FSCO A00–000154

BETWEEN:

E.H.

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Lawrence Blackman

Heard: May 29 and 30, 2001, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Rachel Urman for E.H.
Andrew Lee for Wawanesa Mutual Insurance Company

Issues:

The Applicant, E.H., was injured in a motor vehicle accident on September 8, 1995. He applied for and received weekly income replacement benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the *Schedule*.[1] Wawanesa began paying E.H. weekly loss of earning capacity benefits of $347.60 on February 15, 1999, in accordance with a Residual Earning Capacity Designated Assessment Centre (REC DAC) report of Providence Continuing Care Centre (Providence).

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[1]The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98.

Both parties dispute the REC DAC's findings. The parties were unable to resolve their disputes through mediation and E.H. applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended (the *Insurance Act*).

Accordingly, the issues in this hearing are:

1. What is the correct quantum of E.H.'s loss of earning capacity benefit, pursuant to section 20 of the *Schedule*?

2. Is E.H. entitled to interest on any overdue payments, pursuant to section 68 of the *Schedule*?

3. Is E.H. entitled to his expenses in respect of this arbitration proceeding, pursuant to subsection 282(11) of the *Insurance Act*?

4. Is Wawanesa entitled to its expenses in respect of this arbitration proceeding, pursuant to subsection 282(11) of the *Insurance Act*?

Result:

1. E.H. is entitled to a weekly loss of earning capacity benefit of $411.81 (subject to indexation under section 79 of the *Schedule*) ongoing from February 15, 1999, together with interest on any overdue amounts in accordance with section 68 of the *Schedule*.

2. E.H. is entitled to his expenses in respect of this arbitration proceeding, pursuant to subsection 282(11) of the *Insurance Act*.

EVIDENCE AND ANALYSIS:

1. The statutory context

Under the *Schedule*, insured persons who continue to qualify for weekly income replacement benefits 104 weeks after the onset of their accident-related disability are entitled to a loss of earning capacity (LEC) benefit offer from their insurer. The LEC benefit is calculated as ninety per cent of the difference between the insured person's pre-accident earning capacity (PEC) and his or her residual earning capacity (REC). The insured person who rejects the insurer's LEC offer is assessed by a REC DAC. The REC DAC is required to submit a report which includes the centre's reasons for its conclusion as to "the type of employment that best satisfies the criteria set out in subsection 30(2)" of the *Schedule*.

The criteria set out in subsection 30(2) 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.

The parties agree that E.H.'s PEC is $457.57. The parties further agree that the LEC benefit commences February 15, 1999.

Wawanesa submits that E.H.'s REC is at least $71.35, based on Providence's REC DAC report which recommended that E.H. could perform the duties of Retail Salespersons and Sales Clerks twelve hours a week. Hence, the Insurer submits that E.H.'s LEC is, at most, $347.60 per week. Wawanesa does not suggest that E.H. is capable of returning to his pre-accident employment in food preparation or construction. It does, however, challenge E.H.'s credibility and disputes the extent of his back disability, arguing that he can work even longer hours in retail sales.

E.H. argues that he has a zero REC and hence his weekly LEC benefit would therefore be ninety per cent of $457.57, or $411.81. He argues that the REC DAC's conclusion is flawed in that it did not properly address three of the subsection 30(2) criteria, namely:

- that he must be "able and qualified to perform the essential tasks of the [recommended] employment;"
- the employment must exist in the area in which he lives or is accessible to him; and,
- having regard to the possibility of deterioration of his impairment and his personal and vocational characteristics, that it is reasonable to expect him to engage in such employment.

2. The facts

E.H. was born on July 3, 1961 in eastern Ontario, where he attended school until reaching grade 11 in 1977. He subsequently obtained his high school diploma in 1980 while incarcerated in Texas. In 1982, E.H. took a basic food preparation course at Cambrian College in Sudbury.

