

FSCO A01-000065

BETWEEN:

KEN ALEX RUMAK

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: Joyce Miller

Heard: December 2, 3, 4, 5, 2002, January 6, 7, 8, 9, 10, 2003 and March 11, 2003,
at the offices of the Financial Services
Commission of Ontario in Toronto.
Written submissions were received from both parties by May 2, 2003.
Motion submissions heard on November 3, 2003

Appearances: Rachel Urman for Mr. Rumak
Deborah G. Neilson for Personal Insurance Company of Canada

Issues:

The Applicant, Ken Alex Rumak, was injured in a motor vehicle accident on July 6, 1997. He applied for and received statutory accident benefits from Personal Insurance Company of Canada ("Personal"), payable under the *Schedule*.¹ Personal terminated weekly income replacement benefits on April 12, 2001. The parties were unable to resolve their disputes through mediation,

¹ *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

and Mr. Rumak applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, C.I. 8, as amended.

The issues in this hearing are:

1. Is Mr. Rumak entitled to an income replacement benefit in the amount of \$214.88 per week pursuant to subparagraph 5(2)(b) of the *Schedule* from April 13, 2001 and ongoing?
2. Is either party liable to pay the other's expenses in respect of the arbitration hearing, pursuant to subsection 282(11) of the *Insurance Act*?

Mr. Rumak also claims interest on the amounts owing.

Result:

1. Mr. Rumak is entitled to an income replacement benefit in the amount of \$214.88 per week from April 13, 2001 and ongoing, less any amount for income received by Mr. Rumak in respect of any employment after the accident.
2. Mr. Rumak is entitled to interest on past benefits owed pursuant to subsection 46(2) of the *Schedule*.
3. The parties shall have 30 days from the issuance of this decision to inform the Case Administrator on this file if they wish to present any further evidence and/or submissions on the issue of a special award, failing which I will make a decision on the evidence on the record in this matter.
4. The issue of expenses is deferred until after the hearing on the special award.

INDEX

BACKGROUND:	4
EVIDENCE AND FINDINGS	6
I. Credibility	6
II. Mr. Rumak's Life Pre-Accident	8
III. Mr. Rumak's Life Post-Accident	11
(A) Post-Accident Affect on School and Social Life	16
(B) Post-Accident Affect on Family Life	17
(C) Post-Accident Affect on Employment and Continuing Education	20
(1) Post-Accident Employment	20
(a) Physical Deficits	22
(b) Cognitive Deficits	24
(c) Behavioural Difficulties	25
(d) Emotional Liability	25
(e) Corroboration by Employers	26
(i) Letter from Debbie DiMarco.....	26
(ii) Mr. Michael Gosselin's Testimony	27
(2) Post-Accident Education	31
IV Medical Evidence	32
A Mr. Rumak's Medical Evidence	33
1. <i>Report of Dr. Lesley Ruttan</i>	33
2. <i>Testimony of Dr. Richard Wood</i>	34
3. <i>The Report and Testimony of Dr. Neville Doxey</i>	36
B. Personal's Medical Evidence	39
1. <i>Report of Dr. Stanely Debow</i>	40
2. <i>Vocational Assessment Report</i>	42
3. <i>The AIM Disability DAC Report</i>	45
(a) Dr. B. K. Kim's Evidence	47
(b) Dr. Lynette Bauer's Evidence	51
<i>Summary Findings on AIM'S Disability DAC Report</i>	58
ANALYSIS AND FINDINGS	63
SPECIAL AWARD:	67
REQUEST TO REOPEN HEARING:	69
EXPENSES	71

BACKGROUND:

Mr. Rumak, who was 16 years old at the time of the accident, suffered a catastrophic injury² when he was struck by a car while crossing the street at 8:30 p.m. on July 6, 1997 in Whitby, Ontario.

When Mr. Rumak was hit by the car he was thrown onto the hood of the car and he struck the windshield, which spider webbed as a result of the impact. The moving car then threw Mr. Rumak about 20 or 30 feet and he hit the ground face first. At the scene of the accident the paramedics observed an obvious head trauma³, particularly over his right eye. They also reported his Glasgow Coma Scale ("GCS") - a test measuring a person's consciousness level - on three different readings fluctuated from 5/15, 9/15, and 4/15.

Mr. Rumak was immediately taken to the Oshawa General Hospital. His GCS reading when he arrived at the hospital was 13/15. His condition however began to deteriorate and his GCS reading went down to 7/15. A tube was inserted into Mr. Rumak's larynx to keep the air passages open, and he was transferred to Sunnybrook Health Science Centre in Toronto ("Sunnybrook") at approximately 1:25 a.m.

At Sunnybrook, Mr. Rumak immediately underwent two operations. The first operation was neurosurgery. This operation involved the elevation of the depressed frontal skull fracture and the repair of a laceration to his dura - the outer covering of his brain. The neurosurgeon recorded that the underlying brain tissue that was seen through the lacerated dura was "obviously contused and

² On October 26, 1999, a Catastrophic Impairment DAC Assessment determined that Mr. Rumak suffered a catastrophic injury as a result of his car accident

³ It was later confirmed that Mr. Rumak suffered a fractured skull and a brain injury. Specifically, he had "suffered a right frontal lobe contusion involving multiple foci of haemorrhage and edema of the surrounding brain tissue. These injuries were associated with a fracture of the roof and lateral wall of the right orbit extending vertically through the frontal lobes." [Applicant's submissions at p,9]

appeared necrotic." That is, there was bruising and signs of cell death in the frontal area of Mr. Rumak's brain.

The second operation, which occurred immediately after the first one, related to the fracture to Mr. Rumak's right eye orbit and involved an open reduction and internal fixation of the inferior orbital rim with a bone graft to the orbital floor to repair the damage to the orbit.

Mr. Rumak remained in a semiconscious state in the Intensive Care Unit for about six days. He was then transferred to a ward and was discharged from hospital on July 23, 1997. While he was at the hospital, however, he developed a staph infection which required him to be on intravenous antibiotics for a period of two weeks.

Mr. Rumak's injuries at the time of the accident can be briefly summarized as follows:

- a closed head injury
- right frontal depressed skull fracture
- right frontal contusion
- facial fractures involving the right eye - this included fracture of inferior orbital rim, fracture defect of right orbital floor and fracture of the superior orbit - as well as a fracture of the right Zygoma (cheekbone)
- lacerations to right eye and eyebrow
- contusions and abrasions to the face and extremities
- a fractured left clavicle
- a partial ligament tear in the right knee
- left side hearing loss
- general bodily injuries included neck pain, muscle spasms, restricted range of movement and flow, problems with his pelvis and positioning of some of his internal organs

In addition to the two operations Mr. Rumak underwent on July 7, 1997, as a result of the accident he also underwent two other operations. One, was in November 1999 when the tear to his right knee ligament was repaired. The other was on December 17, 2001, which involved a surgical reconstruction of the skull and facial bones in an attempt to correct a post-traumatic deformity and orbital volume discrepancies. The operation included the removal of the hardware from his previous surgery and the contouring of excessive bone in the right orbital roof and reconstruction of the contour of the skull with calcium phosphate cement and the reconstruction of the right enophthalmos [a backward displacement of the eyeball into the orbit] and correction of the orbital volume discrepancies with Medpor implant.

Mr. Rumak, who is now 22 years old, submits that as a result of the accident he suffers from cognitive, physical, emotional and behavioural problems which has resulted in a complete inability to engage in any employment for which he is reasonably suited by education, training or experience pursuant to the post 104-week test in subsection 5(2) of the *Schedule*.

Personal submits that Mr. Rumak does not meet the post 104-week test in that he has worked and continues to work since 1998. In addition, Personal submits that Mr. Rumak's problems predate the accident.

EVIDENCE AND FINDINGS

I. Credibility

Before discussing the evidence, I would like to make my findings on credibility as it impacts on my findings on the evidence below.

First, I find that Mr. Rumak, who testified for three and a half days, provided very detailed and consistent evidence. Post accident, Mr. Rumak has seen dozens of medical practitioners for

treatment and assessments. There have been no negative comments in any of the medical reports regarding his credibility. In fact, when reading the reports, one instantly sees how open and forthcoming Mr. Rumak was in providing as much intimate details of his life pre and post accident. Several of the medical reports comment on his forthrightness.

Weighing Mr. Rumak's testimony in its totality and taking into consideration the fact that, over the course of a lengthy and detailed hearing Personal was unable to impugn Mr. Rumak's credibility on any of the substantial and material elements of his claim, I find that Mr. Rumak's evidence is believable and credible. Accordingly, I give it full weight.

Second, I give no weight to Personal's submission that Mr. Rumak father's (hereinafter referred to as Ken Rumak) testimony should be taken with "a grain of salt." Personal makes this submission on the basis that Ken Rumak testified that his son started to go out with his girlfriend a "couple" of months before the accident. Mr. Rumak on the other hand had testified that he did not have a girlfriend until two days before the accident.

I find this minor inconsistency does not impugn the totality of Ken Rumak's testimony. Whether Mr. Rumak became romantically involved two months before the accident or two days before the accident is not relevant to the substantial and more significant evidence presented by Ken Rumak regarding Mr. Rumak's life before and after the accident. On this latter point I find Ken Rumak's evidence detailed and consistent with his wife's testimony and consistent with Mr. Rumak's testimony. As well it is consistent with the medical evidence to be discussed below. Accordingly, I give full weight to Ken Rumak's testimony.

I also find that the evidence presented by Mr. Rumak's mother, Irene Rumak, to be detailed and consistent with that of her son and husband. I give full weight to her evidence. Accordingly, for all of the above reasons I find that the evidence presented below based on the testimony of Mr. Rumak, Ken Rumak and Irene Rumak to be credible and reliable.

II. Mr. Rumak's Life Pre-Accident

At the time of the accident Mr. Rumak was 16 years old. He had just finished grade 11 and was living at home with his parents and four younger siblings – three sisters aged 14, 12 and 9, and a brother, aged 7.

Pictures of Mr. Rumak in the year before the accident with his siblings, his girlfriend and several pictures of him in the lead in the school play, West Side Story, show a handsome, trim, charismatic, healthy and happy looking young man.

Ken Rumak described his son at that time as a good looking boy, very popular with lots of friends. He was ambitious, self-motivated and independent. He was not lazy and worked very hard to do all the things he accomplished up to the time of the accident.

His responsibilities at home included:

- dish washing the heavily encrusted dishes and pans
- doing laundry twice a week
- vacuuming
- cleaning the pool 1 to 3 days a week and cut the grass in summer
- shovelling snow in winter
- getting the extra groceries when needed during the week
- picking up his younger siblings when they were visiting friends
- helping his younger sisters with homework
- babysitting his siblings

In addition to his responsibilities at home, Mr. Rumak had a part-time job on Saturdays since the age of 14 delivering furniture for McAllister's Traditional Interiors. As well, in winter he got paid for shovelling his neighbour's driveway.

At the time of the accident Mr. Rumak was on summer break from school and working full time, Monday to Friday, 10 hours a day from 7 a.m. to 7 p.m. for Red Rose Landscaping & Garden Centre, doing manual labour. Ken Rumak testified that Mr. Rumak would bike 20 kilometers a day to and from this job.

In addition to his full-time job, Mr. Rumak continued to work at his part-time job delivering furniture on Saturdays. As well, Mr. Rumak had arranged to conclude his summer working at the Canadian National Exhibition (CNE) as a horse marshall.

In the school year before the accident, Mr. Rumak's grades were average except for Dramatic Arts (81%) and Music Theatre (93%). Mr. Rumak stated that the reason his marks were not as good as they could be was because of the large amount of time he devoted to rehearsing the lead role he had in the school play. The rehearsals were two or three hours, four or five times a week.

Mr. Rumak testified that prior to the accident his career ambition was to be a firefighter and he was studying towards that goal.

Mr. Rumak's physical activities prior to the accident included playing on the senior rugby team, weight lifting, hiking, swimming and skiing.

Ken Rumak testified that he and Mr. Rumak studied Martial Arts together and that Mr. Rumak had achieved the brown stripe level in Karate. As well, for three years before the accident Ken Rumak coached a baseball team that Mr. Rumak played on.

Mr. Rumak's other extracurricular activities included singing, playing the piano, which he taught himself, and playing guitar.

Socially, Mr. Rumak had a wide circle of friends with whom he went out to dinner, coffee shops, movies, parties and skiing. He belonged to his church youth group which met on Sunday evenings. As well, in summer the Church rented a camp for Friday night where the youth group could participate in games, and sing around a camp fire.

Although prior to the accident the evidence shows that Mr. Rumak's home life was in general a very good one and he had a close and loving relationship with his parents and his siblings, there were, however, several hardships that the family went through that year.

Mr Rumak's paternal grandfather, whom he was close to, died of cancer in 1996. That same year Ken Rumak's business, selling alarm systems, closed down. From September 1996 until the accident. Ken Rumak worked for no pay developing a long distance network marketing distribution system which was to be up and running in July 1997. Mrs. Rumak who had been a stay-at-home mom had to get a job to help out with the family income. Ken Rumak also did some part-time financial planning to supplement the family income.

As a result, in the year before the accident, the family suffered not only the sadness over the loss of Ken Rumak's father, but the stress and tension of financial difficulties. Although Mr. Rumak was sensitive to the family's financial difficulties (at some point he loaned his father some money, which was repaid), there is, however, no evidence that these normal stresses of family life had any significant negative impact on Mr. Rumak's functioning physically or emotionally in his daily life.

Accordingly, based on Mr. Rumak's and his parents' testimony, as well as the documentary evidence, I find that in the year before the accident Mr. Rumak was a physically fit, energetic, responsible, hard working, stable, emotionally healthy young man who was close to his family, had positive peer relationships, and who was enthusiastically looking forward to one day training and working as a firefighter.

