries and wheelchair trips.

In September 2005, Mr. Butt underwent EMG testing by Dr. McComas, Emeritus Professor of Medicine (Neurology). Dr. McComas reported that based on these tests Mr. Butt had significant nerve root damage on both sides of his lower back. In his opinion, it is very likely that the nerve root damage is the cause of Mr. Butt's lower back pain and sciatica.

In November 2006, Dr. S. Garner, physiatrist, conducted a medicolegal assessment on behalf of the Applicant. Dr. Garner opined that Mr. Butt might be able to work on a part-time basis until he was aged 60.

Post-accident physical condition—the Insurer's evidence

In November 2005, Dr. R.F. Martin, orthopaedic surgeon, examined Mr. Butt on behalf of Lombard. Dr. Martin reported he performed a musculoskeletal and a neurological examination, and based on his clinical findings and functional assessments, in his opinion, Mr. Butt's major impairment is mechanical back pain without neurological abnormality. In Dr. Martin's opinion, Mr. Butt has a perception of severe disability which prevents him from working beyond twenty hours per week and from performing any physical work at home. Dr. Martin further opined that Mr. Butt does not suffer a complete inability to engage in any employment for which he is reasonably suited by education, training or experience.

I prefer the opinion of Dr. McComas, that there is a neurological basis for Mr. Butt's pain, and reject the opinion of Dr. Martin. Dr. McComas has greater expertise in the area of neurology. His opinion is consistent with the injury initially diagnosed by Mr. Butt's family physician, Dr. Fried, and with Mr. Butt's history of ongoing low back pain.

In cross-examination, Dr. Martin acknowledged that Dr. McComas is a world renowned expert in the field of electromyography. He agreed that it was not possible for Mr. Butt to deceive the EMG test. Dr. Martin testified that Lombard did not provide him with a copy of Dr. McComas' report. I find that Mr. Butt has adduced significant objective evidence that his back pain has a neurological basis.

In November 2005, Lombard also arranged for Mr. Butt to undergo a functional capacity evaluation. The evaluator reported that Mr. Butt was pleasant and cooperative; demonstrated consistent effort; did not exaggerate his symptoms or engage in an inappropriate display of symptoms and that his movement patterns and behaviour correlated with his symptoms and disability.

The evaluator recommended that Mr. Butt avoid frequent bending, squatting, stair climbing, and lifting/carrying over 15 to 20 pounds. On the day of the assessment his sitting tolerance was lower than usual, and he was able to sit approximately 1½ to 2 hours. His standing/walking tolerances were determined to be approximately 20 minutes each. The evaluator concluded that Mr. Butt could do sedentary-light work part-time for three to four hours per day. This would involve occasional lifting of 10-15 lbs, frequent lifting of 8 lbs. The conclusion of the FCE evaluator is entirely consistent with Mr. Butt's experience in the work place during the four years following the accident.

While the assessor concluded that Mr. Butt could do part-time work of three to four hours per day, the standard against which Mr. Butt's disability is to be measured is that of full-time work lasting approximately fourteen to sixteen hours per day.

The FCE evaluator recommended a work-hardening program which included cardiovascular and musculoskeletal strengthening components. Mr. Butt followed these recommendations and Lombard paid for these programs. However, he was not able to increase the duration of time that he could sit and work as a taxi cab driver.

Post-accident cognitive & emotional problems—the Applicant's evidence

Mr. Butt also developed cognitive and emotional problems following the motor vehicle accident secondary to his pain. He has experienced problems with forgetfulness, maintaining attention during long meetings and following long conversations. Mr. Butt testified that before the accident he was "the calmest, coolest person you could imagine." Post-accident, he "loses it." He is easily frustrated, irritated, given to angry outbursts, and has an anger management problem.

Dr. S. S. Waldenberg, psychiatrist, assessed Mr. Butt and testified at the hearing. Dr. Waldenberg diagnosed Mr. Butt with a pain disorder due to a general medical condition with psychological and medical factors; an adjustment disorder with depressed mood; an injury to his lower back; stress from pain and consequent dislocation of his life with effects on his ability to work, perform previous leisure activities; and increased irritability towards his wife and other family members. His global assessment of functioning score was between 60 and 65. In Dr. Waldenberg's opinion, Mr. Butt was unlikely to show any improvement over time. I accept Dr. Waldenberg's opinion.

Post-accident cognitive & emotional problems—the Insurer's evidence

Dr. I. Cote, psychiatrist, assessed Mr. Butt on behalf of Lombard and reported on December 16, 2005 that in her opinion, Mr. Butt had an adjustment disorder with both anxiety and depressed mood, in partial remission, but was not completely disabled from a psychiatric point of view. He had financial, working and marital problems. In her opinion his global assessment of functioning was 60.

Dr. Waldenberg testified that there was not a great deal of divergence between his opinion and that of Dr. Cote; while he rated Mr. Butt's global assessment of functioning at between 60 and 65; while Dr. Cote rated it at 60. I accept Dr. Waldenberg's evidence on this point.