Following several years in which he worked in food preparation in Sudbury or living in southern Ontario, interspersed with periods of incarceration, E.H. returned to eastern Ontario.

After a very brief (three week) stint in telemarketing, E.H. was hired in June 1990 as a labourer with L.A. Knapp in Brockville, Ontario. His duties included landscaping, excavating and paving. In his third year with the company, E.H. became site supervisor, which required continued physical participation in the various contractual jobs as well as keeping daily records, organizing tools and materials and overseeing work to make sure things progressed properly. This was seasonal employment. E.H. testified that during the winter he would collect unemployment insurance rather than look for work.

A September 27, 1996 report prepared by Desjardins Rehabilitation Management Inc. indicates that L.A. Knapp guaranteed E.H. (presumably during the working season) at least 55 hours of work with the possibility of up to 80 hours per week. E.H. is noted as rating his job satisfaction with L.A. Knapp as eight on a scale of one to ten. His employer, Mr. Laurence Knapp, ranked E.H. as "among the highest ¼ as compared with the other employees doing the same work," and "added that [E.H.] is very productive, and in fact he sometimes tries too much." E.H. testified that he and the company owner had future plans that would eventually have him working in the office. He took great pride in his work, often pointing out to his children jobs that he had done. He testified that every year his employer has asked him if he will be coming back to work.

E.H. has an extensive criminal and incarceration record stretching back to 1979. His convictions include theft, breaking and entering, dangerous driving, escaping lawful custody, assault, assaulting a police officer, possession of property obtained by crime, "driving over 80," and driving while disqualified. E.H. was candid about his alcohol abuse problem.

I note, however, that other than the period December 1986 to January 1989, the two years prior to this accident had been E.H.'s longest period without a criminal conviction or parole violation since 1979.

E.H. was injured in a car accident on September 8, 1995, while a passenger. He sustained multiple lacerations, a fracture of the left side of the jaw, a right shoulder separation, and most significantly, a compression fracture of his mid-back at T-12, resulting in a 30 per cent loss of anterior vertebral height.

Since this accident, E.H. has continued to live with his family in Cardinal, Ontario, a small town of approximately 1,000 people. E.H. testified that Cardinal is half-way between Brockville and Cornwall (forty-five to sixty minutes by car from both) and seventy minutes south of Ottawa. Johnstown, Prescott, Morrisburg, Iroquois and Prescott are nearby towns.

E.H. was involved in a subsequent car accident on April 9, 1996. He testified that there were no residual effects from this second accident. Dr. M. Baxter opined in her orthopaedic report of August 19, 1997 for the Insurer that the Applicant's then status of back pain would not have been remarkably different had this second accident not have occurred.

E.H. testified that by late 1998, his only significant physical problem was mid-back pain. His pain was made worse by prolonged sitting or standing, reaching, stress or dampness. He testified that he can sit for perhaps a minute, cannot stand still at all and can walk for twenty or thirty minutes before experiencing throbbing pain. Dr. M. Faris, one of the REC DAC assessors, states in his October 1998 report that E.H.'s back pain had been persistent since the 1995 accident and had remained unchanged, consisting of a constant aching discomfort, which at times would be sharp and that E.H. was unable to find a comfortable position. E.H. testified that just driving from his home in Cardinal to nearby Prescott was stressful, and that he takes Tylenol #3s a half-hour before he has to travel.

E.H. testified that he is not able to return to any type of work solely as a result of his back pain. He stated that he has a hard time concentrating, even when reading a newspaper. He testified that he has not tried to return to work since this accident, nor has he made any effort to look for work, although there was some evidence of post-accident "wheeling and dealing" in cars and car parts, evidently without any monetary success. E.H. did not think that it would be fair to ask someone to hire him if he could not give a 100 per cent effort. E.H. stated that he knew his level of pain endurance and that if the pain became excessive, he could not deal with customers.

E.H. no longer owns a car. The REC DAC notes that his license was suspended at the time of assessment. One REC DAC practitioner states that E.H. could not reapply for his license until 2000; another says that he could not obtain a license until sometime in 2002-2003.