III. Mr. Rumak's Life Post-Accident

Mr. Rumak testified that when he was discharged from Sunnybrook he was not given any information about the nature of his brain injury. He stated he thought he was told that he had a "minor cognitive, head injury."

When Mr. Rumak first got home he was very lethargic and tired. He still had his staph infection and was hooked up with a little robot IV that he carried around with him. He stated he felt "spacey" and everything was different.

Mr. Rumak testified that although Personal appointed a case manager, Jennifer Vanderburgh, no help or direction was really provided to him when he got home regarding receiving any necessary treatment.

Ken Rumak testified that although they lived in Whitby, the case manager worked out of Hamilton, over 100 kilometres away. He testified that all the responsibility to arrange for various treatments fell to him. It was very stressful on him because he had to make decisions about things he knew nothing about. For example, Ms. Vanderburgh would ask him about places in his area that Mr. Rumak could receive treatment and he would have to find a place on his own.

Also, a treatment plan by Dr. Ouchterlony made on November 19, 1997 was only addressed by Ms. Vanderburgh on March 2, 1998.

In her Follow-up Notes dated September 23, 1997, Dr. Donna Ouchterlony, who is the Co-Director, Head Injury Clinic at Sunnybrook and Director, Head Injury Clinic at St. Michael's Hospital, who was following up Mr. Rumak after his discharge from Sunnybrook, noted the following:

The family is quite anxious and feel **their son's case has not been well managed** so far. They feel they have been asked to make too many decisions, i.e. do they know a good physiotherapist in the area, etc. **They can see changes in their son and are definitely looking for support.** [Emphasis added]

Mr. Rumak eventually did receive speech therapy, beginning in September 1997 and physiotherapy in November 1997.

In her report dated September 9,1997, the Speech Language Pathologist, Cyndi Patterson, outlined me results of her "cognitive-communications assessment." They are as follows:

- deficits in auditory information processing for complex/longer information. This could have significant implications in terms of Alex's ability to follow lengthy lectures in a classroom setting.
- deficits in verbal memory for longer, more complex material. Deficits in verbal memory may have significant implications for new academic learning.
- deficits in written information processing for complex material. Increased time was needed to read and comprehend the information. This could have implications re: Alex's ability to process textbook material, without strategies.
- difficulties with divided attention; for example, with notetaking. Repetition was needed, otherwise significant information was missed. Increased response time was needed.
- slower at formulating thoughts into writing at a higher level. Good written organizational skills.
- appeared to fatigue with testing. This area should be monitored closely once Alex returns school.

As a result of these findings Ms. Patterson made a number of recommendations. These recommendations included that Mr. Rumak take a reduced course load - two courses were recommended; that he be provided with a tutor and a note taker and that there should be a

speech language pathology intervention to help compensate cognitive communication deficits, primarily through use of strategies and to liaise with the tutor and school staff.

Mr. Rumak began physiotherapy on November 3, 1997. In her progress report dated January 26, 1998 the physiotherapist, Ruth Burt, stated that:

Mr. Rumak was seen in the Whitby Inter-Action office for soft tissue release, reeducation, range of motion, balance, coordination, and Strengthening exercises. These components of his treatment addressed the functional limitations of fatigue, inefficient gait, inability to participate in his normal sports, school, and leisure activities. Treatment also addressed sensory-motor problems in the areas of memory, concentration, and initiation.

In one other recommendations, Ms. Burt stated that Mr. Rumak should undergo a cognitive assessment and subsequent treatment by an Occupational Therapist experienced in neurology, to address the problems of memory, cognition, attention, and ocularmotor co-ordination (movements in his eye) as it relates to his daily activities and school.

On June 5, 1998 and June 26, 1998, Mr. Rumak underwent an Occupational Therapy/Functional Cognition Assessment with Ms. Susannah Gray.

In her report of June 30,1998, Ms. Gray stated that:

Functionally, Mr. Rumak displayed significant difficulty with selective attention. During the assessment, he was easily distracted visually by the screen saver on the computer and auditorally with the noise in the clinic. During parts of the assessment when he was verbally relaying information to me, he would all of a sudden inappropriately turn to the computer and begin to play a game on it. In the community, the physio assistant reported that while in the gym performing his exercise, he would spontaneously get up and coach someone else on their exercises.

Regarding his "Executive" functions, Ms. Gray stated:

Mr. Rumak displayed difficulties in the areas of organization and problem solving when writing down material during the assessment. He further stated that he is having difficulty also with initiation of activities that before would not have been a problem for him. Functionally this shows itself in his ability to help out in the family home with his younger siblings which he did prior to the accident as both of his parents work.

Mr. Rumak has difficulty organizing large amounts of information and being able to be succinct in his problem solving. Again, his problems with attention and flexibility also impede him from being able to efficiently assess a problem and solve it.

Ms. Gray summarized Mr. Rumak's major problems as follows:

- Selective attention
- Sustained attention
- Attentional flexibility
- Organization and problem solving
- Initiation of activity
- Mental Fatigue
- Increase in anger outbursts

In her summary, Ms. Gray noted that:

Mr. Rumak was **very co-operative** during the assessment sessions and appears **eager to be provided with some strategies to improve his performance**. He is aware that these areas of difficulty are affecting his ability to perform as he did prior to the accident and he feels that they are putting stress on his relationships. [emphasis added]

Based on her assessment Ms. Gray recommended that "Mr. Rumak receive occupational therapy sessions once weekly for 1 hour sessions over the summer months to prepare him for his last year of high school and address life skill issues in the community as necessary."

Mr. Rumak's cognitive and behavioural problems which were recorded by the speech therapist, physiotherapist and occupational therapist are also reflected in the opinion of Dr. Barry Brooker, a neuropsychologist, who performed an Insurer's Medical Assessment on behalf of Personal on November 19 and 20, 1997.

In his report dated December 19, 1997, Dr. Brooker acknowledged Mr. Rumak's cognitive problems and diagnosed him with having a "traumatic brain injury of moderate severity."

He went on to state that:

This [diagnosis] is based on the significant periods of retrograde amnesia and post traumatic amnesia along with the reported right frontal brain contusion and the symptom of altered sense of smell suggesting cortical injury, as well as the current assessment results which reveal cognitive impairment in attention, speed of mental processing, learning, and cognitive executive tendency to perseveration.

In addition Dr. Brooker made the following diagnoses:

- **Organic personality dysfunction** which involves reduced emotional control indicated by irritability and minor explosiveness, and emotional variability.
- **Depressive episode** involving moderate depression which includes affective and somatic signs.
- **Traffic anxiety** with mild residual symptoms.

[emphasis in original]

Dr. Brooker concluded that "[t]he above diagnoses are derived directly from the effects of his motor vehicle accident on July 6, 1997. Prior to that there is no indication that he would have achieved the diagnostic criteria for any of these disorders."

Dr. Brooker recommended that he receive psychotherapy, cognitive therapy, continued support of a tutor, support of a guidance teacher in his adjustment to school, and physiotherapy.

Dr. Brooker also make the following observations and recommendation in his conclusion:

In addition to the above cognitive and emotional difficulties, there is the **social adjustment** with reduced friends and the strain on his relationship with his girlfriend because of his injuries. Attention needs to be directed toward that. There is also the **family adjustment** difficulty which the parents are struggling with because of Mr. Rumak's tendency to irritability and his tendency to be controlling. [Emphasis added]

Mr. Rumak testified that the post accident cognitive and behavioural deficits diagnosed by Dr. Brooker seriously affected his entire life which included his school and social life, his family life and his employment and continuing education.

(A) Post-Accident Affect on School and Social Life

Mr. Rumak testified that because he was given very little information on how his brain injury would affect his life, he was therefore unaware of the impact Ms brain injury would have on his school work. As a result, when he returned to school in the Fall he assumed he would be able to carry out a full course load – which included grade 12 advanced English and Math and an OAC law course.

Mr. Rumak testified that within the first week back to school he realized he could not handle the course she had selected. He had difficult reading and understanding instructions. After the first week of math, he did not understand one word of the material and had to downgrade to general math. He also had to drop his law course and needed a tutor for his English course.

He testified that it took him a long time to read and comprehend the material and if he had two hours of homework, it would take him the whole night to do it. As well, he needed a tutor one to three times a week to assist him with his homework.

In addition to his disappointment in his ability to do his school work, Mr. Rumak stated that when he returned to school he was no longer the popular guy he was before and that he had lost all of his school friends.

Mr. Rumak testified that in the first week of school everyone was friendly to him. Then they noticed that something was wrong because he would not understand what they were saying. He could not take in their conversations. They would start a sentence and he would get lost. He no longer could talk to his friends on a social level. People would say he did not make any sense when he talked. He would behave in a socially inappropriate way. Sometimes he would shout out for no reason. This resulted in some people saying that he was suffering from Turret Syndrome.

Mr. Rumak stated that eventually his school friends turned their backs on him and stopped talking to him because he was slow and could no longer joke around with them as he used to.

He stated that this hurt him a lot. As a result, he turned into a "little hermit." He stayed in his room and did his homework.

Mr. Rumak testified that as a result of his failure at school and loss of his friends, he became very depressed and all of his emotions came out on his family.

(B) Post-Accident Affect on Family Life

Mr. Rumak testified that the accident had a devastating affect on his relationship with his family as well as a traumatic affect on the family as a whole.

Mr. Rumak testified that all of his emotions came out on his family. He yelled at everybody. He yelled at his sisters for things they weren't even doing wrong. He put his fists through walls because he was so frustrated with how he had changed. He pushed one of his sisters against a wall with such a force it left an indentation.

Mr. Rumak stated that everyone around him had to be perfectly quiet and make no noise when he was around because he could not handle it. He became intolerant of anything the family did. He could not eat with the family any more because he could not tolerate the sound of their chewing food and therefore would eat alone in his room.

Mr. Rumak stated that his father tried to help him out and understand what was going on. Nevertheless, he would get mad at his father for no reason just because he needed to be mad at somebody.

The family was assessed by Mr. Barry Brown, a social worker at Family Mediation Inc. In his report of March 3, 1999, Mr. Brown summarizes succinctly the family situation after the accident, and concurs with the detailed and consistent testimony of Mr. Rumak and his parents.

Mr. Brown first notes that prior to the accident Mr. Rumak was an outgoing young man, generally a calm person who shared in a caring and supportive relationship with his parents and younger siblings Mr. Brown then summarizes Mr. Rumak's behaviour after the accident. He states:

Mr. and Mrs. Rumak are particularly upset with Alex's use of foul language when verbally attacking his younger siblings. Alex has also been extremely foul-mouthed to his parents. Mr. and Mrs. Rumak relate that this behaviour which they find emotionally painful to tolerate was not evident prior to Alex's accident.

...

Mr. and Mrs. Rumak relate that the changes in Alex have significantly impacted upon their family as individuals and collectively. In presentation, both parents have been traumatized by their son's accident and losses. Mr. and Mrs. Rumak are aware that they are preoccupied with their concerns and fears for Alex and that they are often withdrawn, despondent and unable to concentrate on tasks as they had. This was particularly so for Mr. Rumak [Ken] who relates that he was unable to adequately attend to his employment for seven months following Alex's accident due to his need to monitor Alex and as well due to his significant despondency in witnessing his son's losses.

As a result of the emotional trauma Mr. Rumak was experiencing over his losses post-accident, he fell into a suicidal depression and was referred to Dr. Michael Teehan for a psychological assessment on March 2, 1998. In his report dated March 29, 1998, Dr. Teehan noted the following:

Alex is in a state of chronic overload so that his ability to deal with stress is less than expected. He is impulsive, will fail to think things through and has trouble coping with the regular kinds of demands he probably managed easily prior to the accident. The risks of him losing control over his feelings becomes substantial as demands and expectations increase beyond what he can manage and yet, he, himself places significant expectations upon himself to behave and achieve at a level commensurate with his pre-accident functioning. Now, he has limited resources and is chronically vulnerable to becoming disorganized by the many of the natural everyday stresses of living in a complex social system. He functions best when within a clear and supportive structure where there is freedom from ambiguity and where the demands meet rather than exceed his abilities to master them. The greatest impact of the overload situation is on his emotions and the brain injury has created more complexity than is common and this unfortunately contributes substantially to his vulnerability to disorganization.

Dr. Teehan stated in his report that "Alex shows signs of neuro-psychological dysfunction and needs a program of neuro-psychologically based physiotherapy to help him in this regard."

In addition, Dr. Teehan began to see Mr. Rumak for psychotherapy on a regular basis from March 18 to August 17, 1998.

Despite treatment, Mr. Rumak's volatile relationship with his family did not abate. In her report of August 16, 2000, Dr. Ouchterlony noted the following:

Alexander's [post-accident] impaired anger management and poor judgement have created difficulties within the home. While most children quarrel and have rivalries to some extent, Alexander's impairments have escalated the situation. Fighting between Alexander and his three sisters became unbearable for all members of the family. **The current solution is that Alexander is not allowed to speak to his sisters, three of his four siblings. Clearly, this cannot be a long-term plan for a reasonable family dynamic.** [Emphasis added]

In the Fall of 2000, to alleviate his deep feelings of frustration regarding the volatility of the home environment, Mr. Rumak went to live with his paternal grandmother in Toronto where he still resides.

Ken Rumak testified that his moving out did not cut Mr. Rumak off from the family. At the beginning there was a cool distance between the family and Mr. Rumak which thawed out over time. Mr. Rumak now visits his family on weekends. However, there are still tensions between Mr. Rumak and his siblings and, while things are calmer, he still has a bullish and aggressive attitude, and both his siblings and Mr. Rumak are happy when it is time for him to go. Mrs. Rumak noted that the family is still required to "walk on eggshells" during these weekend visits.