Vocational assessments—the Applicant's evidence

While loathe to give up his taxi plate, Mr. Butt eventually recognized that he was not able to work sufficient hours to cover the costs of operating his taxi following the accident and was unable to make a living. In September 2007, he underwent a vocational assessment by Ms. P. Gaunt, vocational consultant, and with Ms. M. Ross, occupational therapist, to determine whether alternative sustainable appropriate work could be identified for him.

Based on the results of his aptitude, academic and interest testing and discussions with the assessors, occupations as an explosives handler, bus driver and medical laboratory technologist were considered for Mr. Butt. The assessors concluded that none of the jobs identified were suitable for Mr. Butt.

The job of an explosives handler had a requirement of heavy strength. He would be required to carry heavy explosives on his back. He would also be required to complete two four-month college terms and on the job training. I accept their opinion. Although Mr. Butt had previous experience in the military working with explosives, I also find that on safety considerations alone, work handling or detonating explosives is not suitable work for someone experiencing forgetfulness, irritability and difficulty managing anger.

With respect to work as a bus driver, the assessors noted that Mr. Butt could only tolerate part-time work and there was only full-time shift work available with the City of Hamilton Transit, and he would not be able to sustain that occupation. They rejected this work as unsuitable for Mr. Butt given his pain levels and sleep disturbances and because it was unlikely that he would be able to maintain shift work over time. In addition the assessors opined that he was not ready to work with the public at the level required of a bus driver, given his difficulties with irritability and anger management.

The assessors considered work in a science-based chemical lab, based on Mr. Butt's interest in such work and his training in the sciences before immigrating to Canada. In order to work in such a lab, he would be required to complete a lengthy upgrading program followed by a post-

secondary training program. In the opinion of the assessors, based on his aptitude scores, age and level of functioning, this was not a suitable occupational choice for Mr. Butt. The assessors concluded that given his limited transferable skills, work history, pain levels, reduced emotional tolerances and physical limitations Mr. Butt was unemployable in alternive suitable and sustainable employment.

Vocational assessments—the Insurer's evidence

Lombard did not obtain its own vocational or transferable skills analysis. However, at the hearing, Lombard submitted that Mr. Butt could work as a handyman; a gas station operator, or based on his volunteer work, in a leadership or managerial position. I am not persuaded that the evidence supports Lombard's position.

Handyman

I accept that Mr. Butt was a handyman and had learned many of his skills while working in the military. Prior to the accident, he independently constructed two covered porches on the front and side of his home, installed ceramic flooring throughout most of the lower level of his home, installed mosaic tiling on walls, painted walls throughout the home and trim work in the living and dining room. His renovation plans were interrupted as a result of the accident leaving incomplete flooring, painting and outdoor work. I am not persuaded that his low back pain which results from the October 2003 accident would allow him to work in that capacity.

Garage or gas station operator

Mr. Butt testified that he operated and managed a garage with another individual in about 1976. The garage was in the name of his wife and brother-in-law. They sold the business in two years and financed the sale themselves. The purchasers are still making payments on the mortgage.

Mr. Butt testified that he invested money in a gas station which was leased in Brantford. However, he lost approximately $45,000 in that endeavour.

Mr. Butt testified that he attempted to run a gas station in 2004, without success. He found it difficult because he was required to be present all day and did not have the flexibility to rest as he needed to during the course of the day. I accept his evidence that he would be unable to perform this work on a full time basis.

Volunteer work

Following the accident, Mr. Butt became the president of a community organization. He found meetings too difficult to manage because of his low sitting tolerance and difficulty keeping track of conversations. Because of his cognitive and emotional difficulties, he was unable to manage the tension and responded with frustration or angry outbursts. He testified that people at the organization knew about his situation and while they were discontented with his performance, he had not been required to resign.

On one occasion, there was an incident in which he lost his temper, violence ensued and he was charged with assault. I find it doubtful any employer would tolerate his poor temper and that level of irritability in a work environment where he was employed in a managerial or leadership capacity.

I accept that Mr. Butt met with politicians, participated in photo opportunities and the organization enjoyed financial success under his leadership. Coached by an occupational therapist, Mr. Butt delegated many of his responsibilities to his vice president and created various committees. I find his son wrote his speeches and coached him with respect to their delivery.

Voluntary organizations may tolerate performance that an employer would not. I find that Mr. Butt's pain levels and irritability post-accident impair his interpersonal skills in a significant way. Mr. Butt does appear to have been capable of managing the relatively short-term contact while transporting passengers for a few hours per day. However, I find this limited contact with

passengers to be significantly different from the ongoing inter-relationships required of a manager in a work setting.

Surveillance

Mr. Butt was cross-examined on the surveillance evidence at the hearing. I find that the surveillance does not assist Lombard.