Since the 1995 accident, E.H. has had several further criminal convictions. While in prison he took courses in construction estimation which started approximately 9:00 or 9:30 a.m. and continued, with several long breaks, to about 3:00 p.m., five days a week. He also participated in one-hour examinations. The records from Rideau Correctional & Treatment Centre indicate that E.H. attended classes regularly, had an excellent rating from his teacher and was "an excellent role model for the other students."

E.H. agreed with the Insurer's counsel that his post-accident weekly benefits exceeded his pre-accident declared income. E.H. testified that he did had not declared his employment bonuses.

3. Onus

I raised with counsel the question of who has the onus of proof regarding the quantum of the LEC benefit. I noted the decision of Arbitrator Seife in *Ford and Wawanesa Mutual Insurance Company* (FSCO A98-001436, December 10, 1999), who stated that:

> In my view, once it has been established that an applicant is entitled to an offer with respect to the payment of LECBs, the onus is on the insurer to prove that the insured person has a residual earning capacity to engage in employment and the amount of gross annual income he or she could reasonably earn from such employment. The insurer must demonstrate that the type of employment it selected complies with the criteria set out in subsection 30(1) of the S*chedule*. However, where there has been a REC DAC assessment, as in this case, it is the responsibility of the party challenging the DAC's findings to persuade an arbitrator with cogent evidence why the DAC conclusions should not be accepted. In my view, this approach is consistent with the wording of section 30, the scheme of the *Schedule* dealing with the transition from IRBs to LECBs and the role accorded to the DACs, a neutral third party expert, in early resolution of disputes between an insured person and his or her insurance company.

I also noted Arbitrator Makepeace's comment in *Olszynko and Dominion of Canada General Insurance Company* (FSCO A97-001495, February 22, 1999) that "the Applicant bears the onus of proving her entitlement to LECBs at a higher benefit than determined by the REC DAC."

I further noted my decision in *Desroches and Economical Mutual Insurance Company* (FSCO A97-000312 and A97-000814, November 10, 1999), in which I stated that:

> The onus exists on the party relying on the REC DAC to establish, on a balance of probabilities, that amongst other things that the criteria set out in section 30 of the *Schedule* is satisfied and furthermore that the type of employment selected "best satisfies" that criteria.

Wawanesa submits that either party may challenge the REC DAC assessment, but the onus is on the disputing party to prove, with cogent evidence, that the REC DAC is wrong. The Insurer submits that there is no medical evidence to contradict the REC DAC's conclusion in this case.

In *Walker and State Farm Mutual Automobile Insurance Company* (OIC A-009905, February 23, 1996), Senior Arbitrator Rotter dealt with the submission that the opinion of a DAC assessor should be accepted, unless there was evidence "proving her clearly wrong." She held that:

> I do not accept this submission of the Insurer. In my view, the evidence of a DAC assessor is and remains opinion evidence, which I must weigh carefully in coming to any conclusion. The weight to be accorded any such evidence must be in the discretion of

> the adjudicator, based on a careful evaluation of the thoroughness, relevance, neutrality and value of the opinion provided. Such factors as, for example, the familiarity with the details and history of a particular case, the length and thoroughness of the examination, and the particular area of expertise of the evaluator must all be carefully assessed. Ultimately, the arbitrator has the responsibility of considering all the evidence not just the evidence from the DAC and making a final determination based on his or her best judgement. It is not sufficient to simply accept or adopt the judgement of the DAC assessor, who does not have the legal responsibility or opportunity to hear and weigh all the available evidence in a particular case.
>
> The Legislature has ultimately given the statutory decision-making authority to the arbitrator. I find it would be an abdication of that authority or an inappropriate fettering of discretion to accept the opinion of a DAC assessor in lieu of exercising the authority conferred on me.

