

**BETWEEN:**

**KEN ALEX RUMAK**

**Applicant**

**and**

**PERSONAL INSURANCE COMPANY OF CANADA**

**Insurer**

**REASONS FOR DECISION — SPECIAL AWARD**

**Before:** Joyce Miller

**Heard:** March 25, 26, 29 and 31, 2004, at the offices of the Financial Services Commission of Ontario in Toronto.

**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*.<sup>1</sup> Personal terminated weekly income replacement benefits on April 12, 2001. The parties were unable to resolve their disputes through mediation, 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.

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<sup>1</sup>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.

An arbitration hearing was held on December 2, 3, 4, 5, 2002, January 6, 7, 8, 9, 10, 2003 and March 11, 2003. Written submissions were received by May 2, 2003. Motion submissions were heard on November 3, 2003. On November 5, 2003 I issued my decision, wherein I found that Mr. Rumak was entitled to an income replacement benefit of \$214.88 per week pursuant to subparagraph 5(2)(b) of the *Schedule* from April 13, 2001 and ongoing, less any amount for income received by Mr. Rumak in respect of any employment after the accident.

In addition, I ordered that 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. The parties advised that they wished to have a hearing on this issue.

The issue in this hearing is:

1. Is Mr. Rumak entitled to a special award pursuant to subsection 282(10) of the *Insurance Act*?

**Result:**

1. Mr. Rumak is entitled to a special award of \$12,500.00, inclusive of interest, pursuant to subsection 282(10) of the *Insurance Act*.
2. If needed, the parties may speak to the issue of expenses within 30 days of receipt of this decision.

**BACKGROUND:**

Mr. Rumak, who was 16 years old at the time of the accident, suffered a catastrophic injury<sup>2</sup> when he was struck by a car while crossing the street at 8:30 p.m. on July 6, 1997 in Whitby, Ontario.

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

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 trauma<sup>3</sup>, 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, it 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 & Women’s College Health Sciences 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 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.

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<sup>3</sup> 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]

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.

As a result of his injuries from the accident, Mr. Rumak claims that he suffers from cognitive, physical, emotional and behavioural problems that interfere with every aspect of his life including strained family relations, loss of friends, difficulty in interpersonal relationships when working and continual failure at any job he works at.

At the time of the accident, Mr. Rumak was a high school student who was working at two jobs – a part-time job on Saturday delivering furniture which he had been working steadily at for two and a half years, and a full-time job as a landscaper which he had begun a few weeks before the accident. As well, Mr. Rumak had lined up a job for the end of the summer as a horse marshall at the CNE.

Mr. Rumak's income replacement benefits were terminated on September 26, 2000. Mr. Rumak requested a DAC and his benefits were reinstated until the DAC report. In its report of March 23, 2001, the DAC concluded that Mr. Rumak did not meet the post 104-test, namely, he did not suffer from a complete inability to engage in any employment for which he is reasonably suited by education, training or experience pursuant to subsection 5(2) of the *Schedule*.

Mr. Rumak applied for mediation and arbitration. A ten-day arbitration hearing was held between December 2002 and March 2003. Written submissions were completed by May 2, 2003. As noted above, in my decision of November 5, 2003 I found that Mr. Rumak met the post 104-week test.

Briefly, I found the approximately 25 jobs that Mr. Rumak worked at since the accident were indicative of his incapacity to stay employed despite his honest and continuous attempts to work at any job. I found that Mr. Rumak and his family gave credible evidence with respect to his incapacity to stay employed, which was supported by his medical evidence and the testimony of two of his employers. I gave little weight to Personal's medical evidence. More specifically, I gave no weight to the DAC report which I found was procedurally and substantively flawed.

In my decision I also raised the issue of a special award which is the subject of this arbitration.

There was only one witness at this arbitration, Ms. Suilan Lue, a Litigation Advisor to the Accident Benefit Department, who testified on behalf of Personal. Ms. Lue stated that there were five adjusters over the years on Mr. Rumak's file. These were:

- Elizabeth Modica July 1997 until June 1999
- Janice Moran June 1999 until August 2000
- Suilan Lue August 2000 until November 2000
- Robert Furukawa November 2000 until May 2002
- Anne Kerr May 2002 until July 2002
- Suilan Lue July 2002 until the present

Ms. Lue testified that Personal's actions on Mr. Rumak's file have been reasonable. She stated that Personal terminated Mr. Rumak's income replacement benefit on the basis that he was working since 1998. Personal supported its decision to terminate Mr. Rumak's benefit with the Insurer's Examinations of Drs. Shah, Debow and Isles as well as the Vocational Assessment of Ms. Elaine Miki with a supporting FAE.

Ms. Lue testified that Personal continues to maintain that Mr. Rumak does not meet the post 104-week test based on the fact that he continues to work. Accordingly, Personal submits that Mr. Rumak is not entitled to a special award.

Mr. Rumak submits that Personal ignored the fact that while he made many attempts to work, because of his injuries as a result of the car accident, he has been unable to sustain any employment. Mr. Rumak submits that Personal continuously ignored relevant cogent medical evidence which supports his position that he meets the post 104-week test. Accordingly, Mr. Rumak submits that Personal acted unreasonably when it terminated his income replacement benefit and continued to act unreasonably in withholding his benefit until the arbitration decision.