Conclusion on entitlement to post 104-week benefits

Mr. Butt attributes his inability to return to full-time hours to his pain levels, and to problems with cognitive function, irritability and managing his anger. I accept Mr. Butt's evidence with respect to his pain, cognitive and emotional function.

Dr. McComas' investigations provided objective evidence of a neurological cause to that pain. Mr. Butt's evidence is also supported by the opinions of his family physician, occupational therapists, vocational assessors and psychiatrist.

Despite pursuing a range of treatment modalities to address his physical and psychological impairments, including medication; ergonomic assessments and modifications; obtaining various devices; attempts to gradually increase his tolerance for sitting; pool therapy; work hardening; physiotherapy, chiropractic acupuncture and massage treatments; exercise conditioning; cardiovascular conditioning; psychological and occupational therapy, Mr. Butt has been unable to significantly increase his sitting tolerances or to improve his cognitive and emotional function.

The parties' opinion evidence is largely consistent with respect to the number of hours Mr. Butt is able to work per week. As noted earlier, the term "complete inability" is not to be interpreted in a literal manner; instead, the approach to be taken is to assess "the ability to engage in a reasonably suitable job, considered as a whole, including reasonable hours and productivity." In Mr. Butt's case he is able to work approximately one quarter of his pre-accident hours. However, he needed to work five hours per day to cover his costs and was unable to do so.

Given his age, education, vocational experience, his impairments and prolonged efforts to return to work, I find that Mr. Butt has convincingly demonstrated that he is completely unable to engage in any job for which he is reasonably suited.

Despite the credibility concerns raised by his unreported income, which is discussed under "Quantum" below, he has provided significant objective evidence of his disability.

I accept that the combination of his low back pain and the problems with cognitive function, irritability and anger management issues render him completely unable to work on a full-time basis at any occupation for which he is reasonably suited. I accept that these are the limits of his ability to work.

I find that Mr. Butt has satisfied his burden of proof and conclude that he is entitled to post 104-week income replacement benefits.

Quantum:

Under the *Schedule*, Mr. Butt is entitled to be paid an income replacement benefit of up to $400 per week. As he was self-employed, Mr. Butt's income replacement benefit is calculated on the higher of eighty per cent of his net pre-accident income in the 52 weeks before the accident or in the last fiscal year. Eighty per cent of his net post-accident earnings are subtracted from the amount Lombard is to pay as his income replacement benefit; while eighty per cent of his post accident losses are added to the amount Lombard is to pay as an income replacement benefit. The relevant provisions of the *Schedule* are set out in Appendix A.

According to the Explanation of Benefits dated December 6, 2005, Lombard paid Mr. Butt an income replacement benefit of $400 per week for the 3 week period when he was off work between October 10, 2003 and October 31, 2003. When he returned to part-time work on November 1, 2003, his income replacement benefit was paid at the rate of $162.04 per week.

Mr. Butt claims an income replacement benefit of $288.85 per week based on a calculation in the 52 weeks before the accident, unreported income and various adjustments. He relies on his testimony, documentary evidence and an accounting report prepared on his behalf by Durward Jones Barkwell & Company LLP, chartered accountants that a reasonable amount for his earnings in the 52 weeks before the accident is $16,669 plus 12 ½% in tips.

Adjudicators at the Financial Services Commission have recognized unreported income when reliable evidence is adduced to permit an estimate of the insured person's revenue on a balance of probabilities. However, the failure to report income taxes has often been found to undermine credibility.

Mr. Butt submitted that he was a taxi driver; not a bookkeeper. He testified that he kept a daily print out from his meter which he would total at the end of the year to determine the amount of his revenue. He would then rip up the meter printouts, pick a number which was lower than his actual earnings to avoid income taxes, give that information to his income tax preparer who would prepare his income tax returns on that basis.

I do not view this as a case of poor bookkeeping. Mr. Butt had an accurate record of his gross revenue, excluding tips, but chose not to use that number. I do not equate poor bookkeeping with the notion that one can keep records, total them, destroy those records and then recreate them. Accepting Mr. Butt's testimony at face value, even his 2002 income tax return has no basis in fact. However, it can be considered to be an admission against interest. On a balance of probabilities, I find it establishes a floor for his earnings in the fiscal year before the accident.

Trip sheet summaries

Mr. Butt provided Matson, Driscoll & Damico Ltd. ("MD&D"), the accountants Lombard retained, with his income tax return for the January 1, 2002 to December 31, 2002 period, the year before the accident. He also provided daily revenue summaries for that period.

MD&D noted that Mr. Butt reported revenue for 31 days for each month, including those months which have only 28 or 30 days. This suggests that these documents were not prepared contemporaneously with his earnings but are a poor reconstruction after the fact. They lack the reliability which comes from business records which contain a record of events routinely recorded close to the time at which the events or transactions occur.