Senior Arbitrator Rotter's decision was upheld by Director's Delegate Draper (OIC P96-000036, December 3, 1996). He specifically stated that "[o]ne would expect the DAC assessor to have the advantages of neutrality, familiarity with the issues under the *Schedule*, and ***a duty to produce a report that specifically deals with the critical questions***" (emphasis added).

The onus is on an applicant to establish that he or she is entitled to an LEC offer, which in this case would mean that E.H. continued, 104 weeks after the onset of his disability, to be substantially unable to perform the essential tasks of his job at L.A. Knapp. Further, the onus regarding pre-accident earning capacity (where the figure is not a deemed amount) is on an applicant.

I find residual earning capacity, however, to be akin to post-accident income. The latter deduction is made on the basis of monies actually received. The REC deduction is made because it is reasonable to expect an insured person to go out and earn the monies calculated.

The REC deduction determines the actual reasonable potential of employment accessible to the insured, employment which exists where the insured lives and which the insured is able and qualified to perform

and, given the individual's personal and vocational characteristics and the possibility of deterioration of one's condition, it is reasonable to expect the applicant to take. The REC "employability" deduction from the PEC is not done in the abstract; one's LEC is not reduced because of a hypothetical degree of ability against a backdrop of purely speculative employment.

The LEC, as a long-term weekly benefit provision provides, in effect, that the insurer should no more have to pay monies which an applicant could reasonably earn, than it should have to pay monies which an applicant is in fact earning as post-accident income, subject to any provision to the contrary (for example, paragraph 10(4)(a) of the *Schedule*).

It is the responsibility of the REC DAC, in its several days of evaluation, to properly and thoroughly address the criteria set out in subsection 30(2) of the *Schedule*. I agree with the Applicant's submissions that the legal onus is not on applicants, many of whom have little or no financial resources, to prove a negative, that is, the non-existence of alternative reasonable employment. One would normally expect that the expertise necessary to determine a REC would result in a significantly greater expense than that required to determine whether one is disabled from the essential tasks of one's pre-accident employment.

Hence, I find that an insurer is relieved, in part or in whole, of its responsibility to pay LEC weekly benefits only to the extent that it can establish, on a balance of probabilities, the availability of suitable post-accident employment.

Although *Henriques and Motor Vehicle Accident Claims Fund* (OIC A96-000037, December 12, 1996) dealt with a 1990 accident under an earlier no-fault scheme, I believe that the analysis distinguishing the legal burden of proof from the evidentiary burden is helpful. Arbitrator Renahan stated that:

> However, if the insurer raises the issue that there is specific employment which is suitable for the insured and which the insured can engage in, the insurer has the evidential burden of proving that such is the case. If the insurer satisfies this evidential burden, the evidential burden is cast upon the insured to adduce evidence that the employment is not suitable or that he cannot do it, otherwise he will lose on that issue and will not meet the test set out in section 12(5)(b).

Likewise, I find that there is a shifting evidentiary burden, once the insurer has presented cogent and credible evidence supporting the presence of a REC which meets the requisite criteria. As stated by Senior Arbitrator Rotter, however, "the evidence of a DAC assessor is and remains opinion evidence," and in determining the weight to be given to a REC DAC, it must be determined whether it has properly dealt with the critical questions.

4. Decision

The parties agree that the pertinent period of inquiry as to E.H.'s residual earning capacity is on or about February 15, 1999.

The Applicant, as set out above, argues that the REC DAC report does not meet three of the criteria of subsection 30(2).

The REC DAC recommended that E.H. had the potential for performing the duties of Retail Salespersons and Sales Clerks for up to twelve hours per week (based on a maximum sustained work tolerance of two hours and fifteen minutes). It indicated that jobs in this category included variety store cashier or gas station attendant, where E.H. "would not have to maintain static sitting or standing."

E.H. first argues that he is not "able and qualified to perform" this recommended employment.