## THE LAW

Subsection 282(10) of the *Insurance Act* provides that:

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 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

Succinctly, pursuant to subsection 282(10), an arbitrator must grant a special award, up to 50 per cent of the benefit awarded, once he or she finds that an insurer has acted unreasonably in withholding or delaying payment.

In *Plowright and Wellington Insurance Company*,<sup>4</sup> Arbitrator Palmer made the following comments, which I agree with, on what can be considered to be unreasonable behaviour on the part of an insurer:

“Unreasonable” behaviour by an Insurer in withholding or delaying payments can be seen as behaviour which was excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

## EVIDENCE AND FINDINGS

There are three periods to be considered as to whether or not Mr. Rumak is entitled to a special award. These are: the period between the termination of Mr. Rumak’s income replacement benefit on September 26, 2000 and the DAC report on March 23, 2001; the period between the DAC report and the date of the commencement of the arbitration hearing on entitlement on December 2, 2002; and the period from the conclusion of the arbitration hearing May 2, 2003 until my decision on November 5, 2003.

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<sup>4</sup>(OIC A-003985, October 29, 1993)

## 1. Period between Termination or IRBs and the DAC Report

Ms. Lue testified that she was the adjuster on the file when Mr. Rumak's income replacement benefit was terminated on September 26, 2000. She stated that she had full authority to terminate Mr. Rumak's income replacement benefit. She stated that she authorized the termination of Mr. Rumak's benefits based on the fact that Mr. Rumak was working and the medical evidence which included Insurer's Examination reports by Dr. Shah dated August 10, and 11, 1998, Dr. Debow dated November 5, 1998, Dr. Isles dated November 2, 1998, and a Vocational Assessment conducted by Ms. Elaine Miki, a vocational rehabilitation consultant dated May 4, 2000 along with a supporting FAE.

Ms. Lue testified that she did not consider Mr. Rumak's medical evidence because all of the reports, except for Dr. Ouchterlony's reports of August 16, 2000 (received by Personal in October 2000) and November 16, 2000 were outdated.

Regarding Dr. Ouchterlony's conclusion in her report of August 16, 2000, wherein she states, "Alexander Rumak has sustained a catastrophic injury and requires ongoing support and assistance. His life has been irrevocably altered. He is substantially impaired and will remain so permanently. He is competitively unemployable," Ms. Lue commented that it was her opinion that Dr. Ouchterlony was a general practitioner and lacked the expertise to assess Mr. Rumak's head injury problems.

When it was pointed out in cross-examination that Dr. Ouchterlony was the Director of the Head Injury Follow-up Clinic at St. Michael's Hospital and Co-Director of the Head Injury Clinic at Sunnybrook, Ms. Lue responded that it was her opinion that these could have been administrative positions. She stated that she did not make any further inquiries to verify her opinion. Ms. Lue testified that instead of considering Dr. Ouchterlony's report, she sent it to the DAC to consider and comment on.

## ***Findings***

For the following reasons I find that in the period between when Personal terminated Mr. Rumak's income replacement benefit and the DAC report, Personal acted unreasonably in withholding Mr. Rumak's income replacement benefit.

Terminating an applicant's income replacement benefits is a very serious matter with potentially serious consequences. An insurer contemplating the termination of income replacement benefits, or maintaining a denial, must act reasonably and consider all of the documentation before it. An insurer cannot pick and choose information that favours its own position while ignoring relevant information that favours the applicant.

I find that Personal had a paucity of medical evidence to support its termination of Mr. Rumak's income replacement benefit and that it acted unreasonably in ignoring relevant information that favoured Mr. Rumak.

Mr. Rumak's medical reports, which Personal chose to ignore, describe in detail Mr. Rumak's cognitive and behavioural problems as a result of the accident. They include the reports of Dr. Brooker dated February 18, 1998; Dr. Teehan dated March 29, 1998; Dr. Ouchterlony's reports dated September 11 and 23, 1997, May 5, 1998, December 16, 1998, August 16, 2000 and November 16, 2000; as well as the reports of Mr. Rumak's speech therapist Cyndi Patterson dated September 9, 1997 and January 6, and 27, 1998; physiotherapist Ruth Burt dated January 26, 1998 and May 22, 1998; and Occupational therapist dated June 30, 1998.

I find it unreasonable that Personal would choose to rely on Insurer's Examinations in 1998 as a basis to terminate Mr. Rumak's income replacement benefit in September 2000 and yet completely disregard Mr. Rumak's medical evidence in 1998 because it was outdated.

In my view, the Insurer's Examination reports that Personal relied on to terminate Mr. Rumak's benefit did not reasonably support a termination of benefits in 1998 let alone in September 2000.

(a) *Report of Dr. Shah*

Dr. Shah's report of his assessment on August 10 and 11, 1998 concludes:

**At this time, Mr. Rumak is considered substantially psychologically disabled from returning to a part-time employment.** However, following approximately eight cognitive-behaviour therapy sessions to help him cope with his anger, it will be advisable for him to return to employment concurrent with on-going therapy.

The psychological impairment is reducible and reversible.

An Independent Psychiatric Examination is considered essential to further clarify/modify diagnosis and treatment recommendations provided within this report.