When the revenue amounts provided in the trip sheets were totalled by MD&D, the total 2002 revenue was $57,323 and the net income was $16,669. However, the amounts shown on his Statement of Business activities which were filed with his income tax return for the same period were $30,055 in revenue and a net income of $7,937.

The cheque

Mr. Butt produced a photocopy of a cheque from Veterans cab in the amount of $3,856.89 dated October 15, 2003, payable to him. He testified that this cheque reflected his revenue based on charges for school contracts for the month of September 2003, less an administrative fee of between 5% and 15% as well as dispatch fees. Mr. Butt testified that Veterans paid him by cheque 45 days after he had earned the revenue. Veterans was no longer in business.

Mr. Butt testified that Veterans had a contract with a school board transporting children by taxicab who could not ride on school buses. This work was given to more experienced drivers, like him. He spent between 45 minutes and 2 hours in the morning and again in the afternoon transporting children pursuant to this contract. Between and after these trips, he was free to pick up his own fares who paid cash, or charges such as hospital accounts, some doctors, other private accounts, as well as WSIB and ODSP fares.

Mr. Butt worked for 9 months in 2002 as he went on a three-month family vacation in the summer. If the cheque he tendered is typical of the cheques he received from Veterans during the 9 month period he worked in 2002, his total earnings from Veterans would reflect approximately 70% of the revenue shown on his trip sheets for 2002 and would exceed the amount of revenue contained in his Statement of Business Activities for 2002. I am not persuaded that school

children are likely to provide much if any tip income and therefore question the extent to which tip income was a source of Mr. Butt's revenue.

Mr. Butt testified that he has not reported tip income pre or post accident. He adduced evidence from his accountant, two letters from taxi cab companies, and *viva voce* evidence from Ms. Joynt who authored the MD&D reports, that tips are approximately 10-15% of a taxi cab driver's revenue. In *Kahkesh and Lloyd's Non Marine Underwriters*, (OIC A-000378, March 31, 1992) Arbitrator Palmer's concluded that such testimony proves nothing about the Applicant's income. I agree with her reasons.

I find that Mr. Butt failed to meet his burden of proof in relation to the earnings he claimed he made in the 52 week period before the accident and in relation to his claim for unreported tip income. Mr. Butt's accountant relied on the trip sheets and the average taxi driver's tip income in arriving at Mr. Butt's revenue in the 52 weeks before the accident. To the extent that he did so, I reject it as a reliable estimate of Mr. Butt's earnings for that period.

I find that Lombard used the only documentation it could, namely Mr. Butt's income tax return in the fiscal year before the accident, which at least set a floor for his pre-accident earnings. I am not persuaded that I have a reliable basis to determine the amount by which he under-reported his income on his income tax return.

Lombard retained Matson, Driscoll & Damico Ltd. ("MD&D"), an accounting firm which specializes in working with insurance losses and which provides litigation support to calculate the amount of Mr. Butt's income replacement benefit. Mr. Butt provided MD&D with his 2002 income tax return and trip sheet daily summaries for that period. Although MD&D asked Mr. Butt to provide documents which supported a calculation in the 52 weeks before the accident, he did not do so.

MD&D authored five reports. As it was not possible to substantiate Mr. Butt's claims for unreported income, MD&D used his 2002 income tax return to perform the calculation of his income replacement benefit.

In its final report of November 23, 2007, MD&D calculated his pre-loss net income as $144.19, and his income replacement benefit as $115.35. MD&D reported that between October 10 and 31, 2003, Mr. Butt was entitled to be paid $400 per week, since his business continued to incur net weekly losses in the amount of $312.12. Mr. Butt returned to work on November 1, 2003. MD&D averaged the amount of his weekly income loss from then to September 30, 2007 as $22.28 and added that to a base income replacement benefit of $115.35 for a weekly income replacement benefit of $137.63.

I find that MD&D did not follow the provisions of the *Schedule* in calculating Mr. Butt's income replacement benefit. Mr. Butt's income replacement benefit will need to be recalculated, for the reasons set out below, based on his net income in the fiscal year before the accident as set out in his 2002 income tax return, adjusted for capital cost allowance and for the minimum post 104-week benefit as prescribed by the *Schedule*. In addition, post-accident interest on the loan to purchase a replacement taxi should be deducted as an expense. Lombard is entitled to a credit for the income replacement benefits it paid Mr. Butt.

Capital cost allowance

Section 62(1)(a) of the *Schedule* provides that for purposes of calculating an income replacement benefit, the income of a self-employed person is calculated as the person's profit, under the federal and provincial income tax acts, but without taking into account expenses such as capital cost allowance. Thus capital cost allowance of $1,656.32 was incorrectly deducted as an expense from Mr. Butt's 2002 Statement of Business Activities in calculating his income replacement benefit and should be added back.

Similarly, MD&D deducted capital cost allowance in computing his post-accident expenses. These amounts should be added back into his post-accident income, thereby reducing the amount

of his post-accident losses: $993.79 should be added back into his income for 2003; $596.27 in 2004, etc.