The REC DAC assessment included medical, physiotherapy, psychological and functional capacity evaluations. Regarding E.H.'s physical abilities, I find that the REC DAC provided a neutral, balanced, fair, thorough (based on a seven-day evaluation) and expert opinion. I accept their opinion evidence on this aspect of their report. I also find their opinion consistent with E.H.'s own evidence as to his abilities while taking courses in prison.

Other medical evidence was filed. The authors of these reports either did not address the issue before me or did not provide insight as to the reasons for their conclusion. Hence, they do not persuade me that the REC DAC's view on E.H.'s physical abilities was either too optimistic (as argued by the Applicant) or too pessimistic (as argued by the Insurer).

Dr. E. Silverstein saw the Applicant, apparently at his counsel's request, both before (September 1998) and after (June 1999) the REC DAC evaluation was performed. Dr. Silverstein noted that E.H.'s subjective complaints were "somewhat out of proportion to the injuries sustained and to the physical findings." Nonetheless, Dr. Silverstein was of the view that there was "no doubt that [E.H.] is disabled from returning to work." Unfortunately, Dr. Silverstein did not clarify whether his view pertained to E.H.'s very physically demanding pre-accident employment or to any type of employment, nor did he elucidate whether he was speaking of full-time or part-time work.

Dr. A. Steacie is the Applicant's family doctor. In a letter to the American Bankers Insurance Company, dated November 27, 1998, Dr. Steacie writes that E.H. "continues to be unemployable because of his medical condition." In a Continuing Disability Claim Form dated November 24, 1999 to the same recipient, Dr. Steacie states that he does "not think [E.H.] will ever be employable." However, I see no critique or even mention of the REC DAC report, and no explanation is provided for his opinion. Accordingly, I give the report little weight.

Dr. M. Baxter, in her August 21, 1997 insurer's medical report states that "I feel the disabilities will prevent [E.H.] from ever returning to his previous employment." There is no comment, however, as to E.H.'s ability to perform other employment, although it is noted that E.H. had started to consider retraining and was starting to explore other potential occupations.

The Applicant secondly argues that the REC DAC report did not properly have regard to the possibility of deterioration in his condition or to his personal and vocational characteristics. E.H. further submits that the employment recommended by the REC DAC does not exist in his area and is not accessible to him.

Regarding the possibility that his condition would deteriorate, the REC DAC concluded that this was not expected. E.H. could not refer me to any objective evidence that his condition was worsening. To the contrary, my overall impression of the medical evidence was that E.H.'s back condition had plateaued, while his other accident-related injuries had resolved. Accordingly, I accept the REC DAC's opinion in this regard.

Regarding his personal and vocational characteristics, I find that a thorough psychological report was done as to E.H.'s abilities. E.H.'s arithmetic, spelling, and reading abilities were found to be at high school level. His non-verbal IQ was found to be in the high average range. I note the earlier report of the March of Dimes, prepared November 3-7, 1997 which stated that E.H.'s "vocational aptitudes are strongest in the following areas: Numerical and Clerical." Thus, I find that the selected occupations are appropriate both in terms of aptitude and intellectual ability. I do find, however, that E.H. has very little sales experience.

The Applicant raised the concern of the effect of his criminal record on future employability. I note specifically his convictions for theft. Despite the glowing comments of his prior employer, I find that this is a significant factor regarding potential employment, especially as the proposed occupations often entail access to money, as opposed to E.H.'s predominately prior labouring background.

In addition to his criminal record, there is an even greater concern regarding E.H.'s lack of a valid driver's license. Dr. C. Cooper, in his October 1998 psychological REC DAC report concludes that "[t]hese factors, in conjunction with [E.H.'s] physical restrictions, chronic pain and limited range of transferrable employment skills and lack of formal qualifications will significantly narrow the scope in respect to employability."

I find that the REC DAC Occupational Therapy report correctly states that "[o]nce a job type is chosen, it must be demonstrated that the employment exists within the geographic area of the claimant's home. [E.H.] lives in a small town about 30 km east of Prescott." I also find that the REC DAC further correctly concludes that "this man's experiences with incarceration will most certainly limit the types of jobs for which he might apply. In addition, he does not have a driver's license and will not have a license until sometime in 2002-2003. Because the client lives in a rural community in Eastern Ontario with a population of about 1400, his access to the labour market might be limited."