Based on the results of this assessment, neuro-cognitive rehabilitation is not indicated. Mr. Rumak has made a remarkable cognitive recovery, which is likely to improve further as Mr. Rumak begins to resolve some of the psychological issues.  
[emphasis added]

The first thing to note in the report is that Dr. Shah found Mr. Rumak was "substantially psychologically disabled" and had only opined that after "eight cognitive-behaviour therapy sessions ... it will be advisable for him to return to employment concurrent with on-going therapy." In short, this report recognizes that Mr. Rumak has cognitive-behavioural problems that interfere with his ability to work part-time and that even if he would return to working part-time he would need further treatment.

Personal did not terminate Mr. Rumak's benefits in 1998 on the basis of this report. Neither did it seek a follow-up neuro-psychological assessment to confirm Dr. Shah's findings that "Mr. Rumak has made a remarkable cognitive recovery." I note this latter fact because Personal knew from the Catastrophic DAC report dated October 26, 1999 that Dr. Shah was not qualified to do a neuropsychological assessment on Mr. Rumak.<sup>5</sup>

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<sup>5</sup>In the Catastrophic DAC report, which found Mr. Rumak had suffered a catastrophic impairment as a result of the car accident, Dr. H. Becker noted that "Dr. Shah is not registered by his college to undertake such

In short, at the time that Personal terminated Mr. Rumak's income replacement benefit in September 2000, Personal had clear notice that Dr. Shah's neuropsychological assessment of Mr. Rumak in 1998 was not valid because of his lack of qualifications to do so. The only valid neuropsychological report that Personal had in 1998 was from Dr. Brooker, who had been recommended by Personal's case manager to assess Mr. Rumak. In his report of February 18, 1998, six months before Dr. Shah's report, Dr. Brooker states that, "There is no fundamental change from his report of December 19, 1997."

In his report of 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."

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neuropsychological assessments."

Given that Dr. Brooker was a qualified neuro-psychologist, I find it was unreasonable for Personal to ignore Dr. Brooker's findings and rely on the findings of Dr. Shah's report, six month later, as a basis to terminate Mr. Rumak's benefits in September 2000.

(b) *Report of Dr. Debow*

In his report of November 5, 1998, Dr. Debow concluded that what Mr. Rumak was suffering from was pre-accident social-psychological problems. 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.

Dr. Debow's report on its face was very superficial. It made no mention of any effect that Mr. Rumak's very serious car accident had on his life. Dr. Debow attributed all of Mr. Rumak's problems to his pre-accident life. No comment was made regarding the fact that Mr. Rumak's medical evidence showed that 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.

Personal did not terminate Mr. Rumak's income replacement benefit in 1998 on the basis of this report. However, Personal chose to terminate Mr. Rumak's benefits in September 2000 on the basis of Dr. Debow's 1998 report while ignoring Mr. Rumak's medical evidence for that same year.

One of the relevant reports Personal ignored is a psychological assessment dated March 29, 1998 by Dr. Teehan wherein he states:

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 also 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.

I find that Personal’s one-sided view in ignoring relevant information that supported Mr. Rumak’s claim in favour of its own clearly superficial and weak Insurer’s Medical to be unreasonable as basis to terminate Mr. Rumak’s income replacement benefit.

(c) *Report of Dr. Isles*

In her Insurer’s Examination report of November 2, 1998, Dr. Isles, an Occupational Medicine Physician, 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.

Personal did not terminate Mr. Rumak's benefits in 1998 on the basis of this report. However, without getting an update on Mr. Rumak's physical problems, Personal chose to rely on Dr. Isles' report to terminate his income replacement benefit in September 2000. In my view, relying on this outdated report to terminate Mr. Rumak's income replacement benefit was unreasonable, especially in the light of the fact that Mr. Rumak had undergone knee surgery in 1999. At a minimum, Personal should have gotten an updated report before it chose to terminate his benefits.

(d) *Ms. Miki's 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 demeanor 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 upon completion of the assessment, Mr. Rumak expressed 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.

Ms. Miki's report is the only Insurer's Medical that Personal relied on to terminate Mr. Rumak's benefit that was generated in 2000. In my view, when one balances Ms. Miki's report, in terms of qualifications and knowledge of Mr. Rumak's cognitive and behavioural problems, against Dr. Ouchterlony's report of August 16, 2000, it is very obvious how little experience Ms. Miki had compared to Dr. Ouchterlony and how little Ms. Miki knew about Mr. Rumak's cognitive and behavioural problems. In my view, it was unreasonable on the part of Personal to ignore Dr. Ouchterlony's report in favour of Ms. Miki's report as a basis to terminate Mr. Rumak's income replacement benefit.

*(e) Dr. Ouchterlony's Report*

In her report dated August 16, 2000, Dr. Ouchterlony stated:

I met with Alexander today, and frankly was quite disappointed. While Alexander has been making a determined effort towards his recovery, he is not receiving enough support to facilitate his progress. As I understand it, despite the fact that he is catastrophically impaired, he is not currently receiving any support or benefits.

Alexander has made several attempts to reenter the work force, but unfortunately his multiple impairments have precluded him from doing so successfully. He worked from May to July [2000] at East Side Mario's as a waiter. Because of his cognitive deficits, it took twice as long to train Alexander as it would a person with average cognitive skills. Alexander used all of the tools available to him, to facilitate his job. Alexander is cognizant of his attention and short term memory deficits, and thus made every attempt to fulfil his responsibilities despite his impairments. ... East Side Mario's did attempt to keep Alexander, and demoted him to host. Again, Alexander had difficulty with his distractibility and would often show impaired judgement while performing his duties. He kept forgetting his exact role, and would sometimes do jobs that were intended for the waitstaff. Unfortunately he was fired.