Post-accident earnings

According to MD&D, Mr. Butt's post-accident revenue figures are more consistent with his income tax returns filed in relation to the post-accident periods. His post-accident income tax returns should be used as the basis for calculating his post-accident earnings and expenses.

Post-accident interest expense

Mr. Butt's vehicle was written off in the accident, as there was approximately $4,000 worth of damage to the vehicle. Following the accident, Mr. Butt purchased a new vehicle at a cost of $27,570.15. He paid $5,000 down and obtained a loan for the balance of $22,570.17 at 7.4% interest. In a note to the financial statements, MD&D stated that it disallowed the interest expense because Mr. Butt did not claim the interest as an expense in his post-accident income tax returns.

I disagree with this approach as it is not one prescribed by the *Schedule*. Section 56(1)(a) of the *Schedule* obliges a person who is entitled to an income replacement benefit to make reasonable efforts to return to the employment in which he engaged at the time of the accident. Mr. Butt attempted to return to work twice in the month after the accident.

Mr. Butt promptly arranged to purchase a replacement vehicle for his business in October 2003. At the time that he did so, his medical advice from his family physician was that he would have a prolonged recovery because nerve root irritation takes a long time to heal. His own experience was that he made a full recovery from the injuries he sustained in his two previous motor vehicle accidents. I find he had no reason to doubt in October 2003 that he would be returning to work as a taxi cab driver. Based on the information available to him at that time, I find that at the time he incurred that expense it was reasonable for him to do so to permit him to earn revenue.

I also find that it was a reasonable measure to reduce the loss of revenue his business continued to incur due to his ongoing fixed costs.

Accordingly the interest expense of $1,720 in 2004 and $1,449 in 2005, and so on, should be deducted from his post accident earnings.

Post 104-week minimum benefit

In the post 104-week period, section 6(1)(b) of the *Schedule* prescribes that Mr. Butt's income replacement benefit is based on the higher of $185 per week and the initial calculation of the income replacement benefit. However, MD&D used the lower amount, contrary to the provisions of section 6(1)(b) of the *Schedule*. This reduced the amount of his weekly entitlement by $69.65 per week in the post 104-week period, if this were the only amendment to be made in calculating Mr. Butt's income replacement benefit. In the post 104-week period, Mr. Butt's income replacement benefit should be recalculated based on the higher of the recalculated income replacement benefit and $185 per week.

I remain seized of the amount of Mr. Butt's post-accident income should the parties be unable to agree.

Interest

Mr. Butt claims interest on overdue benefits pursuant to section 46 of the *Schedule*. Section 46 of the *Schedule* provides that an amount payable in respect of a benefit is overdue if the insurer fails to pay the benefit within the required time. The insurer is obliged to pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly.

Section 35 of the *Schedule* requires an insurer to pay an income replacement benefit within 14 days after receiving the application, and thereafter at least once every two weeks. [2]

Lombard's accident benefits technical specialist testified at the hearing. He agreed that Lombard received Mr. Butt's completed application for accident benefits, OCFs 1, 3 and 5 by mid-November 2003, and that the application process was completed by that time. I take that date to be Friday, November 14, 2003, as it is the business day closest to mid-November 2003.

I find that payment of Mr. Butt's income replacement benefit was due by November 28, 2003 and interest therefore commenced on November 29, 2003. Lombard is entitled to a credit of the interest paid to Mr. Butt.

SPECIAL AWARD

Mr. Butt alleges that Lombard unreasonably withheld or delayed payment of his income replacement benefits and claims a special award. Lombard submits that no special award is payable.

Section 282(10) of the *Insurance Act* requires an arbitrator to make a special award where she concludes that an insurer unreasonably withheld or delayed payment of benefits. That section gives an arbitrator the discretion with respect to the amount. Section 282(10) states:

> If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule* , shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*. R.S.O. 1990, c. I.8, s. 282 (10); 1993, c. 10, s. 1

[2] O.Reg. 403/96 as am. by O.Reg. 281/03.

For the reasons which follow, I find that Lombard unreasonably withheld Mr. Butt's income replacement benefits and that Mr. Butt is entitled to a special award.

In the statutory accident benefits scheme, an insurer has the responsibility of determining entitlement to benefits of insured persons. An adjuster is therefore obliged to know the provisions of the *Schedule* as well as arbitral jurisprudence which interprets those provisions.

In *Thevaranjam and The Personal Insurance Company of Canada* (FSCO A05-001820, August 24, 2006), Arbitrator Allen, as she then was, held that "in the adversarial system, the parties are expected to read their expert reports critically and not simply rely on the conclusions in deciding how to adjust claims."

Lombard's accident benefits technical specialist testified at the hearing. He was not the adjuster. He agreed in cross-examination that an adjuster's job is to review and critically analyze expert reports and decide if an insured person qualifies for entitlement to benefits. In this case I find that Lombard did not critically analyze and review the medical and accounting reports.