I also find significant a fairly consistent concern running through the medical reports regarding E.H.'s ability to maintain static positions.

Ms. Desjardins noted in September 1996 that while the Applicant mentioned that he had no restriction in walking, he was unable to sit or stand for extended periods of time. Dr. Baxter, however, stated that E.H. sat through the interview with no specific complaints, although his "sitting posture was slightly restricted due to the handcuffs that he was wearing."

The Brockville Physiotherapy & Sports Injuries Clinic did a Functional Capacities Assessment on October 31 and November 3, 1997. It found no evidence of abnormal pain behaviour, noted E.H. as being cooperative (consistent with the finding of other examiners, including Dr. Baxter) and felt that E.H. "provided consistent and Maximal Voluntary Effort throughout the testing procedure." As an example, regarding dynamic lifting assessment, they noted that "[o]n the majority of lifts, testing was

stopped by the examiner as the patient showed a risk of injury as he would increase forward flexion of the lumbar spine and jerk the weights in attempting to complete the test."

It noted that E.H. reported his sitting ability at 30-45 minutes (observed at 45 minutes with occasional shifting of positions due to increased back discomfort), standing at 30 to 40 minutes (observed at 40 minutes without noticeable changing of positions) and walking reported at 45 minutes. At 45 minutes he was observed with an antalgic gait (that is, to avoid pain) which increased through each day's testing and increased from the first to the second day, but at times was inconsistent in degree. An escalation of symptoms was noted as well as the Applicant being most affected by lifting and static tests. In self-reporting forms, E.H. described his pain as "throbbing, stabbing, gnawing, aching, annoying and nagging." He noted that his ability to travel depended on the distance.

In its November 1997 report, the March of Dimes noted that Cardinal is a village of about 1,000 people with two major employers. It indicated that E.H. did not think that there was a bus joining Cardinal and the surrounding area. It noted that "[E. H.] was enthusiastic and demonstrated interest in the vocational exploration process. He cooperated fully with this counsellor. [E.H.] indicated that his pain had increased over the course of the week. . . . [he] agreed that it was likely a combination of the evaluation and the increased amount of sitting (more than normal for him) during the vocational testing."

Noting E.H.'s possible barriers to employment, including a lack of job search knowledge, his criminal record and limited access to transportation out of Cardinal, the March of Dimes identified ten specific employers, only two of which were in Cardinal. One of those two latter employers had only full-time positions, with entry level computer skills being required. No one had been hired in the last three years. The other employer's positions required lifting over 50 lbs., carrying, bending, pulling and the use of a jack hammer, with no one being hired in the last four years. A driver's license was required. College study in public administration was considered to be an asset. Seven jobs were also considered in Brockville and one in Ottawa. For reasons of location, as well as physical demands, employment pre-requisites and/or limited openings, I find none of these positions appropriate.

In September 1998, Dr. Silverstein noted the Applicant's statement that his back pain was aggravated by sitting for more than ten minutes, and walking or standing more than 30 minutes. Dr. Steacie, in January 1998, noted that when sitting, E.H. needed to move constantly secondary to pain. When standing for 30 seconds, he needed to move to relieve the pain. In a February 1999 Physical Capacities Evaluation, Dr. Steacie wrote that E.H. could sit for 15 minutes, and stand or walk for 20 minutes.

Dr. Holmes is a registered psychologist who counselled E.H. for substance abuse, anger management and lifestyle issues. He commented in his March 2001 report that E.H. "needed to be seated in an easy chair, but often needs to be shifting his weight and position. I do not feel that E.H. exaggerated his symptoms or disability, as these problems are more embarrassing to him,

and he is not given to wanting sympathy or difficulties." I accept these comments not as opinion evidence (Dr. Holmes being candid in his report that he was not qualified to address medical issues related to the Applicant's physical condition and disability and had not reviewed the medical reports) but as a lay person's observations.