(C) Post-Accident Affect on Employment and Continuing Education

Ken Rumak testified that in August 1998 Mr. Rumak's rehabilitation was terminated by the Insurer because he had missed an appointment, having incorrectly recorded it in his timetable. This testimony was not controverted in re-examination.

When his rehabilitation was cut off, Mr. Rumak embarked on a course of trying to rehabilitate himself by working and continuing his education.

(1) Post-Accident Employment

Since August 1998 until the time of the hearing, Mr. Rumak has had approximately 25 jobs.

These jobs are as follows:

- In 1998, starting in August, Mr. Rumak worked as a part-time Concessions (Candy Counter) Attendant at Cineplex Odeon; a Horse Marshall at the Canadian National Exhibition; a part-time host at Lone Star Cafe in Pickering (this job ended in April 1999).

- In 1999, starting in April, Mr. Rumak worked as a part-time Lot Associate and cashier for Home Depot in Whitby which ended in October 1999; and a Horse Marshall at the Canadian National Exhibition.
- In 2000, Mr. Rumak's jobs, starting in January, included: salesperson for Eco-fax Vacuum Cleaners; security guard and doorman for Opium Night Club; server for East Side Mario's in Oshawa; security guard for Knights On Guard; server, Einstein Cafe & Pub in Toronto (approximate date ending May 17, 2001); server at O'Grady's Tap & Grill.
- In 2001, Mr. Rumak began working in May as a server for Safari Bar and Grill in Toronto; server at The Beacher Cafe in the Beaches; a sandwich maker at Subway; a Horse Marshall at the Canadian National Exhibition; server at The Tap & Tankard; server at The Unicorn/Ned's Sports Bar; order-picker Sobeys; server at Jack Astor's (Toronto); server at Rain Forest Cafe.
- In 2002, Mr. Rumak began working in February as a security guard at Tone-Gar Security Services; on-call personal support worker for KMW Health Care; athletic instructor at Summit Camp; a Horse Marshall at the Canadian National Exhibition; and as a Banquet Porter at Embassy Suites/Hilton.

In addition to the above jobs, Mr. Rumak worked as a volunteer from February 1999 to June 1999 for the Whitby Fire Department in a program called "Learn Not to Burn" which required Mr. Rumak to go to different schools and participate in educating the students on fire prevention. He also volunteered at a Youth Service Club called Octagon from September 1999 until January 2000.

All of the above jobs that Mr. Rumak held were part-time. Many of the jobs did not last long – they ranged from one day, to several weeks to one, two or more months. The longest job he held was eight months at Einstein Cafe & Pub.

Mr. Rumak gave very detailed evidence on all of the above noted jobs, the type of work they entailed, his difficulties with these jobs and his reasons for leaving.

Mr. Rumak testified that his failure at these jobs involve physical, cognitive, behavioural and emotional deficits that are directly related to his car accident and prevent him from doing his work.

(a) Physical Deficits

An Insurer's Medical report by Dr. Katherine Isles, an Occupational Medicine Physician, in November 1998 diagnosed Mr. Rumak's shoulder and knee injuries as permanent. She stated:

The impairment is considered to be permanent at the present time, however, it is unknown whether it is going to progress or stay static. It is likely, however, with age that there will be some progression with respect to the osteoarthritic changes, especially with respect to the right knee as well as the left shoulder.

A report by Dr. N.C.S. Doxey dated December 15,2001 sums up Mr. Rumak's post accident physical impairments as follows:

- He has intermittent low back pain and stiffness which radiates at times to the mid and upper back. The symptoms are aggravated by stress, by exertion, by prolonged standing, and by lifting.
- His right knee is weaker than the left and tends to give out due to instability. The right knee problems are aggravated by prolonged standing, sitting, traversing rough ground, and climbing ladders.
- His pelvis "goes out"... however, there is no pain.

- His left clavicle is painful when exercising.
- He has reduced range of movement in the left shoulder.
- His right eye vision is blurred and needs correction.
- His sense of smell is dulled, as well as his sense of taste.
- He has diminished hearing on the left.
- He stated that his eyes become fatigued, due to the misalignment of his visual fields, and that his eyes do not track together completely; he saw a neuro-ophthalmologist in this connection. He finds it hard to read or gaze at a computer screen.
- He has scars on the left side of his face.
- He stated that his neck is stiff and uncomfortable, although not actually painful.

Mr. Rumak testified that his physical impairments noted above prevented him working at physical jobs. For example:

- He had difficulty working in his pre-accident job as a horse marshal in part because of an inability to stand for a long time due to his knee injury.
- He was unable to manage his job at Home Depot as a Lot Associate - which required cleaning the parking lot by gathering all the shopping carts, picking up special orders and obtaining propane keys, and carrying out larger orders - or as a Cashier, because of the physical pressure on his knee, from pushing shopping carts, and standing at the cash register.
- Because of his knee problem, he could not do his job as a security guard at Opium Night Club, and for an assignment at Costco as a door monitor in his job for Knights On Guard which required a lot of standing.

- At his most recent job as a banquet porter the physical drain on his knee after working a 10 to 12-hour shift requires him to take the next day off to recuperate. There are no long-term prospects for him in this line of work because he could not manage physically on a full-time schedule and the part-time work is on an on-call basis.

(b) Cognitive Deficits

Mr. Rumak testified that his cognitive problem is one of the principal problems he has in working at any job. His cognitive problem includes an inability to multitask, difficulty in setting priorities, difficulty focusing, succumbing easily to visual distraction, memory problems, difficulty following a conversation with more than one person and inappropriate behaviour.

Mr. Rumak gave detailed examples on all his jobs where his cognitive deficiencies affected his ability to work and he was either fired or he left because he felt inadequate. The following are some of the examples:

- He was fired from his positions at East Side Mario's and O'Grady's Tap & Grill because he could not do the job.
- He left Safari Bar and Grill because he could not do the job and did not want to experience the bad feeling of failure that accompanies being fired.
- He left Jack Astor's because he did not want to be singled out as inadequate.
- He was fired from The Tap & Tankard due to problems with his tone and the fact that he got flustered when serving food and drink.
- He underwent an "implied firing" at The Beacher Cafe and was fired from the Unicorn.
- In his attempt to sell vacuum cleaners he only lasted three-and-half weeks, because he forgot the information he was supposed to know about the vacuum to be sold and could not do a good presentation.

- He lasted one day in his job as an order-picker at Sobeys grocery warehouse because he found the amount of information given during the training "too much."
- At the Opium Night Club where he worked as a security guard, he became confused when required to use birth dates on identification cards to determine whether patrons were old enough to enter the establishment. He had difficulty focusing his attention on the crowd when responsible for perimeter security. He left that position impulsively after several months.

(c) Behavioural Difficulties

Mr. Rumak testified that he had a personality change after the accident. Whereas, before the accident he was a polite and socially appropriate person, after the accident his behaviour was temperamental and inappropriate.

Mr. Rumak testified he would be rude and blunt for no reason. He would get angry and lose his temper very quickly. Working as a server he would have confrontations with staff and patrons.

At other times he would be overly friendly with patrons, sitting down and talking to them and completely forgetting that he was actually serving until they reminded him.

As a security guard for Opium Night Club, Mr. Rumak stated, he did not know where to draw the line between being effective and being aggressive. He would use excessive force to break up fights at the nightclub. He seemed to want to get into confrontations, which was not consistent with his pre-accident personality or his martial arts training.

(d) Emotional Liability

The testimony of Mr. Rumak, his parents, his former employers, his treating psychotherapist, Dr. Richard Wood, and expert witness. Dr. Neville Droxy, as well as the medical documentation all confirm that post accident Mr. Rumak continues to suffer from emotional problems that interfere with his ability to work.

With respect to his current emotional state, Mr. Rumak testified that:

Everything that I go through every single day is failure after failure. There is always a constant reminder that I am not the person that I used to be before the accident and I've got to deal with that and that puts me in a terrible mood when it comes to my emotions. I mean – I'll be – even if I am with my friends and you know we're out, or we're walking in Toronto or we're at the bar having some food, you know, I could be happy with them and all of a sudden, bang, something will happen and it will trigger why I am not the same and I just pick up and leave. Guys, I got to go. I just leave. I don't cry, although there is lots of times when I do feel like crying but I don't let myself cry.⁴

(e) Corroboration by Employers

To support his testimony and medical evidence regarding the problems his car accident injuries have caused him in trying to work as a server, Mr. Rumak presented a letter from the owner of East Side Mario's corroborating his difficulties with working as a server. In addition to this corroborating letter, two employers of Mr. Rumak testified at the hearing regarding the difficulties Mr. Rumak had working at his jobs as a server and security guard. They were Michael Gosselin, Manager at Einstein Cafe, and Catherine Ranton, Operations Coordinator at Tone-Gar Security Services ("Tone-Gar").

(i) Letter from Debbie DiMarco

An undated letter from Debbie DiMarco, the owner/operator of East Side Mario's, to Mr. Rumak's lawyer corroborates the difficulties Mr. Rumak testified that he had working as a server. The letter notes that Mr. Rumak had worked as a server from May 22, 2000 to July 4, 2000 and in part states:

⁴ Transcript Volume III at pp 320-321

...Alex [had] problems accomplishing multiple tasks assigned. The position of a server... involves many steps. Alex often became confused following these steps of service and frustrated, and even with our extensive training was still "messing up". It is only fair to say that Alex is a very polite, and intelligent person who got along well with everyone however his retention and multi-task skills seriously affected the way he performed and eventually led to his dismissal.

(ii) Mr. Michael Gosselin's Testimony

Mr. Gosselin testified about Mr. Rumak's performance at his job as a server and bartender at Einstein Cafe & Pub.

Mr. Gosselin stated that the most important characteristics of a server are friendliness, efficiency and speed, a good sense of money, a good sense of organization and a jovial attitude. The goal of a server is to make sure that customers are enjoying themselves.

Mr. Gosselin stated that a good bartender would also have the same skills and characteristics.

Mr. Gosselin testified that Mr. Rumak was kind of "hit and miss" regarding his organizational skills as server. He stated that the busier the restaurant got, the more confused Mr. Rumak became. He would have difficulty carrying a number of orders in his head and when he was ordering through the bar, often times things would be stated wrong. This resulted in wasted time and wasted product.

Mr. Gosselin stated that Mr. Rumak had similar organizational problems working as a bartender. A bartender, on the one hand, has to listen to servers calling out drinks that need to be served to the tables and, on the other hand, the bartender has to deal with the customers sitting at the bar.

Mr. Gosselin stated that Mr. Rumak often ran into problems if he had to listen to too many people at once. Instead of taking time to get a proper order out before starting on the next one,

he would try to take it all in at the same time. The end result would be he gave out the wrong product which would go to waste.

Mr. Gosselin stated that while other servers also made errors, Mr. Rumak made far more errors than other servers, because in his case errors tended to happen on a nightly basis, particularly when the restaurant was busy.

Mr. Gosselin testified that there were problems with Mr. Rumak's interaction with the other servers and customers. Mr. Gosselin stated he had requests from servers not to work with him. When Mr. Rumak was bartending there would sometimes be shouting matches between the server and Mr. Rumak. This would be because he would confuse his priorities as to who to serve first, the person at the bar or the server's order. More often than not he would snap at the server and this created a certain amount of uncomfortableness for people who were patronizing the establishment.

Regarding his relationship with customers, Mr. Gosselin stated, if 15 people (four or five tables) came in at one time, Mr. Rumak would rush himself and, in turn, be gruff and actually rude at some point to the customers. As well, in a restaurant bar where drinking is going on one expects some joking around with the servers and bartenders. Mr. Gosselin observed that there were certain times when Mr. Rumak seemed unable to discern when somebody was joking with him and when somebody was serious and he tended to become rude when he deemed that they were not actually just fooling around with him.

Mr. Gosselin stated that he did learn about Mr. Rumak's car accident and brain injury and tried to give him the benefit of the doubt and he talked to Mr. Rumak and asked him to simply take better control over his attitude and frustration.

When asked why Mr. Gosselin kept Mr. Rumak on so long if he had so many difficulties. Mr. Gosselin responded:

I think I misread the situation. At first I had thought it was simply a character thing and that with a little bit more experience he would get used to the situations that arose. I also, as I said, I like to give people the benefit of the doubt, allow them to use their own initiative, work through their problems. To be quite honest, I thought the guy needed a bit of a break. I don't like firing people. I don't like seeing people out of a job. I didn't dislike him by any means, so I didn't really want to screw his life up anymore than it may have already been at that point.⁵

Mr. Gosselin stated that when Mr. Rumak quit the job and then called back a week-and-a-half later asking for his job back, he chose not to rehire him.

(iii) Ms. Catherine Ranton's Testimony

Ms. Ranton testified about Mr. Rumak's work performance as a security guard for Tone-Gar.

Ms. Ranton testified that Mr. Rumak's primary work was to be a security officer at trade shows. His responsibilities involved access control, which means scanning badges to allow the appropriate people on me floor, keeping an eye on people wandering about the floor, providing information and preventing products from coming off the floor without a release form which was a responsibility of the security officer to collect.

Ms. Ranton described the important characteristics of a security officer which included the ability to focus and to multitask, that is, to concentrate on more than one task or duty at a time. She also described the important interpersonal characteristic of a security guard such as punctuality and the ability to communicate effectively.

Ms. Ranton testified that when given directions and duties Mr. Rumak was very keen and would be more than willing to do them. Unfortunately, his performance fell short when he had to do more than one thing at a time.