In a previous position at the Lone Star, another restaurant, Alexander again had difficulties. Because of his cognitive impairments, he was subject to distractibility. This particular restaurant has a great deal of activity and music and proved too difficult for Alexander to concentrate on the task at hand. Again, he was forced to leave.

While working at Home Depot, Alexander found that it was his physical limitations that presented the greatest impairment for his position. His knee was exceptionally painful, and prevented him from fulfilling a great many of the duties required of him. Alexander has since had knee surgery and I am uncertain that the prognosis will be from this. Hopefully, it will give him less pain and greater mobility.

However, after the surgery was completed and Alexander was ready to go back to work, Home Depot was unable to find an appropriate position for him. While he was never actually fired, he was repeatedly left off of the work schedule.

He is currently working in a job as a security guard, and I find this exceptionally worrisome. Alexander has consistently displayed impaired judgement in his previous employment and I fear that the consequences would be more severe in his current position. Like many patients who have sustained a severe brain injury, Alexander also has brief flashes of rage and needs help with controlling his anger. Again, these traits are not appropriate for his current job as a security guard.

Alexander is in need of vocational counselling to find a more appropriate position. While I do not believe that he is competitively employable, he has indicated to me that having a job is beneficial for his self-esteem. He requires a full vocational assessment and perhaps some form of supported employment. ...

...

In summary, Alexander has suffered several traumatic losses. Because of the severity of his head injury, he has suffered a personality change which has affected all of his intra-personal relationships. **His multiple cognitive and physical deficits have prevented him from sustaining employment or continuing education.** All of these factors have significantly increased his depression. Alexander requires extensive vocational counselling to facilitate an appropriate job for him (if indeed, it exists). ...  
[emphasis added]

Ms. Lue testified that she did not consider Dr. Ouchterlony's report in her decision to terminate Mr. Rumak's income replacement benefit because in her view Dr. Ouchterlony was a general practitioner and lacked the expertise to comment on Mr. Rumak's brain injury problems.

Ms. Lue stated she did not know what Dr. Ouchterlony's qualifications were and assumed that her

position as director and co-director of the Head Injury clinics at St. Michael's and Sunnybrook could have been administrative. I give little weight to Ms. Lue's opinion.

In her report of August 16, 2000, Dr. Ouchterlony starts with a list of her qualifications. These are:

- she is a qualified physician licensed to practice in the province of Ontario;
- Director of the Head Injury Follow-up Clinic at St. Michael's Hospital;
- Co-Director of the Head Injury Clinic at Sunnybrook;
- she has worked in the field of Neurorehabilitation for over twenty-five years;
- she founded in 1974 the first Neurorehabilitation Unit in Toronto (and the second in Canada) and was Director of this unit until 1998;
- she has presented extensively in Canada and internationally on the topic of head injury rehabilitation and also published in this area;
- presently she is:- Co-Investigator on two Physician's Services Inc. Foundation grants and an Ontario Neurotrauma Initiative Partnership grant; Principal Investigator on a grant from the TRI Foundation to further investigate head injury and sits on the Toronto Acquired Brain Injury Network and Advisory Committee and Chair Systems Coordination Committee of the Steering Committee.

I do not find it reasonable that based on the above qualifications Ms. Lue concluded Dr. Ouchterlony was not medically qualified to comment on Mr. Rumak's brain injury and its effect on his life. Even if Ms. Lue genuinely thought that Dr. Ouchterlony was an administrator, but was not certain of this fact, then it was very easy for her to verify Dr. Ouchterlony's medical qualifications. She did not do so. I find this to be unreasonable in the face of the seriousness of the decision to terminate Mr. Rumak's income replacement benefit and the paucity of medical evidence Personal had at the time to support its decision.

## **Conclusion**

The evidence was very clear from Ms. Miki's and Dr. Ouchterlony's reports that at the time Mr. Rumak's benefits were terminated, he very much wanted to work and get on with his life. Personal had ample evidence that Mr. Rumak had attempted to work at numerous jobs and had failed – despite these failures, he kept on trying to work. In my view, it was unreasonable on the part of Personal to focus in on the fact that Mr. Rumak was trying to work, and ignore cogent medical evidence, especially the report of Dr. Ouchterlony, that **he lacked the ability to sustain employment at any job** because of his injuries as a result of the car accident.

Personal had no up-to-date medical evidence to contradict Dr. Ouchterlony's findings in her report of August 16, 2000 that Mr. Rumak was not competitively employable because of his cognitive-behavioural problems as a result of the accident. I find that in the light of the paucity of its own medical evidence it was unreasonable on the part of Personal to have ignored Dr. Ouchterlony's report and continued to withhold Mr. Rumak's benefit when it received her report in October 2000.