In his October 1998 REC DAC report, Dr. Faris reported E.H. as saying that his back pain "is aggravated with any attempts at prolonged sitting . . . he tends to be very restless and finds he is at his best when he is up and moving about. He is incapable of standing still. His description was quite consistent with the behaviour observed in clinic today." Dr. Faris further stated that E.H. "presented as a very cooperative historian and in the context of the physical examination . . . He did demonstrate significant pain behaviour during the assessment and when walking down the hall while unaware of being observed . . . In the clinic, during the history, he was constantly moving about in his chair and within 15 minutes of entering the room he got up and had to walk around. The remainder of the history involved him repetitively getting up and walking and then sitting for brief periods of time. All the behaviour observed was consistent with his own description."

Dr. Faris noted that E.H. took two tablets daily of Tylenol #3 and (an anti-inflammatory) Ibuprofen 600 mg. four times daily for his back pain. He had also used alcohol and Demerol on "the black market" to deal with his pain. E.H. was also noted as taking Zoloft 100 mg, an anti-depressant for his anger control problems.

In her REC DAC physiotherapy assessment, Lisa Vogelzang, stated that "[f]unctionally [E.H.] cannot tolerate static positions, which is typical with lumbar hypermobility. He cannot squat beyond a 90˚ hip flexion range comfortably, and would not be able to tolerate axial loading as in lifting. He should not perform activities that require a lot of lumbar rotation. He is at his best handling light loads and constantly changing positions or moving (such as walking) . . . He did not strike me as someone who is dramatically pain focussed. He has a very specific problem, and has realized his limitations."

In his psychological report, Dr. Cooper stated that "it was seemingly difficult for him to remain sedentary for any significant period of time. He was, however, able to complete a number of the test items while standing, pacing, and so on. When required to remain seated for more extended periods, [E.H.] completed testing by working while standing, by taking periodic breaks, and so on. On balance, it was one's impression that these difficulties became somewhat more pronounced as the day progressed despite the fact that he took medication prior to lunch."

Mr. Philip Ambury, an occupational therapist and the REC DAC Coordinator, stated in his October 27, 1998 report that E.H. demonstrated excellent effort and good motivation throughout the situational assessment of five consecutive days (following two consecutive days the prior week). He noted that the maximum duration of work completed was two hours and fifteen minutes, during which time the Applicant would frequently take breaks and pace in the room.

Wawanesa attacked E.H.'s credibility as to the extent of his disability on the basis of, amongst other things, his exaggerated disabilities (such as testifying that he could only sit for maybe a minute); that he did not report all of his income; that he was prepared to collect UIC off-season rather than seek employment; that he had little incentive to look for work as he was receiving more in weekly benefits than he declared pre-accident (especially as he has been incarcerated every year since the accident); and that his post-accident criminal assaults would indicate a greater level of physical ability than admitted.

Based on the evidence before me, I am persuaded that E.H. sustained a very real injury in the September 1999 accident, as a result of which he has very real physical limitations and the inability to maintain static positions. Specifically, I accept his inability to sit without increasing pain for any significant period of time, be that 20, 30 or 45 minutes. I rely both on my observations of E.H.'s demeanour and presentation and the medical reports. Overall, the reports note (and I accept) that E.H. was a cooperative patient who gave a good effort at testing and whose observed behaviour was consistent with his complaints. I find that E.H.'s manner of speech at this hearing or what one might very politely describe as a sometime non-exemplary lifestyle, do not detract from these findings.