⁵ Transcript Volume VI p. 753

Ms. Ranton testified that Mr. Rumak would begin losing his concentration about three or four hours into his eight to twelve-hour shift. On one occasion, when his job was to watch people enter and leave the show, Mr. Rumak allowed a camera onto the floor, although he had been told cameras were not allowed, because of concerns about product espionage. Not only did he allow the camera in but he showed poor judgement when reporting the error by not following the protocol (which had been reviewed with him prior to his shift and several times throughout the day) by calling Tone-Gar's client directly instead of his immediate supervisor.

Ms. Ranton Stated that the client was quite perturbed that Mr. Rumak was not following the protocol and asked that Tone-Gar take away Mr. Rumak's two-way radio. Ms. Ranton stated that when she confronted him about this incident, Mr. Rumak was very upset about it, explaining that he had seen people go in and out but was unable to focus on exactly what was going on around him.

Ms. Ranton described a number of incidents where Mr. Rumak's lack of focus, concentration and good judgement was detrimental to the work he had to do. One incident almost cost Tone-Gar a show because Mr. Rumak got distracted in his duties and temporarily lost a box of identification cards which included the credit cards and drivers' licenses of the exhibitors at the show. The director of the show, who was also an exhibitor, came back to get his identification only to find that the box was missing. He became very irate and questioned the competency of the guards that were hired.

Ms. Ranton also testified that Mr. Rumak was constantly late for work and it had a negative impact on the trade shows because it required her to leave access doors unguarded because there was not enough coverage. It also frustrated his fellow security officers who were required to pick up the slack for him.

Ms. Ranton stated that Mr. Rumak explained that the reason for his lateness was that it was hard for him to get up in the morning, to focus, get motivated and get going. She stated that she was aware of Mr. Rumak's car accident and she tried to make accommodations by booking him for the night shift, because there are fewer duties at night and less people with whom to interact.

However, she had concerns about Mr. Rumak working the night shift because of his inability to stay focused and ensure people on the floor are not putting things in their pockets, and his tendency to wander and not do what he is supposed to be doing. Ms. Ranton explained that this was a greater concern at night because there are fewer guards at night and, therefore, less back-up to catch a mistake made by Mr. Rumak.

Ms. Ranton testified that her own supervisors had talked to her on two occasions about terminating Mr. Rumak. One of the reasons they had been so accommodating was because he fitted the physical appearance that Tone-Gar's clients prefer. Ms. Ranton stated that although her supervisors were aware that Mr. Rumak had been in a car accident in which he sustained a head injury and agreed with what she was trying to do for him, they had definitely stated he would only be given one more chance.

(2) Post-Accident Education

With the help of tutors, summer school and reducing his course load, Mr. Rumak was able to finish grade 12. In the fall of 1999, he enrolled in a firefighting course at Durham College. It was his intention to try and fulfill a dream he has always had about being a firefighter. The course was a 10-month course in which the first semester dealt with a technical overview of firefighting. The second semester starting in January 2000 dealt with the practical side of firefighting.

Mr. Rumak testified that when he tried to answer questions in class, the words he tried to say came out mixed up and his answers were not fully organized. He stated that his classmates made fun of him. He got labeled as the dummy of the course.

Ken Rumak testified that Mr. Rumak's firefighting college classmates would draw pictures of him and his scar and pass them around. Because of Mr. Rumak's inappropriate behaviour, he was an outcast in what was supposed to be a team environment.

Due to knee surgery that Mr. Rumak had in November 1999, he had to drop out of the course because he was unable to qualify for the physical test that was required to enter the second semester. Mr. Rumak stated that although he had expected a speedy recovery, his knee was too unstable for him to do the practical part of the course, for example, climbing ladders.

In April 2000, Mr. Rumak attempted an OAC biology night course and found that he could not understand it. He was unable to obtain a tutor and eventually dropped out. In September 2000, Mr. Rumak registered at George Brown College to study acting. This again was another failed experience. Mr. Rumak testified that he did not fit in with merest of the students. He stated that he could not speak intelligently about anything and not many people wanted to talk to someone who could not carry on a conversation. He also had problems with the courses. For example, in his improvisation class, he had a couple of good ideas, however, when he tried to express them, he blanked out. He stated that it was really hard to do that and then have to face everybody afterwards. As a result, he dropped out before the end of the first semester.

Since the time he dropped out of George Brown College, Mr. Rumak has not enrolled in any other post secondary courses.

IV Medical Evidence

The medical evidence presented by both parties was quite extensive. It included copies of numerous reports, assessments, clinical notes and records dating back to the accident. As well, Mr. Rumak's treating psychologist, Dr. Wood, and an expert on Rehabilitation Psychology,

Dr. Doxey, testified on behalf of Mr. Rumak. Two of the DAC assessors. Dr. B.K. Kim, a psychiatrist, and Dr. L. Bauer, a neuro-psychologist, testified on behalf of Personal.

Except for an Insurer's Medical report by Dr. Debow, I have chosen to focus on me medical evidence provided in the two years before the hearing, not only because it is most relevant to the issue in this arbitration, the post 104-week test, but also because it includes the period when Personal terminated Mr. Rumak's benefits.

A Mr. Rumak's Medical Evidence

1. Report of Dr. Lesley Ruttan

Four years post accident. Dr. Lesley Ruttan, a Psychologist who practises Clinical Neuropsychology and Clinical Psychology, undertook an in-depth examination of Mr. Rumak.

The purpose of the assessment was to provide Mr. Rumak's counsel with an opinion on Personal's agreement to fund 20 sessions of "cognitive stress management therapy."

In her report of August 17, 2001, Dr. Ruttan succinctly concludes:

Mr. Rumak's life has been significantly altered in most domains as a result of injuries sustained in the July 6,1997 motor vehicle/pedestrian accident. For example, **behavioural difficulties** resulted in loss of friends and in him having to move out of his parent's home. **Cognitive deficits** have continued to interfere with his work performance and **physical deficits** appear to have precluded his dream of becoming a firefighter and resulted in reduced physical activity and participation in previously enjoyed sports. **Emotional lability** interferes in most interpersonal relationships and he is lacking in sense of direction for his life.

Dr. Ruttan concludes her report by commenting on the series of 20 psychological treatment sessions that Personal had approved by stating that, in her view, these treatment sessions were "...appropriate given the severity of Mr. Rumak's brain injury and resulting cognitive and behavioural impairments."

The psychological treatment that Personal agreed to pay was provided by Dr. Wood, a clinical psychologist. Dr. Wood testified at the hearing and his clinical notes and records were entered into evidence.

2. Testimony of Dr. Richard Wood

Dr. Wood testified that 90 percent of his practice is psychotherapy. A small percentage of his practice involves psychological assessment and psycho-legal evaluation. He is also the Director of a DAC, Thornhill Multidisciplinary Centre. Dr. Wood testified that he provided treatment to Mr. Rumak from September 24, 2001 to May 10, 2002.

Dr. Wood testified that his clinical notes reflect the concerns that Mr. Rumak described to him when he came for treatment. These included:

- his inability to manage anger was his most immediate concern
- impulsivity paired with his outbursts of rage which frightened him
- depression which episodically became intense and which episodically seemed to generate suicidal thought
- a variety of cognitive deficits that were giving him a great deal of trouble and interfering with his performance at his various jobs. This included a perceived impairment of organizational ability and ability to plan and take initiative; an inability to apply appropriate judgement to a given situation; difficulty multitasking, impaired memory and distractibility. (Dr. Wood stated that these cognitive deficits would generally be described as disruption of the executive function of his brain.)
- he was "terrifically" pre-occupied by the cycle of job attainment and job failure he had faced because of his physical and cognitive deficits.
- despairing about his future

Dr. Wood testified that Mr. Rumak felt that his life had changed dramatically after the car accident. Although attempts were made by Dr. Wood to talk about Mr. Rumak's pre-accident life, Mr. Rumak resisted this because he found it too painful.

Dr. Wood testified that he observed that Mr. Rumak "... really didn't appreciate social nuance, really didn't appreciate others' reactions to him, didn't pick up social cues, didn't mediate his responses in a socially appropriate way." Dr. Wood testified that his observations were reflective of what he imagined some of Mr. Rumak's difficulties were at work.

Dr. Wood testified that it was his impression that much of Mr. Rumak's frenetic activity, moving from one job to another, from one place to another, was a confirmation of a manic defence against depression.

Dr. Wood testified that Mr. Rumak's presentation did not change a great deal over the course of his treatment. Dr. Wood stated that towards the end of the treatment Mr. Rumak showed as much volatility, pressure of speech, agitation, perseveration (the persistent repetition of the same verbal response when no longer appropriate) and impulsivity as when he started treatment. His depression and future hopelessness persisted.

Dr. Wood testified that at the end of Mr. Rumak's therapy in May 2002 he tried to convey to Mr. Rumak that he needed to create more stability in his life and talked to him about a program of rehabilitation that would help protect him from some of the increasingly emotional storms Dr. Wood felt Mr. Rumak was facing.

More specifically, Dr. Wood stated that Mr. Rumak should have assistance in establishing realistic vocational plans and enter into a process of vocational retraining where he had ongoing support with a great deal of Structure and close supervision. As well, Mr. Rumak should have ongoing therapy to ensure that he has a better means of getting through the process.

Dr. Wood testified that, while at the end of therapy Mr. Rumak understood more about his difficulties, he was unable to apply problem solving to them. He could not move insight and problem solving forward into a given current situation.

Dr. Wood stated that when Mr. Rumak's treatment concluded in May 2002 because Mr. Rumak had made plans to be away for the summer, he expressed his strong concern to Mr. Rumak that he return to treatment, but left the choice up to him.

3. The Report and Testimony of Dr. Neville Doxey

Mr. Rumak was assessed by Dr. Doxey at the request of his counsel. Dr. Doxey is a treating clinical and rehabilitation psychologist who has also been administering neuropsychological screening tests and interpreting them for about 28 years. According to the Ontario College of Psychologists' Guidelines, a rehabilitation psychologist has the knowledge and skills to assess and treat individuals with impairments that are physical, emotional, cognitive or social in nature.

In his testimony Dr. Doxey highlighted certain aspects of his experience which included his work at the Workers' Compensation Board [now called the Workplace Safety and Insurance Board], where he was Chief of Psychological Services from 1984 to 1998, and his private practice that he began approximately in 1977, and which includes treatment of brain-injured individuals and individuals suffering from chronic pain. He also conducts disability assessments on behalf of plaintiffs and defendants, and insurers and insureds.

Dr. Doxey testified that his ratio in his practice between assessment and treatment was three to one. That is for every one hour that he saw a patient for assessment, he spent three hours providing psychological treatment.

Mr. Rumak was seen by Dr. Doxey on August 15, 2001. He underwent a two-hour clinical interview on that date; as well, he was administered, over a period of seven hours, a battery of

psychological tests pertaining to his academic and intellectual abilities, vocational interests and aptitudes, and his psychological functioning. In addition, Dr. Doxey did an in-depth review of Mr. Rumak's medical file which is summarized in five pages in his report.

In his report dated December 15, 2001, Dr. Doxey concluded that Mr. Rumak: "Presently remains with very significant physical, cognitive, and personality/emotional dysfunctions and deficits."

Regarding Mr. Rumak's cognitive functioning Dr. Doxey concluded:

It is also clear that Mr. Rumak has impaired cognitive functioning as a result of his closed head injury.

...

Presently, Mr. Rumak admits to difficulties with maintaining attention, dealing with small details, multi-tasking, memory, verbal expression, mental confusion, and setting priorities. During our interview, clinical indicators of profound cognitive impairment were quite evident. Thus, even though he performed well on most of the measures of cognitive/intellectual functioning that we administered to him (as was the case during the assessments by Drs. Brooker and Shah), we are forced (based on the file material reviewed above, his history, and his overall presentation) to conclude that Mr. Rumak has significant cognitive impairments.

(It should be noted that, in our experience, a disjuncture between psychological test performances and "real world" functioning, in persons with a history of head injury, is not a rare phenomenon. Such a disjuncture simply illustrates the limited ecological validity of neuropsychological tests, which are typically highly structured, when assessing some types of clients for certain purposes.)

...

In our opinion, he has major cognitive impairments that affect much of his life, and these impairments are primarily related to the accident. We certainly agree with the opinions of Dr. Ouchterlony and Dr. Salmon that he has significant and catastrophic impairment of many of his mental functions. His history and the file material reviewed above provide abundant evidence that these cognitive impairments have serious implications for his ability to learn, and even for his daily living. He may well need essentially permanent support (probably on an on-call basis as needed) from an occupational therapist in order to cope with overwhelming issues as they emerge.

[Emphasis in Original]

Regarding Mr. Rumak's personality, emotional and occupational functioning, Dr. Doxey concluded:

As far as *personality and emotional functioning* are concerned, ... there has been a major personality change as a result of his accident-related closed head injury. ... Given that this is essentially a permanent condition, he has probably already achieved most of the therapeutic change that is possible. Nonetheless, his condition will present ongoing problems ... For these reasons, we believe, it is appropriate to provide him with permanent access (as needed) to an occupational therapist, as discussed above, as well as to individual and family counselling resources on the same basis (if such counselling is not already being provided). [Emphasis in the original]

As far as Mr. Rumak's emotional functioning is concerned, it is difficult to separate this from the personality change discussed above. However, it certainly is clear from our review of the file material that he has had serious difficulties with depression in the past. ... Presently, neither his clinical presentation nor the results from objective psychological testing indicate that there is any cause for great concern regarding his emotional state, and we are inclined to agree with Dr. Anderson that he meets the DSM-IV criteria for an **Adjustment Disorder With Depressed Mood, Chronic**. However, we wish to caution that, notwithstanding the objective psychological test results, it is our suspicion that there may be more disturbance than is immediately apparent, at least at different times (due to his mood lability). ... In addition, there are **some features of a Simple Phobia, Situational Type (automobile traffic)**, and he clearly has some **cosmetic anxiety**. These are still further reasons for providing psychological counselling, or maintaining it if it is already being provided. With regard to his cosmetic anxiety, it seems to us that his desire for a personal trainer is reasonable, and should be considered, at least on a trial basis. [Emphasis in the original]

With regard to Mr. Rumak's **occupational functioning**, as mentioned earlier, it is clear from his history that he had a strong work ethic prior to the accident, which did not change afterwards. However, his ability to remain employed became quite problematical following this event. He has had a series of fairly menial jobs but only for short periods. Either he has been fired or he left, probably impulsively. We have no doubt that his poor post-accident work history is a function of the changes in his personality and behaviour, the cognitive deficits, the fatigue and lack of endurance, and the deterioration in his inhibition and judgement, have resulted from his accident-related closed head injury.