Although Personal received Dr. Ouchterlony's report in October 2000, it could have reconsidered its decision to terminate Mr. Rumak's income replacement benefit before the DAC requested by Mr. Rumak was set up. I find the fact that Personal reached back to three very weak Insurer's medical reports in 1998 as a basis to terminate Mr. Rumak's income replacement benefit in September 2000, while ignoring Dr. Ouchterlony's August 16, 2000 report, as well as Mr. Rumak's relevant medical reports for 1998 because allegedly they were outdated, was clearly unreasonable.

Accordingly, for all of these reasons I find that when Personal terminated Mr. Rumak's income replacement benefit and continued to withhold these benefits in the period up until the DAC assessment, it acted unreasonably.

## 2. Period Between the DAC report and the Arbitration

Ms. Lue testified that when Personal received the DAC report with its consensus that Mr. Rumak did not meet the post 104-week test, there was nothing in the report that Personal could conclude that the report was flawed in any significant manner. Therefore, on the basis of the DAC's conclusion Personal maintained its termination of Mr. Rumak's income replacement benefit. Ms. Lue further testified that Personal did not consider further reports on behalf of Mr. Rumak from a treating psychologist, Dr. Ruttan in August 2001, and a December 2001 medical-legal report from Dr. Doxey which was received by Personal in March 2002.

Ms. Lue stated that these reports did not address the post 104-week test and that, in any case, she would give precedence to the holistic approach of the DAC report which she stated was on a higher level of value than an individual report from an expert.

### *Findings*

#### *(a) The DAC Report*

I do not agree with Personal's submission that there were no substantial flaws that could easily be discerned from reading the DAC report. For the following reasons I find that there were obvious discrepancies, contradictions and omissions that should have given Personal pause for concern.

#### *(i) Dr. Kim's Report*

- The Executive Summary under the heading of "Chief Current Complaints" listed that Mr. Rumak complained of "Neck stiffness." However, the report of the physiatrist assessor, Dr. Kim, in his list under the heading "Current complaints," makes **no mention** that Mr. Rumak complained of any neck problem. Under the heading "Physical Examination," Dr. Kim states:

“Cervical spine movements were also pain free and normal... .” In short, Dr. Kim’s report makes no mention of “neck stiffness” but rather finds that Mr. Rumak has no neck problems.

- The Executive Summary states that Mr. Rumak complained of “Low back pain.” Dr. Kim’s report under “Current Complaints” states: “Always pain in the back and pelvis area.” However, significantly, there is **no mention** in Dr. Kim’s report that he had examined Mr. Rumak’s back. Nor did Dr. Kim make any further comments anywhere else in his report regarding Mr. Rumak’s back and pelvis pain. In short, aside from noting Mr. Rumak’s complaint, Dr. Kim’s report remains silent as to whether or not he had considered Mr. Rumak’s back pain in his final conclusion.
- The Executive Summary states that Mr. Rumak complained of “Right knee pain.” Dr. Kim’s report, under “Current Complaints,” states: “Right knee - 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.” Under the examination heading, Dr. Kim briefly stated: “... although he has some subjective symptoms of the right knee, he has no ligament instability with swelling of the joint.”
- Unlike the Executive Summary, Dr. Kim does not specifically mention “knee pain.” More significantly, Dr. Kim does not explain what he means by “no ligament instability with **swelling** of the joint.” Neither does Dr. Kim mention what tests he did to come to this conclusion. Moreover, the superficiality of Dr. Kim’s examination and diagnosis of Mr. Rumak’s right knee should have been obvious to Personal especially when its own Insurer’s Medical by Dr. Isles diagnosed Mr. Rumak’s knee injury as “permanent.” In fact, there was nothing in this brief report which would indicate that Dr. Kim had read Dr. Isles’ report and her conclusion that Mr. Rumak had a permanent knee impairment.

A serious omission from Dr. Kim's report is any knowledge or information regarding Mr. Rumak's background in respect of education, training or experience. The key to a post 104-week assessment is to determine whether an applicant can work at any job for which the applicant is reasonably suited by education, training or experience.

It is obvious from Dr. Kim's report that he did not canvass even in the most superficial way Mr. Rumak's background. In his very short report there are only two sentences about Mr. Rumak's previous life before the accident. They are:

Past health is entirely unremarkable prior to the accident.

...

Prior to the accident he was very active in sports - baseball, football, rugby, cycling, etc. and he did not have any sports related injuries prior to the accident.

While it is clear that Dr. Kim as a psychiatrist was not required to undertake an in-depth vocational history on the level of a vocational assessor, however, at a minimum it is only reasonable that if he is going to conclude that Mr. Rumak did not meet the post 104-week test that he should have canvassed more of Mr. Rumak's education, training or experience prior to the accident than the fact that Mr. Rumak played sports prior to the accident and had no sports-related injuries.

There is nothing in Dr. Kim's report to show that he had any knowledge of Mr. Rumak's background aside from the fact that he played sports. This lack of knowledge was confirmed at the hearing when Dr. Kim testified that it was his belief that prior to his car accident Mr. Rumak worked as a waiter.

Aside from not knowing Mr. Rumak's pre-accident background, Dr. Kim's report showed how little he knew about Mr. Rumak's post accident life. Although since the accident Mr. Rumak had worked at a number of jobs - which included, a candy counter attendant, a part-time host job, a lot associate for Home Depot, a horse marshall at the CNE, a salesperson for vacuum cleaners, a security guard and

doorman - Dr. Kim only mentions one job that Mr. Rumak worked at since the accident, a waiter at East-Side Mario's.