Because it felt that E.H.'s performance may not have been at a competitive speed for even a half-day's work, the REC DAC recommended the E.H. could work "up to" 12 hours per week. As jobs such as dispatcher and telemarketer were not available in the labour market survey completed, the REC DAC's recommendation was Retail Salespersons and Sales Clerks. The report states that "there ***may be*** the potential for short shifts although some work places may require the person to work an eight-hour shift" [emphasis added]. The report states that jobs such as a variety store cashier or gas station attendant would not require static sitting or standing. The report also states that there may not be an opening in the client's hometown, but "HRDC statistics show 102 vacancies for the region."
The report, however, does not indicate what specific area is encompassed in "the region." Nor does the report indicate that these positions are accessible to the Applicant. There is only speculation of the potential for short shifts. There is no indication that these positions will in fact accommodate E.H.'s physical restrictions and vocational obstacles properly noted by the REC DAC assessors themselves.

Accordingly, I find that the REC DAC has failed to demonstrate, as its report noted was required, that the proposed employment exists where the Applicant lives and is accessible to him, these being critical questions mandated by paragraph 30(2)(2) of the *Schedule*. As stated by the Director's Delegate in *Ford and Wawanesa Insurance Company* (FSCO P00-000005, August 4, 2000), looking at paragraph 30(2)(2) of the *Schedule*, "if part-time employment is being considered, the existence and accessibility of part-time employment must be considered."

It is simply insufficient for me to receive submissions, unsupported by evidence, that one can "expect" these types of jobs to exist in every town or region or that work accommodations are commonplace. I am not prepared to make such assumptions. Rather, one would expect, especially outside a major urban centre such as Toronto, that a hands-on detailed investigation would have been conducted as done by the March of Dimes.

Furthermore, given the Applicant's documented difficulties sitting for any extended period of time and his unchallenged evidence as to the time that it takes to travel from his home to Brockville, Cornwall or Ottawa as well as the lack of any evidence as to how the Applicant would get to these municipalities (E.H.'s wife working in the morning and afternoon as a bus driver, the Applicant not owning a car and the lack of public transit out of Cardinal noted by E.H. to the March of Dimes), I am not persuaded that these locations are accessible.

The question before me is whether I am persuaded, on a balance of probabilities, on the evidence presented that on or about February 15, 1999 there was sales type employment reasonably available to E.H.:

> within a relatively short driving distance from his residence in Cardinal, Ontario (given his problems with prolonged sitting, especially when he would be expected to subsequently put in a shift working followed by travelling back to Cardinal),
>
> - which is accessible by means other than E.H. himself driving,

- that provides part-time positions of a maximum of up to two hours and 15 minutes a day,
- to someone with a lengthy criminal record and little sales experience,
- which would allow frequent breaks, pacing and changes of position,
- such that it is reasonable to expect that E.H. should be working at such employment rather than the insurer paying an equivalent amount?

I am not so persuaded. If the onus were on the Applicant to establish the lack of existing and accessible employment, based on the evidence specifically of the March of Dimes' employment survey, the result would not differ.

Accordingly, I find E.H.'s REC to be zero. Therefore, he is entitled to a weekly loss of earning capacity benefit of $411.81 (subject to indexation under section 79 of the *Schedule*) ongoing from February 15, 1999, together with interest on any overdue amounts in accordance with section 68 of the *Schedule*.

EXPENSES:

The parties jointly informed me that it was appropriate for me to deal with the question of the expenses of this arbitration proceeding at this juncture.

Considering the Applicant's success in this proceeding, the conduct of both parties to facilitate the proceeding, and my finding that this application was meritorious and brought in good faith, I award the Applicant his expenses of this arbitration proceeding.

July 13, 2001

Lawrence Blackman
Arbitrator

Date

FSCO A00–000154

BETWEEN:

E.H.

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. a weekly loss of earning capacity benefit in the amount of $411.81 (subject to indexation under section 79 of the *Schedule*) ongoing from February 15, 1999, together with interest on any overdue amounts in accordance with section 68 of the *Schedule*.

2. his expenses in respect of this arbitration proceeding, pursuant to subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c. I. 8.

July 13, 2001

Lawrence Blackman
Arbitrator

Date