...

Presently, he is trying to hold down two jobs, with neither being as fulfilling or as remunerative as he wishes. The prospect for him keeping these jobs over the long term is poor, and his future job prospects and learning capacity are also poor.

The only way to mitigate this situation, at least partially, is to provide him with a professional vocational rehabilitation case manager, a job coach, or other similar supportive resources. We are dubious that, even with such support, he would be successful. Hence, we find ourselves in agreement (sic) Dr. Ouchterlony's view that the prognosis for his competitive employability over the long term is very guarded. [Emphasis in the original]

Dr. Doxey gave very detailed testimony which highlighted and elaborated on his conclusions in his report.

In summary, Dr. Doxey testified that Mr. Rumak's brain injury caused by the car accident left him with cognitive deficits and a personality change. In his view, every major facet of Mr. Rumak's life had been profoundly affected subsequent to the accident. Dr. Doxey noted that four years after the accident he remains symptomatic and his life no longer even remotely resembles what it was previously.

Dr. Doxey pointed out that prior to the accident Mr. Rumak had a strong work ethic which still remains with him after the accident. In Dr. Doxey's view, while Mr. Rumak still has the capacity to be hired, given the multiplicity of difficulties with which he is beset. Dr. Doxey believes that it is highly improbable that Mr. Rumak will be able to sustain employment for long in any position. Dr. Doxey's prognosis is for multiple short-term, low level occupations with repeated firings or impulsive leavings. Over the longer term, he opines that Mr. Rumak will encounter greater and greater difficulty in even being given the opportunity to be hired.

B. Personal's Medical Evidence

To support its position that Mr. Rumak does not meet the post 104-week test, Personal relies on an Insurer's Medical report by Dr. Stanley Debow, a psychiatrist, who concluded that Mr. Rumak's problems in November 1998 were as a result of pre-accident social psychological problems. Personal also relies on the May 4, 2000 Vocational Assessment report by Lakeridge Health Corporation Regional Evaluation Centre, which indicates a number of jobs Mr. Rumak

can perform. In terminating Mr. Rumak's weekly income benefits, Personal relies on the March 23, 2001 DAC report which concluded that Mr. Rumak did not meet the post 104-week test.

For the following reasons I give little or no weight to these reports.

1. Report of Dr. Stanely Debow

In his report of November 5, 1998, Dr. Debow concluded that Mr. Rumak's problems pre-date the accident. He stated:

Mr Rumak has underlying and pre-existing unresolved feelings to the conflictual relationship between his parents. He has, as well, unresolved feelings to the father's depressive feelings in terms of father's financial difficulty.

Mr. Rumak has unresolved feelings to early difficulties with self esteem in terms of his weight difficulties.

Mr, Rumak has unresolved pre-existing feelings in terms of conflictual relationship to a female.

Accordingly, Dr. Debow concluded that what Mr. Rumak was suffering from was pre-accident social-psychological problems.

I give no weight to this conclusion. First, I find it significant that Dr. Debow completely ignored the fact that Mr. Rumak had suffered a serious accident and what, if any, effect the accident may have had on him. Instead, he draws unsubstantiated conclusions on passing remarks that Mr. Rumak had made to him about his past. For example, in the history portion of his report, Dr. Debow notes: "[Mr. Rumak] indicates that as a child he was 'chunky'... that during this period of time he had limited sports activities..." On this one remark Dr. Debow concludes that Mr. Rumak is suffering from pre-accident self-esteem problems.

Dr. Debow, however, completely ignored how Mr. Rumak was functioning before the accident, namely, that when Mr. Rumak entered high school, he slimmed down, became physically fit, was engaged in many sports, including playing on the senior high school rugby team, and was a happy and popular young man at the time of the accident. Moreover, Dr. Debow makes no mention of any emotional effect on Mr. Rumak's inability to engage in any of these physical activities post accident because of his injuries received in the accident.

I find these to be significant omissions. Given the medical reports available to Dr. Debow that showed in the Spring of 1998 Mr. Rumak was suffering from severe depression and suicidal ideation over his physical and cognitive losses as a result of the car accident. Dr. Debow should have had some awareness that Mr. Rumak was suffering from more than pre-accident self-esteem problems.

Second, Dr. Debow diagnosed Mr. Rumak with pre-accident unresolved feelings regarding his father's depression and financial problems. In his report, Dr. Debow states "[Mr. Rumak] indicates that there is a history in his family of emotional disorder in that his father had financial difficulties and had also seen Dr. Teehan in July of 1998."

It is clear from this statement that Ken Rumak saw Dr. Teehan post accident for depression. This is consistent with Ken Rumak's testimony and supporting documentary evidence that he suffered a clinical depression after the accident because of the effect the accident had on him emotionally and financially for the family. This is also consistent with Mr. Rumak's testimony that what he was describing to Dr. Debow was the post accident effect on his father and his reaction to it.

In my view, Dr. Debow either ignored or failed to properly elicit relevant information regarding the effect that Mr. Rumak's father's post accident depression had on him. I therefore do not find Dr. Debow's conclusion that Mr. Rumak was only suffering from pre-existing unresolved feelings towards his father to be reasonable in the circumstances of this case.

Similarly, I give no weight to Dr. Debow's conclusion that Mr. Rumak was suffering from a pre-existing conflictual relationship with a female. The evidence shows that Mr. Rumak only became romantically involved with his girlfriend two days before the accident and it was only post accident that Mr. Rumak and his girlfriend began to have difficulties and the relationship ended.

I also find there is no evidence to support Dr. Debow's conclusion that Mr. Rumak was suffering from pre-existing unresolved feelings to the conflictual relationship between his parents. I Accept Mr. Rumak's credible evidence that what he was describing to Dr. Debow was the turmoil he was feeling about the family situation at the time he saw him after the accident.

In my view, based on all pre and post accident information which Dr. Debow should have reasonably made himself aware, including the medical reports of Drs. Brooker and Teehan, cited above, as well as eliciting relevant information from Mr. Rumak, I find that in the circumstances of this case Dr. Debow's conclusion was unreasonable.

Accordingly, for all of these reasons I give no weight to Dr. Debow's conclusions that Mr. Rumak is suffering from pre-accident social-psychological problems.

2. Vocational Assessment Report

On April 26, 2000, Mr. Rumak underwent a Vocational Assessment at the Lakeridge Health Corporation Regional Evaluation Centre, In her report dated May 4, 2000, under the heading of "Summary Assessment", Ms. Elaine Miki, vocational rehabilitation consultant and certified assessor, commented on Mr. Rumak's demeanour during the assessment. She stated:

[Mr. Rumak] performed the assessment, **working diligently**, taking one 15 minute break and one scheduled lunch break for 30 minutes. He demonstrated signs of impatience during the assessment and expressed a preference to not have the standardized explanations repeated for each module. Near the end of the assessment, Mr. Rumak demonstrated signs of irritability, talking out loud and shifting about. Nonetheless, he continued his assessment process without showing extreme signs of discomfort... [emphasis added]

In addition, Ms. Miki commented that Mr. Rumak expressed, upon completion of the assessment, a sincere interest in the outcome of this assessment to learn what kinds of vocational alternatives may be plausible for him.

Ms. Miki then went on to conclude that "with on-the-job training, or otherwise short-term instruction", she recommended the following three jobs that were suitable for Mr. Rumak:

- Sales Representative, Wholesale Trade (Non Technical);
- Customer Service Clerk, Insurance, Telephone, Utility Company; and
- Insurance Clerk.

As well, Ms. Miki reported that with further post secondary school training in either college or university Mr. Rumak could work as a Technical Sales Specialist; Company Trainer or a Computer Operator.

In relation to the above jobs Ms. Miki stated "[Mr. Rumak] does report concerns over mentally organizing technical and mechanical issues despite the fact that these were areas in which he demonstrated a high average aptitude range (General Learning Ability, Spatial Aptitude, Form Perception and Clerical Perception)." This latter comment made by Ms. Miki will be the subject of further discussion below regarding the difference between structured test results and the experience in trying to function in the day-to-day activities of living and working in light of the effects of a brain injury as a result of the car accident.

On this latter point, my findings show that the medical evidence supports that when evaluating and making recommendations about a person's ability to function in the real world, the day-to-day functioning has to be considered and that structured test results are not definitive.

I note that in her report Ms. Miki confirms Mr. Rumak's credibility regarding putting forward his best efforts in testing as well as showing a sincere desire in trying to find a job that he could do. I accept Mr Rumak's testimony, supported by the medical evidence, that because of his brain injury and the physical, cognitive, behavioural and emotional deficits caused by the car accident, he cannot perform the recommended jobs.

In his report dated December 15, 2001, Dr. Doxey identified the following abilities these jobs require: judging priorities, significant use of memory, complex problem-solving, working with others, continuous learning, decision making, reading, interpreting complex insurance documents, dealing with angry customers and solving their problems. Dr. Doxey stated that in light of Mr. Rumak's *"documented cognitive deficits, his visual field problems affecting reading, his dislike of reading, and his organic personality change, Mr. Rumak is unsuitable in all of these dimensions."* [Italicized in original]

Dr. Doxey goes on to state in his report: "Since these essentially direct entry jobs are so obviously unsuitable, we find it unnecessary to comment on the remaining jobs suggested by [Ms. Miki], all of which require longer periods of training and which, in all likelihood, are even more complex and demanding than the ones just discussed."

I accept Dr. Doxey's conclusions not only because they accord with the testimony of Mr. Rumak, his parents, his employers and Dr. Wood, but also because there is little evidence from Ms. Miki's report that she had a full understanding of the serious difficulties that Mr. Rumak was encountering in his everyday life and work experiences because of his physical, cognitive, behavioural and emotional difficulties. I accept that the job recommendations are not realistic in the circumstances of this case and are not suitable jobs within the parameters of the post-104 week test. Accordingly, for all of these reasons I can give little weight to the job recommendations in Ms. Miki's Vocational Assessment Report.

3. The AIM Disability DAC Report

On September 26, 2000, Personal terminated Mr. Rumak's benefits. In the OCF 17, Notice of Stoppage of Weekly Benefits and Request for Assessment, Personal stated: "You do not suffer a complete inability to perform any employment for which you may be reasonably suited, as required under your policy." As a result, on October 16, 2000, Mr. Rumak requested a DAC assessment.

The Disability DAC assessment was conducted by The Accident Injury Management Clinic ("AIM") on November 21 and 22, 2000, December 4, 6, and 18, 2000 and February 12, 2001. The team of five DAC assessors, namely. Dr. B.K. Kim (physiatrist); Dr. G. Moddell (neurologist); Dr. Lynette G. Bauer (neuropsychologist); Mr. Mike Drinkwater (physiotherapist); and Mr. Jeff McComb (kinesiologist) performed the Functional Abilities Evaluation ("FAE").

On March 23, 2001, the AIM report concluded that Mr. Rumak did not meet the post 104-week test and that he did not suffer from a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. Accordingly, based on AIM'S DAC results, Personal terminated Mr Rumak's benefits on April 12, 2001.

At the hearing, in addition to relying on the DAC conclusion. Personal called two DAC assessors. Dr. B.K. Kim, a physiatrist, and Dr. L. Bauer, a neuropsychologist, to testify on its behalf.

As a background to my analysis of the reports of the DAC assessors and the consensus of DAC reports, I would first like to set out a brief sketch of some of the relevant sections of the *Disability Designated Assessment Centre Assessment Guide: A guide to conducting Disability DAC assessments* ("DAC Guidelines") prepared by the Minister's Committee on the Designated Assessment Centre System on April 2000. The DAC Guidelines set out the standards and procedures on how disability DACs should be conducted.

The DAC Guidelines state that the purpose of a disability DAC is to offer an independent opinion that will assist the insured and insurer to resolve an existing dispute. The DAC Guidelines set out this purpose as follows:

In the case of a disability DAC assessment for "Earners Post-104 Weeks," the DAC Guidelines state that the DAC **must adhere** to four basic steps [s.2].⁶ The first step [s.3] being a "Clinical/Functional Assessment & Employment Cluster" includes the following:

In this step, the appropriate examinations, clinical investigations and assessments are conducted. The type and range of these are left to the judgement of the assessor(s) and will be determined by the claimant's potential impairment and consequent disability. The purpose of this (these) examinations(s) is to:

- Collect relevant claimant history, pre-accident conditions, objective and subjective complaints.
- Determine that the claimant has (or does not have) an impairment and consequent disability as defined by the SABS.
- Provide an opinion as to the origin of the impairment and consequent disability; i.e., determine if there could be a direct cause between the claimant's accident and his/her impairment.
- Determine the cumulative impact of the claimant's accident related impairments) and consequent disabilities.