There was no mention in Dr. Kim's report of how Mr. Rumak had functioned at his job at East-Side Mario's. Personal, on the other hand, had Dr. Ouchterlony's report of August 16, 2000 which stated that Mr. Rumak could not do the job because of his car accident injuries and was fired from the job. Personal had sent this report to the DAC to consider and comment on. Dr. Kim makes no mention of this report in his assessment.

For these reasons I find that the contradictions, omissions and superficiality of Dr. Kim's DAC assessment and conclusions were clearly evident in his report and that this should have been evident to Personal when it reviewed the DAC report.

Aside from the contradictions, omissions and superficiality of Dr. Kim's report, the other DAC reports also lacked substance.<sup>6</sup> Other than Dr. Bauer's report, which was an in-depth, densely written, small typescript, 23-page report, the reports of the other assessors on the face of it were superficial. The reports of 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." There was very little in these reports that reflected the seriousness of Mr. Rumak's injuries from his car accident and his failing struggles to work at any job.

**(ii) Dr. L. Bauer's Report**

Dr. Bauer's report on the face of it should also have raised concerns to Personal regarding her conclusion. In her conclusion Dr. Bauer states:

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<sup>6</sup>See my decision of November 5, 2003 on entitlement at Page 60 for a more in-depth analysis.

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.

[emphasis added]

It is clear from reading her report that Dr. Bauer, in coming to her conclusion, ignored all other relevant information other than the cognitive test results which Mr. Rumak scored well on. Examples in her report of information that were not taken into consideration in concluding that Mr. Rumak did not meet the post 104-week test are:

- On the Multidimensional Pain Inventory, his responses indicate that **his pain is interfering significantly in his ability to work**, take part in social and recreational activities, and to plan activities. His pain varies little in intensity and causes him moderate suffering. He is not often able to do something to help reduce it and feels that he does not have much control over it. He is significantly limiting his activities in order to try and lessen his pain. [emphasis added]
- The history portion of the report notes that Mr. Rumak has concentration, memory and multitasking problems when trying to work and was in fact fired from his job as a waiter because of these problems. His memory and concentration problems were confirmed in Dr. Bauer's test results.
  - Under the heading "Attention and Concentration" the report notes "Mr. Rumak's performance was in the Mildly Impaired range." Dr. Bauer noted that the Stroop Test, which measures concentration which requires the reading of coloured words, Mr. Rumak performed at the lower end of the average range.
  - Under the heading "Memory Functioning" assessed through the California Verbal Learning Test, Dr. Bauer noted that Mr. Rumak performed in the lower end of the

average range for a man of his age. As well, Mr. Rumak made “a **significantly high number of intrusion errors** during cued recall. That is, when category cues were provided to aid his recall, they distracted him and he produced items from those categories that had not been on the original list. ... the **intrusion errors appear to be attributable to difficulties with concentration.**” [emphasis added]

- Despite the fact that Dr. Bauer knew that Mr. Rumak had been fired from his job as a waiter because of his problems with memory, concentration and multitasking and in light of her test results, she, nevertheless, recommended as possible employment for Mr. Rumak the job of a server.
- Dr. Bauer’s report further states that “[f]rom 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.”

The report states “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 generally anxious with particular anxiety while crossing streets.” [emphasis added]

Despite the fact that Mr. Rumak had these suicidal thoughts Dr. Bauer, nevertheless, recommended as possible employment for Mr. Rumak that of a courier or limousine driver.

- Dr. Bauer's report does not give any consideration to the Medical Rehabilitation DAC report of January 24, 2000. The DAC was a psychological assessment by Dr. A.M. Anderson wherein he stated that "The present assessment suggested the presence of **significant emotional problems**, to the extent a DSM-IV Adjustment Disorder is present ..." and that it was reasonable and necessary that **Mr. Rumak be provided with up to 20 cognitive and stress management therapy sessions** for anger and other psychological difficulties associated with his Adjustment Disorder. [emphasis added]
- More significantly, Dr. Ouchterlony's report of August 16, 2000, which Personal specifically sent to the DAC to comment on, was omitted from Dr. Bauer's extensive review of the medical information. This could have been either because she had not received it or she had chosen to ignore it. Whatever the reason, the fact that Dr. Bauer did not comment on Dr. Ouchterlony's August 16, 2000 report should have been of concern to Personal, especially in light of Dr. Bauer's conclusion.

In my view, it is clear from the above few examples that Dr. Bauer's conclusion that there were no psychological factors that prevented Mr. Rumak from performing any job, including that of a waiter or limousine driver, was problematic and should have been of concern to Personal when reviewing the DAC report.

*(iii) Omission of Dr. Ouchterlony's August 16, 2000 Report*

A glaring omission in the DAC report is the lack of acknowledgement or reference to Dr. Ouchterlony's report of August 16, 2000. The only DAC assessor to list in detail the documents reviewed was Dr. Bauer. In her seven pages of documents reviewed, Dr. Bauer mentions only one report by Dr. Ouchterlony dated September 23, 1997 which deals with the fact that Mr. Rumak was not getting any treatment and that Dr. Ouchterlony thought Mr. Rumak's return to school was inappropriate.