An adjuster critically reviewing and analyzing MD&D's accounting reports would note that capital cost allowance was deducted from Mr. Butt's earnings in the year before the accident, contrary to the requirements of the *Schedule*. This had the effect of reducing the amount of Mr. Butt's weekly income benefit.

A similar error was made by MD&D in calculating Mr. Butt's post 104-week entitlement by using an amount which was lower than the minimum benefit payable under the *Schedule*.

Lombard received the report of Dr. McComas on November 3, 2005. That report indicated that Mr. Butt had significant objective evidence of nerve root injury and that this was likely the cause of his back pain and sciatica. The report was done as a section 24 assessment, and Lombard paid Dr. McComas' invoice on November 16, 2005.

Lombard arranged an insurer's examination by Dr. Martin, orthopaedic surgeon, in relation to Mr. Butt's ongoing claims for income replacement benefits at or around the same time it received Dr. McComas' report, but failed to send that report to Dr. Martin, either as part of the package of reports before his assessment or after it received his report, for an opinion or reconsideration of his opinion that there was not a neurological basis for Mr. Butt's back pain.

If Lombard considered Dr. McComas' report in adjusting Mr. Butt's claim, I have no evidence as to why it would prefer the opinion of an orthopaedic surgeon – that Mr. Butt did not have a neurological problem, but a perception of disability – to that of a professor emeritus in neurology, who provided objective evidence that Mr. Butt had a neurological problem.

An insurer has an ongoing obligation to consider further information as it becomes available. In *Erickson and The Guarantee Company of North America*, (OIC A000560, June 2, 1992) updated medical information was available to the Insurer well in advance of the arbitration hearing day, however, the Insurer made no effort to review or re-assess its position in light of that information. The Insurer was found to have "acted unreasonably in refusing to re-evaluate its position in light of the new information available to it" and to have unreasonably withheld benefits. On this basis, I find Lombard unreasonably withheld Mr. Butt's income replacement benefits.

I find that Lombard did not critically review the medical evidence with respect to Mr. Butt's post 104-week entitlement to income replacement benefits in light of arbitral jurisprudence concerning the complete inability test. There was little difference in the opinions offered by the Applicant's experts and the Insurer's, with two exceptions. One was the cause of Mr. Butt's back pain as discussed above. The second was the question of whether Mr. Butt met the complete inability test.

While Lombard's assessors opined that Mr. Butt did not meet the complete inability test, a critical analysis of the available evidence would show that they had misapplied that test in light of arbitral jurisprudence. There was little difference in the data on which the parties' experts reached conflicting opinions as to whether Mr. Butt met the complete inability test. There was

little disagreement with respect to his psychological impairments; the impact of his low back pain; the type of work Mr. Butt could do or with respect to the number of hours he could work per day. Mr. Butt provided objective evidence that this was a neurological impairment.

Lombard's adjuster would be aware of the number of treatment options which had been explored by Mr. Butt over a prolonged period of time. None of these treatments had significantly improved his ability to sit for longer hours. The surveillance evidence did not contradict the Applicant's medical evidence. Lombard's own FAE concluded that Mr. Butt was only able to work up to four hours a day part-time. As noted earlier the standard against which Mr. Butt's disability was to be measured was the ability to perform full-time work, fourteen to sixteen hours per day, eighty-four to ninety-six hours per week.

The accounting evidence showed that Mr. Butt was losing money post-accident. The reports of his occupational therapists raised the question of his inability to earn a living by continuing part-time work as a taxi-driver and also referred to Dr. McComas' report. The only vocational evidence offered a conclusion that there were no suitable alternative occupations for Mr. Butt. The Insurer had no opinion evidence as to what job was suitable for the Applicant. This is the scenario even before the impact of Mr. Butt's psychological impairment is weighed together with his physical impairments.

In *Plowright and Wellington Insurance Company* (OIC No. A-003985, October 29, 1993), Arbitrator Palmer held that the standard expected of an insurer's examiner and supervisors in adjusting a claim is one of sound and moderate judgment. I find that having regard to the available evidence of disability, Lombard unreasonably withheld Mr. Butt's income replacement benefits.

Even if Lombard was correct in its position that Mr. Butt did not meet the post 104-week test for entitlement, it did not put him in stoppage in accordance with the requirements of the *Schedule*. In failing to comply with these requirements, Lombard withheld approximately 4 months of income replacement benefits.

Under section 37 of the *Schedule*, the earliest date on which Lombard was permitted to stop payment of this benefit was 14 days after he received the notice of stoppage. At the earliest that would have been January 31, 2006, and if the notice of stoppage was mailed to him, sometime in early February 2006.[3]

In this case Lombard paid Mr. Butt income replacement benefits up to October 3, 2005. The reports prepared as a result of Lombard's insurer examinations were not available until January 4, 2006 and Lombard's notice of stoppage dated January 17, 2006 stated that the effective date of the stoppage was January 4, 2006.