In addition, the DAC Guidelines require that an "employment cluster" be created to assess whether the applicant suffers a complete inability to perform any employment for which he or she is reasonably suited by education, training or experience.

⁶ 1. Health professionals' examinations of impairments) and disability and claimant's "employment cluster" defined.
2. Collaborative decision-making re: need for further evaluation.
3. Additional examinations(s) and/or focused functional assessment as required. Repeat Step 2.
4. Report.

The DAC Guideline states [s.5.3.2]:

...Defining the employment cluster begins with an in-depth history solicited from the claimant to determine these 3 key variables (i.e., the claimant's education, training or experience), [emphasis added]

...

The employment cluster established for the claimant must be stated in the report, and the basis for which it was established.

With these Guidelines as background, for the following reasons I give little or no weight to the DAC report's conclusion.

(a) Dr. B. K. Kim's Evidence

Before discussing Dr. Kim's report and testimony, I wish to point out that there was a significant discrepancy between Dr. Kim's original report that he wrote himself and the version in the final DAC report. According to Dr. Kim, the final DAC report was prepared by the co-ordinator at AIM and the co-ordinator made changes to the content of his draft. For now, I will discuss only the official DAC report and I will deal with the matter of the changes made by the AIM co-ordinator in my overall discussion of the DAC report below in (c) of this decision.

The DAC consensus report notes that Dr. Kim concluded with the other DAC assessors that Mr. Rumak did not meet the post 104-week test as required in the *Schedule*. For the following reasons I give no weight to Dr. Kim's conclusion.

Dr. Kim, a retired physiatrist, testified that 85 per cent of his assessment work is for insurers and the balance is for DACs. Dr. Kim testified that he usually takes an hour to do an assessment. This includes: reviewing all of the background documentation, which he sees for the first time at the appointment, interviewing the client and performing a physical examination. He stated that the least amount of time is spent on the physical examination. He jokingly stated it can take about two minutes.

Dr. Kim stated that if he had a lot of documentation to cover he may spend some extra time reviewing the documents, after his assessment examination. In the case of Mr. Rumak, he did not recall if he spent any extra time.

In his report, Dr. Kim has a category heading "Social and Family Background" in which he sums up in five sentences Mr. Rumak's background. He has listed no separate category for vocational background. Instead, two of the five sentences under the "Social and Family Background" category state: "His present employment is a waiter in a bar and he works approximately 24 hours a week. Prior to this job he worked at East-Side Mario's as a waiter."

In his testimony under examination-in-chief, he stated that prior to the accident Mr. Rumak was working as a waiter and that Mr. Rumak was presently functioning in his pre-accident occupation. Under cross-examination, he admitted he actually did not know whether Mr. Rumak was a waiter before the accident. He stated "It is not my job to gather the vocational history in detail."

Dr. Kim testified that he did not have to know what Mr. Rumak's pre-accident work demands were. He stated, unlike a pre 104-week test, he did not consider pre-accident job demands to be important information for the post 104-week test.

As well, Dr. Kim stated that it was not important to find out how Mr. Rumak was functioning in his post-accident employment. He stated that as long as he was working, it was not up to him to find out how he is managing at his work.

Interestingly, although Mr. Rumak told Dr. Kim that he always has pain in the back and pelvis area, there is no record in his report that Dr. Kim had examined Mr. Rumak's back or made any findings on this. However, although Mr. Rumak had not made any complaint to Dr. Kim regarding his neck, Dr. Kim reported that on examination Mr. Rumak's cervical spine was

normal and pain free. When asked why he failed to record any tests conducted on Mr. Rumak's back. Dr. Kim responded defensively that it was his "shortcomings."

In his report, Dr. Kim noted that Mr. Rumak stated that his most severe physical complaint was his right knee. Dr. Kim noted "sometimes has limited tolerance and tires easily and is sometimes heavy. Often it tends to give way, but has never actually given way and fallen down."

In his findings on his physical examination. Dr. Kim only noted "although he has some subjective symptoms of the right knee, he has no ligament instability with swelling of the joint." However, Dr. Kim stated that he had no record of any tests done on Mr. Rumak's knee to substantiate his findings.

Dr. Kim concluded his report by stating:

On conclusion of the examination from a physical point of view, there are several rather serious injuries such as fracture of the clavicle on the **right**⁷ side, knee strain and head injury. After excellent medical and surgical intervention as well as supportive rehabilitation services he is functioning well physically and there is no measurable physical impairment preventing him from carrying out **the essential duties as recommended by the FAE.**

The emotional aspect is quite a significant one from the head injury which will be commented on by other assessors for an in-depth assessment of this status.
[emphasis added]

Dr. Kim testified that he had not read the FAE report when he prepared his report that went to the AIM co-ordinator. Nor did he read it afterwards. He stated that it is possible that he did not actually see the FAE report when the consensus report was signed. He stated it is possible that he may have gotten a verbal report over the phone by the AIM co-ordinator. He stated that as a general rule the AIM co-ordinator of the DAC clinic would phone him if the FAE conclusion was different from his observation and he would evaluate his conclusion in the light of the DAC FAE report.

⁷ The fracture sustained was on the left side.

Dr. Kim stated whether he read the FAE report or not, the only part of the report he looks at is the conclusion section and not the full FAE report. It should be noted, however, that the conclusion of the FAE in the DAC report does not list any essential duties of Mr. Rumak's employment, as stated in Dr. Kim's final report- it merely reiterates that Mr. Rumak does not meet the post 104-week test.

Findings of Dr. Kim's Evidence

With the DAC Guidelines as a background, for the following reasons I find that Dr. Kim did not perform an objective, proper or fair DAC assessment on Mr. Rumak:

- I find that Dr. Kim did not get a proper medical history. I find that Dr. Kim did not engage in any meaningful review of the background medical documentation provided to the DAC. Dr. Kim's very short three page report, filled with a lot of white space and big type, unlike Dr. Bauer's report, which was a substantial in-depth report, has no category for "Documents Reviewed." In contrast, Dr. Bauer lists seven pages of documents reviewed. This indicates that the DAC was provided with a substantial amount of background medical documentation.

I note this latter point because Dr. Kim stated he usually reviews background documentation during his one hour appointment and that he had no recollection of having reviewed any documentation after the assessment appointment. In my view, if Dr. Kim had reviewed the voluminous amount of documentation either before or after his assessment, there is no reason why he should not have recorded this fact in his report. Therefore, on a balance of probabilities, I find it is more likely than not that Dr. Kim did not engage in any meaningful review of the background medical documentation provided to the DAC.

- I find that Dr. Kim did not get a proper vocational history nor did he explore the essential tasks of Mr. Rumak's employment. Dr. Kim stated that he did not think it was important. In my view, this indicates that Dr. Kim did not understand that in order to determine, in a fair and balanced manner, whether or not Mr. Rumak met the post 104 week test, it was essential to have this background information.
- Similarly, I find that Dr. Kim did not elicit any information from Mr. Rumak about how he was functioning in his present employment and whether he could do his job. This is an indication that Dr. Kim either ignored or was unaware of the importance of having this information in order to determine if Mr. Rumak did or did not meet the post 104-week test.
- I find that Dr. Kim's physical examination as noted in his report and in his testimony was clearly a brief examination.
- Lastly, unlike the other DAC assessors, in his conclusion, I find that Dr. Kim did not clearly state whether or not Mr. Rumak met the post 104-week test. The final DAC report, prepared by the DAC co-ordinator, refers to "the essential duties as recommended by the FAE." However, Dr. Kim testified that he had not read the FAE report. More significantly, he stated that if he does read an FAE report, it is only its conclusion. In this case, the FAE conclusion makes no reference to "essential duties."

Accordingly, for all of these reasons I give no weight to Mr. Kim's assessment and his conclusion.

(b) Dr. Lynette Bauer's Evidence

Dr. Bauer is a practising neuropsychologist since 1991. Her first job, from October 1991 to March 1994, was at a geriatric centre in Whitby. There she worked exclusively with elderly

people who suffered mostly from dementia, depression or mania. Dr. Bauer testified that 85 percent of her work at this job was assessment, 15 percent treatment.

At the end of 1993, Dr. Bauer began to do psycho-vocational assessments for victims of car accidents. For most of the time until March 1996, she administered two psycho-vocational assessments a day, five days a week. At the time of the hearing, 90 percent of Dr. Bauer's work consisted of performing assessments for insurers and DACs and 10 percent providing treatment.

Dr. Bauer's report of Mr. Rumak's assessment states that Mr. Rumak had a number of difficulties including: pain, fatigueability, and some memory and concentration difficulties.

In addition Dr. Bauer stated that:

From a psychological perspective, testing indicates that Mr. Rumak is continuing to find it difficult to adjust to the physical and cognitive consequences of his accident. Personality testing indicates that he is very emotionally sensitive to his body and bodily changes and that rather than working through emotional problems, he tends to deny and avoid emotional pain and to act out physically and emotionally instead.

Dr. Bauer also stated that:

Testing indicates that he is currently feeling moderately depressed and although he continues to have some suicidal ideation he has no intention to act. However, he does report that he stopped driving because of an urge to run his car into a pole and his mood should be monitored regularly for the risk of an impulsive suicide attempt particularly if he is subjected to further stresses in the future. He is also moderately anxious with particular anxiety while crossing streets.

Although in her testimony Dr. Bauer denied Mr. Rumak suffered from perseveration,⁸ a behaviour observed by other medical practitioners, she did record in her report what appears to be a perseveration incident, namely, that: "At times, [Mr. Rumak] wished to continue providing information even when the assessor thanked him and encouraged him to answer another question. He did not want to be stopped in his account and was abrupt in his manner at times."

⁸ Perseveration is defined as: "persistent repetition of the same verbal or motor response to varied stimuli; continuance of activity after cessation of the causative stimulus." Borland's Pocket Medical Dictionary, 26th Edition

Dr. Bauer dismissed this incident as riot being perseveration, but did not provide a reasonable alternate explanation for this behaviour, to refute the perseveration diagnosis made by other medical practitioners.

With respect to Mr. Rumak's future employment. Dr. Bauer first wrongly states that Mr. Bauer has Grade 13 education and then goes on to comment that "he does not have further formal training which would provide him with strong transferable skills." However, she notes that if Mr. Rumak wished to **further his education**, he would be a very good candidate for computer graphics, interior designer, layout artist, quality control technician or technologist.

At the end of her report. Dr. Bauer lists a number of "**Possible** Suitable Occupations" for which he is reasonably suited based on his education, training or experience. These include:

- Animal attendant
- Invoice/Order Checker
- Cashier, Box Office Cashier, Theatre
- Dispatcher, Motor Vehicle
- Food and Beverage Server
- Touch-Up Painter
- Spray painter
- Hardware Installer
- Woodworking Machine Sander
- Car Rental Agent
- Material Handler - light
- Courier Service Driver
- Limousine Driver
- Messenger

I have emphasised the word "possible" because I believe it reflects a certain ambiguity. More specifically, it comes across as a hedging as to whether or not Mr. Rumak can indeed do any of these jobs. Regarding the job as a Food and Beverage Server, the evidence shows that Mr. Rumak has made many attempts to work as a server and has failed at these attempts.

Moreover, given Mr. Rumak's phobia for driving, which Dr. Bauer acknowledges in her report, cited above, recommending that he can work as a limousine or courier service driver would seem to be highly improbable jobs that he could do.

I note that in examination-in-chief and not controverted in re-examination. Dr. Bauer testified that Mr. Rumak's emotional instability, which she acknowledged was as a result of the accident, could affect his performance in a detrimental way in any occupation, including any occupation she has listed in her report.

In my view, for these reasons the listed jobs have not been properly thought through as viable employment, but appear to be more speculative than real. Accordingly, I cannot give much weight to Dr. Bauer's list of possible jobs that Mr. Rumak could do.

Despite the above-mentioned vulnerabilities noted in Dr. Bauer's report regarding Mr. Rumak's psychological condition. Dr. Bauer concludes her report stating that: "The results of the present neuropsychovocational assessment indicate that there are no neurocognitive or psychological factors that would cause Mr. Rumak to suffer from a complete inability to engage in any employment for which he is reasonably suited by education, training or experience."

Dr. Bauer testified that the basis for her conclusion that Mr. Rumak is not prevented from working were Mr. Rumak's neuropsychological test results and that these test results must prevail over any other evidence to the contrary.

On this latter point, Dr. Bauer stands in opposition to the views of other medical practitioners including Drs. Doxey and Wood, as well as the medical literature which stated that a person's day-to-day functioning at home, at work, and in the community must be considered when making a diagnosis.

In cross-examination, Dr. Bauer was asked if she was familiar with the text *Neuropsychological Assessment* by Dr. Muriel D. Lezak.⁹ Dr. Bauer enthusiastically held up a copy of this text and stated that this was a book that she relied on. However, when presented with quotes excerpted from the text which were contrary to her view, she disagreed with it.

These excerpts state:

Cognitive impairment associated with destruction or disconnection of frontal lobe tissue usually does not appear as a loss of specific skills, information, or even reasoning or problem-solving ability.... **In fact, patients with frontal lobe lesions often do not do poorly on those formal ability tests in which another person directs the examinations, sets the pace, starts and stops the activity, and makes all the discretionary decisions** The closed-ended questions of common fact and familiar situations and the well-structured puzzles with concrete solutions that make up standard tests of cognitive abilities are not likely to present special problems for many patients with frontal lobe injuries. Perseveration or carelessness may lower a patient's scores somewhat but usually not enough to depress the scores significantly. **Cognitive defects associated with frontal lobe damage tend to show up most clearly in the course of daily living and are more often observed by relatives and co-workers than by a medical or psychological examiner in a standard interview.** Common complaints about such patients concern apathy, carelessness, poor or unreliable judgment, poor adaptability to new situations, and blunted social sensibility. However, these are not cognitive deficits in themselves, but defects in processing one or more aspects of behavioral integration and expression ...