I give little weight to Ms. Lue's testimony that Personal did not know of the omission of Dr. Ouchterlony's August 16, 2000 report until the arbitration hearing on the special award because it was not the normal practice for an adjuster to check off every report reviewed by the DAC. In her view, to do so would be an "overwhelming" duty in the face of the other job functions an adjuster is required to do.

However, this was not a situation which required Personal to check every report reviewed by the DAC. Personal, in deciding to terminate Mr. Rumak's income replacement benefit, had not considered Dr. Ouchterlony's report on the basis that it wished to have the DAC's comments on it. This was therefore a situation where it was incumbent on Personal to verify that Dr. Ouchterlony's report was considered in the DAC assessment.

I find it was unreasonable on the part of Personal, not only to ignore Dr. Ouchterlony's report when it terminated Mr. Rumak's income replacement benefit, but it was also unreasonable not to follow-up on whether or not Dr. Ouchterlony's report was commented on by the DAC, especially in light of the DAC's conclusion that Mr. Rumak did not meet the post 104-week test.

In the case of *Fimiani and Liberty Mutual Insurance Company*,<sup>7</sup> Arbitrator Muir made the following comments which I agree with.

... the insurer is limited in its ability to select the DAC assessors.

... [however] these limits on the ability of an insurer to select the DAC assessor does not mean that it is required to follow without question the opinions of a DAC. The choice to terminate benefits or not is still open to the insurer after receiving the DAC report. If the company decides to terminate benefits and if that decision is found to be unreasonable, a special award may be made despite the company's reliance upon a DAC assessment.

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<sup>7</sup>(FSCO A97-001518, January 11, 2000)

When Personal received the DAC report with its obvious flaws, aside from Ms. Miki's vocational assessment, Personal only had two medical reports in the post 104-week period. These included the January 24, 2000 Medical Rehabilitation DAC report which found Mr. Rumak had **significant emotional problems** and that it was reasonable and necessary for Mr. Rumak to have up to 20 **cognitive** and stress management and therapy sessions, and Dr. Ouchterlony's detailed report of August 16, 2000, which concluded that Mr. Rumak was "**competitively unemployable.**"

At this point Personal had a number of choices. One, with notice to Mr. Rumak, Personal could have asked the Disability DAC for clarification on the omissions and contradictions in the DAC report. Two, it could have again reviewed the medical evidence, including the January 2000 Medical Rehabilitation DAC report and Dr. Ouchterlony's August 16, 2000 report, and, in the light of the flawed Disability DAC, it could have reinstated Mr. Rumak's income replacement benefit. Or, three, it could have ignored the flaws in the Disability DAC report and continue to withhold Mr. Rumak's income replacement benefit. Personal made the latter choice.

I find that in weighing all of the evidence and for the reasons given above, Personal, in choosing to ignore the obvious flaws in the Disability DAC, namely the superficiality, lack of neutrality, and the serious omission of the DAC not commenting on Dr. Ouchterlony's report, acted unreasonably in relying on the DAC and in continuing to withhold Mr. Rumak's benefits.

**(b)     *The Reports of Dr. Ruttan and Dr. Doxey***

After Personal received the Disability DAC report, it received two medical reports from Mr. Rumak. One was a report dated August 17, 2001, from a treating clinical psychologist, Dr. Ruttan, who had eight years of experience in the field of Clinical Neuropsychology. The other was a medical-legal report from Dr. Doxey, a clinical psychologist with a vast experience in treating and assessing patients both for insurers and insureds.

Dr. Ruttan saw Mr. Rumak on five occasions for the purpose of treating him after Personal had agreed to fund 20 therapy sessions. In the end, Mr. Rumak preferred to work with a male therapist and began treatment with Dr. Richard Wood in September 2001.

In her report, Dr. Ruttan noted:

Dr. H. Shah conducted a neuropsychological re-evaluation and psychological evaluation. Strangely, it was noted that the assessment “failed to identify any significant neuropsychological impairment as a direct result of the accident,” and that neuro-cognitive rehabilitation was not warranted. Mr. Rumak was considered substantially disabled from a psychological point of view from returning to part-time employment although the impairment was judged to be “reducible and reversible” such that with treatment, he was expected to return to work. As noted by Dr. H. Becker (October 26, 1999), **Dr. Shah was not in fact deemed competent by his college ... to conduct neuropsychological assessments and as such, conclusions and recommendations are of questionable validity.**

[emphasis added]

In her report Dr. Ruttan concluded:

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 also concluded that the 20 psychological treatment sessions approved by Personal were “... appropriate given the severity of Mr. Rumak’s brain injury and resulting **cognitive** and behavioural impairments.”

Dr. Doxey, in his detailed report of December 15, 2001, based on an in-depth review of Mr. Rumak's medical file which is summarized in five pages; a two-hour clinical interview on August 15, 2001 and seven hours of of psychological tests pertaining to Mr. Rumak's academic and intellectual abilities, vocational interests and aptitudes, and his psychological functioning, like Dr. Ruttan, concluded that Mr. Rumak :

Presently remains with very significant physical, **cognitive**, and personality/ emotional dysfunctions and deficits. [emphasis added]

Dr. Doxey found that it was "... clear that Mr. Rumak has impaired *cognitive functioning* as a result of his closed head injury." Although Dr. Doxey did not comment specifically on the Disability DAC, he did raise the following important point on cognitive testing:

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.)*

[Emphasis in original]

As well, Dr. Doxey's report included a detailed criticism of Ms. Miki's vocational assessment which Personal had relied on to terminate Mr. Rumak's benefits. With respect to Mr. Rumak's occupational functioning, Dr. Doxey concurs with Dr. Ouchterlony's prognosis. In his report he stated:

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 behavior, the cognitive deficits, the fatigue and lack of endurance, and the deterioration in his inhibition and judgment, that have resulted from his accident-related closed head injury. [emphasis in original]

...