I remain seized of the amount of the special award, pending the recalculation of the Applicant's income replacement benefit and interest pursuant to the *Schedule*.

Expenses:

If the parties are unable to agree on expenses, they should follow the procedure set out in section 79 of the *Dispute Resolution Practice Code—Fourth Edition, Updated October* 2003.

March 3, 2009

Suesan Alves
Arbitrator

Date

[3] O.Reg. 403/96 Amended to O. Reg. 546/05

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A06-001227

BETWEEN:

EJAZ BUTT

Applicant

and

LOMBARD GENERAL INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. Lombard General Insurance Company of Canada shall pay Mr. Ejaz Butt post 104-week income replacement benefits pursuant to section 5(2)(b) of the *Schedule*.

2. Lombard General Insurance Company of Canada shall recalculate the amount of Mr. Butt's income replacement benefit on the basis set out in this decision. I remain seized of the amount of Mr. Butt's income replacement benefit.

3. Lombard General Insurance Company of Canada shall pay Mr. Ejaz Butt interest on overdue benefits commencing November 29, 2003 pursuant to section 46(2) of the *Schedule*.

4. Lombard General Insurance Company of Canada shall pay Mr. Ejaz Butt a special award because it unreasonably withheld or delayed payment of benefits pursuant to section 282(10) of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended. The amount of the special award is to be determined by agreement or order once Mr. Butt's income replacement benefit is recalculated together with interest. I remain seized of the amount of the special award.

6. If the parties are unable to agree on expenses, that issue may now be addressed.

March 3, 2009

Suesan Alves
Arbitrator

Date

Appendix A

PART I - GENERAL

Amount of Benefit

6. (1) The amount of the income replacement benefit shall be,

(a) for each of the first 104 weeks of disability, 80 per cent of the insured person's net weekly income from employment determined in accordance with section 61; and

(b) for each week after the first 104 weeks of disability, the greater of the amount specified in clause (a) and $185.

(2) The insurer may deduct from the amount of the income replacement benefit payable to an insured person 80 per cent of the net income received by the insured person in respect of any employment subsequent to the accident.

(3) For the purpose of subsection (2), the net income received by an insured person in respect of employment subsequent to the accident shall be determined by subtracting the following amounts from the gross income received by the person in respect of the employment subsequent to the accident:

1. The premium payable by the person under the *Employment Insurance Act* (Canada) on the gross income.

2. The contribution payable by the person under the Canada Pension Plan on the gross income.

3. The income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross income.

(4) For the purpose of subsection (2), net income from self-employment for an insured person who was self-employed at the time of the accident shall be determined without making any deductions for,

(a) expenses that were not reasonable or necessary to prevent a loss of revenue;

(b) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose; and

(c) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident.

(5) If the insured person was self-employed at the time of the accident and the person incurs losses from self-employment as a result of the accident, the insurer shall add to the amount of the income replacement benefit payable to the person 80 per cent of the losses from self-employment incurred as a result of the accident.

(6) For the purpose of subsection (5), losses from self-employment shall be determined in the same manner as losses from the business in which the person was self-employed would be determined under subsection 9 (2) of the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), without making any deductions for,

(a) expenses that were not reasonable or necessary to prevent a loss of revenue;

(b) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose;

(c) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident;

(d) expenses that are eligible for capital cost allowance or an allowance on eligible capital property; or

(e) losses deductible under section 111 of the *Income Tax Act* (Canada). O. Reg. 403/96, s. 6.

Collateral Payments for Loss of Income and Maximum Amount of Benefit

7. (1) Despite subsections 6 (1) and (5), but subject to subsection 6 (2), the weekly amount of an income replacement benefit payable to a person shall be the lesser of the following amounts:

1. The amount determined under subsections 6 (1) and (5), reduced by,

   i. net weekly payments for loss of income that are being received by the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, and

   ii. net weekly payments for loss of income that are not being received by the person but are available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, unless the person has applied to receive the payments for loss of income.

2. The greater of the following amounts:

   i. $400.

   ii. If the optional income replacement benefit referred to in section 27 has been purchased and is applicable to the person, the amount fixed by the optional benefit. O. Reg. 403/96, s. 7 (1); O. Reg. 462/96, s. 4; O. Reg. 281/03, s. 2 (1, 2).

(2) For the purposes of paragraph 1 of subsection (1), the amount determined under subsections 6 (1) and (5) shall not be reduced by,

(a) benefits under the *Employment Insurance Act (Canada)* that are being received by or are available to the person;

(b) payments under a sick leave plan that are not being received by the person but are available to the person; or

(c) payments under a workers' compensation law or plan that are not being received by the person and to which the person is not entitled because the person has elected under the workers' compensation law or plan to bring an action. O. Reg. 403/96, s. 7 (2); O. Reg. 281/03, s. 2 (3).