...

Many of the behavior problems arising from impaired executive functions are apparent even to casual or naive observers. For experienced clinician these problems can serve as hallmarks of brain damage,... **Other defects in executive functions, however, are not so obvious. The problems they occasion may be missed or not recognized as neuropsychological by examiners who only see patients in the well-structured inpatient and clinic settings in which psychiatry and neurology patients are ordinarily observed.** Perhaps the most serious of these problems, from a psychosocial standpoint, are impaired capacity to initiate activity, decreased or absent motivation (anergia) and defects in planning and carrying out the activity sequences that make up goal-directed

⁹ Lezak, Muriel D. (1995) *Neuropsychological Assessment* (3rd ed.). New York: Oxford University Press (exhibit20)

behaviors.... Patients without significant impairment of receptive or expressive functions who suffer primarily from these kinds of control defects are often **mistakenly judged** to be malingering, lazy or spoiled, psychiatrically disturbed, or-if this defect appears following a legally compensable brain injury-exhibiting a "compensation neurosis..." [Emphasis added]

I quote Dr. Lezak at length because, in my view, it is not only similar to the view expressed by Dr. Doxey, but it also clearly coincides with the reality of the situation in this case, namely, Mr. Rumak, who always gave his best effort when being tested, functioned well in the test environment. However, all the evidence of his functioning in his daily life clearly indicates that he is suffering from cognitive difficulties.

Like Dr. Bauer, Dr. Doxey had similar test results regarding Mr. Rumak's cognitive functioning. However, Dr. Doxey pointed out in his testimony that neuropsychologists' testing have a narrow focus in their use of specialized instruments to try and identify the extent or type of cognitive compromise or deficit a person might have and its locus within the brain, as compared to the broader view of a treating psychologist who has the opportunity to meet the person week after week, establish a rapport and gain a perspective on an individual's life. That is, unlike the expert assessor, the treating psychologist can see the person's different moods, find out what is really going on in their life on an ongoing basis and gain a broader perspective on how a person is functioning in the real world.

Essentially, Dr. Doxey's testimony reflects the views expressed by Dr. Lezak in her book, the experience of Dr. Wood in his treatment of Mr. Rumak, and Mr. Rumak's evidence including that of his parents and his employers regarding his day-to-day functioning in the real world, despite the very good test results.

In face of all the evidence regarding the incongruence between Mr. Rumak's neuropsychological test results and Mr. Rumak's functioning in the real world, I note that Dr. Bauer's position stands alone. Dr. Bauer did not provide any cogent objective evidence to corroborate her view that all other evidence, except the test results, must be discounted.

Despite the compelling evidence in support of Mr. Rumak's position, I found Dr. Bauer was rigid in her position that her test results were a true reflection of Mr. Rumak's condition, namely, that post accident he was not suffering from any neuropsychological problems, including cognitive problems that prevented him from working.

Dr. Bauer was adamant that Mr. Rumak, his parents, and his employers' experiences with Mr. Rumak's daily functioning, which was contrary to her test results, were not as relevant as her test results. Nor, in her view, would the opinions of other medical experts, including Dr. Muriel Lezak, an expert that she admitted that she herself relies on, would sway her that additional information, other than the test results, had any value in coming to her conclusion that Mr. Rumak did not suffer from any cognitive difficulties.

Like Dr. Debow, Dr. Bauer attributed Mr. Rumak's post-accident difficulties to pre-accident personality traits and pre-accident difficulties. In her view, Mr. Rumak's problems are the result of a predisposed histrionic personality that he was born with and that he had social difficulties prior to the accident.

When Dr. Bauer was presented with information that prior to the accident Mr. Rumak was a happy, hardworking, stable, young man, successful, popular, ambitious and looking forward to a bright future. Dr. Bauer, in my view, unreasonably minimized this information. She merely dismissed it by stating that members of a family are not necessarily reliable in assessing changes in a person's functioning following an accident.

It was my impression that Dr. Bauer unreasonably blinded herself to the reality of the situation in this case. Namely, that prior to the accident there is no evidence that Mr. Rumak displayed any of the post accident cognitive difficulties he now experiences on a daily basis. In fact, there is a myriad of credible evidence, if Dr. Bauer chose to see, to substantiate how well he was functioning before the accident.

I, therefore, prefer the evidence of Drs. Doxey and Wood over Dr. Bauer, not only because they reflect the medical literature and the reality of the situation in this case but, unlike Dr. Bauer, whose principal work is that of an assessor, the work of Drs. Doxey and Wood principally entails treatment and seeing patients over long periods of time. In this case, they would have more experience regarding the reality of the day-to-day functioning of a brain injured person than Dr. Bauer.

Accordingly, for all of these reasons, I find Dr. Bauer's conclusion that as a result of the car accident Mr. Rumak is not suffering from any neuropsychological deficits that interfere with his ability to work, not to be a reasonable or neutral conclusion in the circumstances of this case.

Accordingly, I give very little weight to Dr. Bauer's conclusion that Mr. Rumak does not meet me post 104-week test.

Summary Findings on AIM'S Disability DAC Report

Step two in the DAC Guidelines [s.4], for the post 104-week DAC assessment, is referred to as "Collaborative Decision-Making." This step requires collaborative decision-making on the part of the DAC assessors. The DAC *Guidelines* state:

At this point in the assessment, information has been collected from the clinical examinations) and the history generated by the claimant. An employment cluster has been identified, and the employment demands examined. **The team must now confer**, to determine if it has sufficient information to render an opinion or if it needs further assessment data. In some cases it may be necessary to assess the claimant's ability to perform specific tasks which are required for the employment in his/her "cluster". [Emphasis added]

In their testimony in examination-in-chief, both Drs. Kim and Bauer stated that they did **not confer**, see or sign the consensus report.

In examination-in-chief. Dr. Kim testified that he did not see the consensus report which is compiled by the clinical co-ordinator. As well, Dr. Kim stated that he does not sign the consensus report but authorizes the co-ordinator to sign on his behalf.¹⁰ In addition, he stated he never attended any consensus meeting. He stated, "I never had any team meeting anywhere. I go to three DAC center[s] but I don't have any team meeting..."¹¹

In examination-in-chief. Dr. Bauer testified:

... I don't see the consensus at that particular place, this report from AIM in Whitby.

...

I hand in my report at that place in Whitby and ask them to let me know if – I type my own reports. I provide them with only a hard copy. I do them on a Mac computer to be incompatible with anything they have and **that's deliberate, because I don't ever hand a disk that could be altered without my knowledge.** So I hand them a hard copy [at] that particular DAC and I've asked them about this, why don't I get to see your overall conclusion and they said that's just the way we do it there and so they send out their consensus. I have not seen it. Now, I just live up the road, so I could come down and sign it but I've never been asked to and when I've enquired about it, I've been told by them that this is the way they do it. **This is not my signature.**¹² [Emphasis added]

In response to a clarifying question I had as to whether Dr. Bauer had at any time read the reports by the other AIM assessors for Mr. Rumak's DAC, she responded:

No. In fact, I am often the first time person to see the client because they want a job that's generated from 1MB¹³ in these particular assessments which then goes to them so they can tailor their functional physical assessment according to the jobs that I would recommend. Sometimes I send ahead a little note summarizing my findings and the jobs that I think might be suitable and they use that as a basis for the functional assessment.¹⁴

¹⁰ Transcript Volume IX at pages 17 and 18

¹¹ Ibid at page 19

¹² Transcript, Volume VIII at p. 213

¹³ "IME" is an acronym for Insurer's Medical Examination

¹⁴ Ibid at page 215

I note that the FAE report in its conclusion states something to the contrary regarding consultation with the other assessors. It states:

Based on the results of today's functional testing and **in consultation with the other assessors on this file**, it is felt that Mr. Rumak does not suffer a complete functional inability to perform the occupations cited for which he is suited for by training, education or experience. [Emphasis added]

It is clear from Drs. Bauer's and Kim's testimony that none of the AIM assessors held a consensus meeting nor did they see or sign the consensus report. I accept the testimony of Drs. Kim and Bauer to be true. Accordingly, I give very little weight to the FAE's conclusion that its final conclusion was based on consultation with the other assessors on the file.

I also note that the only person to sign their own individual report was Dr. Bauer. All other reports were not signed. As well, other than Dr. Bauer's report, which was a substantial, in-depth densely written, small typescript, 23-page report, the report of the other assessors on the face of it were superficial. The reports of the physiatrist, Dr. Kim, the neurologist, Dr. Garry Moddel, and the physiotherapist, Mike Drinkwater, consisted of three or four pages, mostly filled with white space and very large typescript. The major portion of the content of the reports consisted of a similar repetition under the title of "History of Motor Vehicle Accident and Mechanism of Injury."

In addition, as noted above, Dr. Kim's draft report was modified by the AIM co-ordinator in a substantial way. In my view, this is not a case where the AIM co-ordinator merely edited and reformatted the style of Dr. Kim's report, but this is a case where significant changes were also made to the content of the report. For example, in Dr. Kim's original draft report, he has the following sentence which states:

For a job **he *tried to work as a waiter*** in a bar and worked 24 hours a week in September this year and continues working.

In the final report, the AIM co-ordinator changed the sentence to read:

His present employment is a waiter in a bar and he works approximately 24 hours a week.

In my view, the change in the phrase outlined in bold is more than a style edit. By eliminating the word "tried," it takes away a nuance that leads one to infer that Mr. Rumak is working as a waiter without any problem whatsoever. However, the preponderance of the evidence suggests that Mr. Rumak had considerable difficulty performing his Job duties and it is more likely than not that Dr. Kim's use of the word "tried" suggests that those difficulties were expressed to Dr. Kim.

Had this been the only change by the AIM co-ordinator, I do not think it would be that crucial to a report that was otherwise without problems. However, there were numerous other changes to the report. While these changes were mostly insignificant, there was one very significant change by the AIM co-ordinator to Dr. Kim's original conclusion. In the report that Dr. Kim typed himself, and which he relied on when giving his testimony, he stated "[Mr. Rumak] is functioning well physically and there is no measurable impairment preventing him from carrying out the **essential duties of his everyday activities and also some of the activities within his background he is able to do so.**"

The DAC Report, which Dr. Kim did not sign, significantly changes his conclusion by stating "he is functioning well physically and there is no measurable physical impairment preventing him **from carrying out the essential duties as recommended by the FAE.**"

Essentially, the AIM co-ordinator changed Dr. Kim's conclusion to something he did not say in the original. This clearly was not a style edit.

Although Dr. Kim could not remember, he speculated that the AIM co-ordinator would have called him about the changes and he would have initialled the changes. In my view, however, it is more likely than not that Dr. Kim did not see these changes until the time of the hearing.

In my view, given me serious and substantial change to the conclusion, if Dr. Kim had seen the final DAC report and initialled the changes, then on a balance of probabilities it would have been reasonable for him to have signed a copy of the final report with the initialled changes in his file.

I am reinforced in my opinion by the fact that when Dr. Kim testified at the hearing, the report he relied on to refresh his memory was his original draft report and not the final report by the DAC. In my view, had Dr. Kim been aware of the changes in the final report, it is more likely than not, he would not have relied on his draft report. In fact, it seemed to me that Dr. Kim appeared to be surprised when the discrepancy was first presented to him. His explanations of the situation noted above, although sincere, were mere speculations, as he had in fact no memory of the situation.

I, therefore, conclude it is more likely than not that Dr. Kim did not see the final DAC report and did not see the changes made by the AIM co-ordinator.

Accordingly, I find it is more likely than not that the AIM co-ordinator went beyond her jurisdiction and took liberties with changing Dr. Kim's report without his knowledge to shore up his report to conform to the consensus.

In addition, given that the other DAC reports, except for Dr. Bauer's, were not signed, I am not confident that the AIM co-ordinator did not take similar liberties, as she did with Dr. Kim's report, to change the reports of the other DAC assessors without their knowledge. I note this especially in the light of Dr. Bauer's testimony that she feared changes to her report without her knowledge and so made sure that she provided the DAC with an incompatible computer disk of her report. This would lead me to believe that it is more likely than not that in the past the AIM DAC facility in Whitby has changed the content of reports without the assessors' permission.

Accordingly, for all these reasons, I find that the DAC report is seriously flawed in its substance. Accordingly, I give little weight to the DAC's conclusion that Mr. Rumak does not meet the post 104-week test.

ANALYSIS AND FINDINGS

The burden of proof rests with Mr. Rumak to show on a balance of probabilities that he suffers a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. For the following reasons I find that Mr. Rumak has met his burden.

Subparagraph 5(2)(b) of the *Schedule* provides that:

(2) The insurer is not required to pay an income replacement benefit,

...

(b) For any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience;

The first case to interpret the language of subparagraph 5(2)(b) was the case of *Lombardi and State Farm*.¹⁵ In that case, Arbitrator Sampliner interpreted that "the Legislature intended 4 complete inability to mean a higher degree of disability than the pre-104 week "substantial inability test.

Arbitrator Sampliner goes on to state:

Three distinct levels of injury or disability appear in the 1996 *Schedule*. A "catastrophic impairment" is the most severe and has a specific definition.¹⁶ The phrases "substantial inability" and "complete inability" are undefined, but each has been interpreted in previously noted cases. I find that the drafters did not intend for mere to be a similarity between these two because otherwise there would be no need for both.

I am persuaded from the review of the various no-fault legislation and the case law that the drafters of the 1996 *Schedule* intended all three phrases to operate as a continuum. I find that "complete inability" does not require the degree of

¹⁵ *Lombard and State Farm Mutual Automobile Insurance Company* (FSCO A99-000957, April 11, 2001)

¹⁶ Section 2 of the *Schedule*: quadriplegia, paraplegia, limb amputations, total blindness, significant brain impairments, [footnote in original]

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.¹⁷

Thus, two themes emerge from the current regime's use of the term "complete inability." First, I find that the grammatical arrangement of the phrase modifies "any employment," distinctly referring to the range of all suitable jobs.¹⁸ Second, I find that the Legislature intended to raise the standard beyond a relatively sizable inability¹⁹ for each job.

I agree with Arbitrator Sampliner's findings²⁰ and incorporate his reasoning in my conclusions below.

First, the evidence is clear, Mr. Rumak suffered a catastrophic injury as a result of the car accident. His injuries were serious. Post accident, the evidence reveals that Mr. Rumak has had ongoing physical, cognitive, emotional and behavioural problems as a result of these injuries.

In weighing and balancing the medical evidence as to whether Mr. Rumak meets the post 104-week test, I prefer Mr. Rumak's medical evidence over that of Personal's.

I give full weight to Mr. Rumak's medical evidence. I found that the testimony of Drs. Wood and Doxey was presented in an in-depth, even handed manner. Both had a clear and deep understanding of Mr. Rumak's vocational history and his struggles with his everyday life because of his brain injury as a result of the car accident.

¹⁷ *Zurich Insurance Company and Lanctot* (FSCO P99-00012, November 9, 1999) - "The standard should not be set so high that it precludes legitimate claims, or so low that it encourages specious ones." [footnote in original]

¹⁸ *Wigle and Royal Insurance Company of Canada* (OIC A-012312, January 12, 1996) [footnote in original]

¹⁹ *Steele and Zurich Insurance Company of Canada* (OIC A-OOW24, December 3, 1992), *Whitney and Co-operators General Insurance Company* (OIC A-001005, March 31, 1993) [footnote in original]

²⁰ These findings were not disturbed in the appeal decisions, *Lombard and State Farm Mutual Automobile Insurance Company* (FSCO P01-00022, February 26, 2003). See also *Terry and Wawanesa Mutual Insurance Company* (FSCO AOO-000017, July 12, 2001)

I find the conclusions of Drs. Ruttan, Wood and Doxey to be consistent with each other, as well as with the majority of the medical evidence. Their observations and conclusions were also consistent with the testimony by Mr. Rumak, his parents and Mr. Rumak's employers.

In contrast, I can give very little weight to the medical evidence of Personal based on my above analysis and findings with respect to the reports of the Vocational Assessment, the reports of Drs. Debow, Kim, Bauer and the AIM DAC report as a whole. In summary, I found the Vocational Assessment superficial; Dr. Debow's conclusion unreasonable; Dr. Kim's report unreliable; Dr. Bauer's conclusion not to be neutral; and the DAC report as a whole inherently flawed.

Accordingly, for these reasons, I prefer Mr. Rumak's medical evidence over that of Personal.

Second, despite Mr. Rumak's serious injuries, and having been found by a Catastrophic Impairment DAC to have suffered a "catastrophic injury" as a result of the car accident, I find that Mr. Rumak has made valiant efforts to mitigate his circumstances to try and get back to a normal, balanced life.

There is no question in my mind from Mr. Rumak's testimony, and the evidence as a whole, that Mr. Rumak's efforts to get on with his life have been sincere. His frustration and disappointment is quite evident in his testimony. His desire to make something of his life is also evident. In my view, based on the totality of the evidence in this case, the fact that Mr. Rumak has worked and continues to work 104 weeks post-accident does not disqualify him from meeting the post 104-week test. I am reinforced in my opinion by the decision of Justice Reid in the case of *Fowler vs Co-Operators Insurance Association (Guelph)*²¹

²¹ (1978), 20 O.R. (2d) 728 (Ont.H.C.J)

In that case. Justice Reid stated:

There is no better evidence of incapacity to perform a task than the failure of an honest and sustained attempt to do it.

He goes on to state:

It might at first glance seem anomalous to hold that a person who has returned full-time to work and who is receiving full pay is at the same time totally disabled". This anomaly is more apparent than real. First, on the facts, the plaintiffs employer did not keep her on because he was satisfied with her work. He was not satisfied. He kept her because he hoped she would improve, notwithstanding that she was not capable of doing what was expected of her and that the quality of her work had deteriorated.

It is open to an employer to keep on an employee whose work is not satisfactory just as it is open to him to terminate the employment. As I have observed, those facts standing by themselves may mean little. To be terminated does not prove that an employee does not have the capacity to perform a task nor does to be kept on the payroll prove that he has.

I find Justice Reid's findings very relevant in this case. It is clear from the testimony by Mr. Gosselin and Ms. Ranton, two of Mr. Rumak's employers, that they were aware of Mr. Rumak's limitations because of his injuries in the car accident, nevertheless, they kept him on despite his deficits believing he deserved a chance and hoping that he would get better.

In my view, I do not believe that Mr. Rumak should be faulted for trying and failing. Like Justice Reid, I believe that in this case there is no better evidence of Mr. Rumak's incapacity to stay employed than the continued failure of his honest and sustained attempts to work at any job.

Accordingly, for all these reasons I find that Mr. Rumak suffers from a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. Accordingly, I find that Mr. Rumak is entitled to an income replacement benefit in the amount of \$214.88 per week from April 13, 2001 and ongoing, less any amount for income received by Mr. Rumak in respect of any employment after the accident. Mr. Rumak is also entitled to interest on past benefits owed at the statutory rate of two per cent per month compounded pursuant to subsection 46(2) of the *Schedule*.

SPECIAL AWARD:

Section 282(10) provides:

If the arbitrator finds that an insurer has unreasonably withheld or delayed payment, 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 percent 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*.

In *Anizor and Royal Insurance Company of Canada*,²² Arbitrator Palmer held that pursuant to section 282(10) of the *Insurance Act*, an arbitrator has an inherent jurisdiction to grant a special award once she finds that an insurer has acted unreasonably, "whether or not such a claim has been raised in the Application for Appointment or an Arbitrator, Reply by Insurer, at the pre-hearing conference, or otherwise."

In *Leitgeb and Allstate*²³ Director's Delegate Draper concurred with the reasoning in *Anizor*. In *Leitgeb*, he stated as follows:

I agree with the arbitration decisions that have held that a special award is not a claim to be advanced like a claim for benefits. See for example *Victoria Anizor and Royal Insurance Company of Canada*, January 24, 1995, OIC File No. A-003702; *Carmen Palumbo and Dominion of Canada General Insurance Company*, April 13, 1995 [QIC File No. A-007314]. Rather, it is a statutory authority, or a direction, given to the arbitrator to make an award if he or she finds that not only are benefits owing to the applicant, but that they were unreasonably withheld or delayed by the insurer.

²² *Anizor and Royal Insurance Company of Canada* (OIC A-0003702, January 24, 1995)

²³ *Leitgeb and Allstate Insurance Company* (OIC P-012407, November 16, 1995)

In my view, this has at least two consequences. First, the arbitrator can order a special award whether or not it was raised in mediation or at the pre-hearing. This is subject to the principles of fundamental justice and fairness, which probably require some notice to the insurer that a special award is being considered.

Second, the special award provision does not create an entirely separate basis for production. An applicant seeking production from an insurer's records must demonstrate some reasonable basis for its relevance to the issues before me arbitrator.

In *Royal and Clark*,²⁴ following the decision in *Leitgeb*, Director's Delegate Draper stated that subject to the principles of fundamental justice and fairness, in his opinion "... section 282(10) gives arbitrators the authority to impose a special award based on the evidence presented at the hearing, whether or not notice was given before the hearing."

In the recent appeal case, *Zurich North America Canada and Stargratt*,²⁵ Director's Delegate Makepeace reaffirmed the principle that "Arbitrators have authority to raise a special award on their own initiative" during the Course of the hearing. In addition, Director's Delegate Makepeace stated that "ideally," the arbitrator should give particulars for why a special award is being considered without necessarily appearing to be stepping into the fray.

From the above cases, three principles can be abstracted:

- an arbitrator has the statutory jurisdiction to raise a special award issue on their own initiative pursuant to section 282(10) of the *Insurance Act*;
- the principles of fundamental justice and fairness require some notice to the insurer that a special award is being considered;
- where it is feasible, without impugning their neutrality, an arbitrator should provide sufficient particulars as to why a special award is being considered.

²⁴ *Royal Insurance Company of Canada and Clark* (OIC P97-00008, September 26, 1997)

²⁵ (FSCO P01-00045, March 31, 2003)

With these principles in mind, I am giving notice to the parties that a special award is being considered in this case. I do that since after reviewing the totality of the evidence it appears that Personal may have unreasonably withheld Mr. Rumak's income replacement benefits as provided in subsection 282(10) of the *Insurance Act*.

Specifically, my concern relates to Personal's reliance on the Disability DAC report by AIM which on the face of it appears to be inherently flawed. It would seem from the evidence that Personal relied on this DAC to terminate Mr. Rumak's income replacement benefit, and to continue to withhold benefits, in the face of other cogent medical evidence to the contrary. More specifically, I would refer the parties to my findings on the Disability DAC report above.

Accordingly, the parties shall have 30 days from the issuance of this decision to inform the Case Administrator on this file if they wish to present any further evidence and/or submissions on the issue of a special award, failing which I will make a decision on the evidence on the record in this matter.

REQUEST TO REOPEN HEARING:

As noted above, the final submissions on this arbitration were provided by May 2, 2003. At the request of Personal's counsel I advised the parties on October 1, 2003 that the decision in this arbitration would be forthcoming within three weeks. On October 21, 2003, on the eve of issuing my decision, Ms. Linda Wolanski, who is now representing Mr. Rumak while Ms. Urman is on maternity leave, wrote to me requesting a reopening of the arbitration hearing to introduce new evidence.

A telephone conference was held on November 3, 2003 with Ms. Wolanski and Ms. Neilson. Ms. Wolanski presented her arguments for the reopening. She submitted that Mr. Rumak wishes to introduce two reports for assessments that were performed after the hearing was concluded.

One report dated August 12, 2003, was a Situational Assessment performed by the Hamilton Health Sciences Vocational Services, and the other a report, which was undated, dealt with a Rehabilitation Therapy Functional Assessment that took place over the period of June 19, 2003 to August 7, 2003 at the Hamilton Health Sciences ABI [Acquired Brain Injury] Services at Chedoke Hospital in Hamilton.

Ms. Wolanski submitted that these reports came about as a result of an Evaluating Functional m Take Assessment performed on January 3 and 22, 2003 at the Hamilton Health Sciences. Mr. Rumak was referred for this assessment by the case manager, Ms, Diane M. Taylor.

Ms. Wolanski submitted that the reports deal with Mr. Rumak's ongoing cognitive complaints regarding his ability to do work at any job and that they were relevant to the issue in dispute at the arbitration. Ms. Wolanski submitted that the recommendations for the assessments were made in November 2002 and that Personal had only agreed to fund these assessments on May 13, 2003. As a result, the reports could not have been acquired in time for the hearing.

Ms. Neilson, on behalf of Personal, in a letter October 28, 2003, with brief reasons, opposed the reopening of the hearing. I declined to hear further submissions from Personal as I did not find that Mr. Rumak had made a case for reopening the arbitration hearing.

Finding:

Rule 43.1 of the *Dispute Resolution Practice Code* (4th Edition, May 31, 2001) ("Practice Code") states:

The arbitrator may reopen a hearing at any time before he or she makes a final order disposing of the arbitration.

Rule 43.2 of the Practice Code states:

Rules 37 to 42 apply to the reopening as modified by the arbitrator.

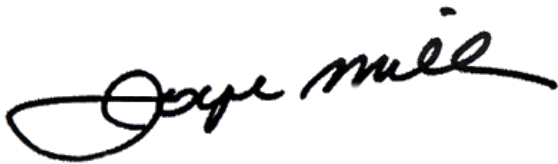
Rule 39 of the *Practice Code* allows an arbitrator to admit relevant evidence which has not been served within the proper time lines where there are extraordinary circumstances to justify an exception to the rule. In the present circumstances, I do not find that Mr. Rumak has presented any extraordinary circumstances which would justify the filing of these reports at such a late date.

The fact that the assessments were conducted after the hearing was concluded, but before the decision was rendered, does not amount to extraordinary circumstances. The burden of proof in this arbitration rested with Mr. Rumak. If these reports were crucial to Mr. Rumak's case, there is nothing that prevented Mr. Rumak from proceeding to obtain these assessments prior to the arbitration hearing, rather than waiting for Personal's decision to fund the assessments.

Accordingly, for these reasons I decline to reopen the hearing.

EXPENSES

The issue of expenses is deferred until the issue of the special award is dealt with.



Joyce Miller
Arbitrator

November 5, 2003

Date



FSCO A01-000065

BETWEEN:

KEN ALEX RUMAK

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the Insurance Act, R.S.O. 1990, c.L8, as amended, it is ordered that:

1. Personal shall pay Mr. Rumak an income replacement benefit in the amount of \$214.88 per week from April 13, 2001 and ongoing, less any amount for any periods of time that Mr. Rumak has worked, less any amount for income received by Mr. Rumak in respect of any employment after the accident.
2. Personal shall pay Mr. Rumak interest on past benefits owed pursuant to subsection 46(2) of the *Schedule*.
3. The parties shall have 30 days from the issuance of this decision to inform the case administrator on this file if they wish to present any further evidence and/or submissions on the issue of a special award, failing which I will make a decision on the evidence on the record in this matter.

A handwritten signature in black ink that reads 'Joyce Miller'.

Joyce Miller
Arbitrator

November 5, 2003

Date