(3) For the purpose of this section, net weekly payments for loss of income shall be determined by subtracting from the gross weekly amount of payments for loss of income the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross weekly amount of payments for loss of income. O. Reg. 403/96, s. 7 (3).

(4) For the purpose of subsection (3), the person whose net weekly payments for loss of income are to be determined shall be deemed to be a resident of Ontario. O. Reg. 403/96, s. 7 (4).

Gross Income Calculations

8. (1) An insured person who is eligible for an income replacement benefit under paragraph 1 of section 4 and who was not self-employed at any time during the four weeks before the accident shall designate one of the following time periods:

1. The four weeks before the accident.

2. The 52 weeks before the accident.

(2) An insured person who is eligible for an income replacement benefit under paragraph 1 of section 4 and who was self-employed at any time during the four weeks before the accident shall designate one of the following time periods:

1. The 52 weeks before the accident.

2. The last fiscal year completed before the accident for the business in which the person was self-employed, if the business completed a fiscal year before the accident. O. Reg. 403/96, s. 8 (1, 2).

(3) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 1 of section 4 shall be deemed to be the following amount:

1. In the case of a person who designated the four weeks before the accident under paragraph 1 of subsection (1), the person's gross income from employment for the four weeks before the accident, multiplied by 13.

2. In the case of a person who designated the 52 weeks before the accident under paragraph 2 of subsection (1) or paragraph 1 of subsection (2), the person's gross income from employment for the 52 weeks before the accident.

3. In the case of a person who designated the last fiscal year completed before the accident under paragraph 2 of subsection (2), the person's gross income from employment for that fiscal year. O. Reg. 403/96, s. 8 (3); O. Reg. 462/96, s. 5.

(4) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 2 of section 4 shall be deemed to be the person's gross income from employment for the 52 weeks before the accident.

(5) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 3 of section 4 shall be deemed to be the gross income payable under the contract of employment, extrapolated to reflect an annual income.

(6) A determination of gross income under subsection (3) or (4) shall include any benefits received under the *Employment Insurance Act* (Canada) or a predecessor of that Act in respect of the relevant period.

(7) If a person qualifies for an income replacement benefit under paragraph 1 or 2 of section 4 and also qualifies under paragraph 3 of section 4, the person's gross annual income from employment shall be determined under subsection (3) or (4), as the case may be, until the day he or she would have been entitled to begin employment under the contract described in paragraph 3 of section 4, and thereafter the person's gross annual income from employment shall be determined in accordance with subsection (5). O. Reg. 403/96, s. 8 (4-7).

PART XIV
INCOME CALCULATION

Net Weekly Income Formula

61. (1) For the purpose of this Regulation, a person's net weekly income from employment shall be determined in accordance with the following formula:

$$A = \frac{B - C - D - E}{52}$$

where,

A = the person's net weekly income from employment,

B = the person's gross annual income from employment,

C = the annual premium payable by the person under the *Employment Insurance Act* (Canada) on the gross annual income from employment,

D = the annual contribution payable by the person under the *Canada Pension Plan* on the gross annual income from employment,

E = the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross annual income from employment.

(2) For the purpose of subsection (1), the person whose net weekly income from employment is to be determined shall be deemed to be a resident of Ontario. O. Reg. 403/96, s. 61.

Income from Self-Employment

62. (1) For the purpose of this Regulation, a person's income from self-employment shall be determined in the same manner as the person's profit from the business in which the person was self-employed would be determined under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), but without taking into account,

(a) expenses that are eligible for capital cost allowance or an allowance on eligible capital property;

(b) capital gains or losses; or

(c) losses deductible under section 111 of the *Income Tax Act* (Canada).

. . .

Income Tax Calculations

63. (1) For the purpose of this Regulation, the income tax payable by a person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) shall be determined having regard to only the following deductions and tax credits that apply to the person under those Acts:

1. Alimony and maintenance payments deduction.
2. Basic personal tax credit.
3. Married person's tax credit or equivalent to married tax credit.
4. Age tax credit.
5. Disability tax credit.
6. Employment insurance premium tax credit.
7. Canada Pension Plan tax credit.
8. Quebec Pension Plan tax credit. O. Reg. 403/96, s. 63 (1).

(2) If a determination of the income tax payable by a person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) is necessary to determine the amount of a benefit under this Regulation, the applicant for the benefit shall provide the insurer with such information as is reasonably necessary to enable the insurer to make the determination. O. Reg. 462/96, s. 11.

(3) Failure to comply with subsection (2) does not relieve the insurer from any time limit established by this Regulation for the payment of the benefit, but the insurer shall determine the amount of the benefit on the basis of its best estimate of the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), subject to later adjustment of the amount of the benefit when subsection (2) is complied with. O. Reg. 403/96, s. 63 (3).