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 earning 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 added]

Ms. Lue testified that the reports of Drs. Ruttan and Doxey did not affect Personal's decision to withhold Mr. Rumak's income replacement benefit. She stated that Personal's position is that more weight is given to a DAC report which is holistic as opposed to individual medical experts' reports. As well, she stated neither Dr. Ruttan's nor Dr. Doxey's reports specifically addressed the post 104-week test nor did they specifically address the Disability DAC.

### ***Findings***

While the reports of Dr. Ruttan and Dr. Doxey did not specifically address the Disability DAC and the post 104-week test, they nevertheless presented significant cogent evidence that Personal should have, at a minimum, had their reports reviewed by one of its own medical assessors and/or reassessed its position on withholding Mr. Rumak's income replacement benefit based on these medical reports. Personal did neither.

I give little weight to Personal's submission that it could not have had Dr. Ruttan and Dr. Doxey's reports assessed by an insurer's medical because the CAT DAC and Dr. Ruttan's report had pointed out that Dr. Shah was not qualified to make a neuro-psychological assessment. This is a poor excuse. In my view, in light of the seriousness of continuing to withhold Mr. Rumak's benefit, there was nothing to prevent Personal from having the medical reports it used to terminate Mr. Rumak's benefit along with Mr. Rumak's medical reports from Drs. Ruttan and Doxy reviewed by an insurer's medical expert other than Dr. Shah.

As stated above, an insurer cannot pick and choose information that favours its own position while ignoring relevant information that favours the applicant. In my view, the reports of Drs. Ruttan and Doxey provided relevant information that was consistent with all of Mr. Rumak's medical evidence (including the medical reports in 2000 from Dr. Ouchterlony and the Medical Rehabilitation DAC by Dr. Anderson) that since the time of his accident Mr. Rumak suffers from physical, cognitive, emotional and behavioural deficits that interfere with his being able to sustain employment at any job.

As stated in the case of *Fimiani and Liberty Mutual*, an insurer is not required to follow without question the opinions of a DAC. Given that Personal had a paucity of medical evidence on which to base its initial termination and the fact that the Disability DAC had obvious omissions and contradictions, I find it was unreasonable that Personal, after receiving the reports of Drs. Ruttan and Doxey, continued to withhold Mr. Rumak's income replacement benefit.

Accordingly, for all these reasons in the period between the DAC report and the arbitration hearing on entitlement, I find that after the receipt of an obviously flawed DAC, as well as the substantial medical reports from Drs. Ruttan and Doxey supporting Mr. Rumak's position, Personal's decision to continue to withhold Mr. Rumak's income replacement benefit was unreasonable.

### **3. The Period between the Arbitration and Receipt of the Arbitration Decision**

Mr. Rumak submits that in the period between the arbitration hearing and the arbitration decision Personal had ample evidence to reinstate Mr. Rumak's income replacement benefit. In support of its submission, Mr. Rumak relies on the testimony of Personal's witnesses Drs. Kim and Bauer, which brought to light substantial irregularities with the DAC. In addition, Mr. Rumak submitted that at the hearing he provided detailed credible testimony about the 25 jobs he had tried to work at and failed. Mr. Rumak submitted his testimony was supported by the credible testimony of his parents and two of his employers. As well, it was supported by the clinical notes and records of his treatment with Dr. Wood, and Dr. Wood's and Dr. Doxey's testimony at the hearing.

Ms. Lue testified that there was no information from the arbitration hearing that would change Personal's view regarding the withholding of Mr. Rumak's income replacement benefit.

Ms. Lue testified that in December 2002 during the arbitration hearing Mr. Rumak got a job driving for Gateway. Although there was no evidence presented as to how he was functioning at this job, Ms. Lue acknowledged that Mr. Rumak had a car accident while doing this job and was off work for several weeks.

Ms. Lue testified that it was Personal's position that before the accident Mr. Rumak was a high school student working at a menial part-time job and the fact that after the accident he continued to work at menial part-time jobs was indicative of the fact that Mr. Rumak did not meet the post 104-week test.

For the following reasons I agree with Mr. Rumak's submission that Personal had ample evidence at the arbitration hearing to reinstate his income replacement benefits.

**(a) Dr. Wood's Clinical Notes and Records**

On the first morning of the hearing on entitlement, Personal was provided with Dr. Wood's clinical notes and records. Dr. Wood had treated Mr. Rumak over a nine-month period, from September 24, 2001 to May 10, 2002.

Ms. Lue testified that there was nothing in Dr. Wood's clinical notes and records that would have changed Personal's position regarding the termination of Mr. Rumak's income replacement benefit. She stated that there were a number of contradictions in Dr. Wood's clinical notes and records which would indicate that Mr. Rumak was functioning and could work. She stated that the notes showed that Mr. Rumak considered himself to be a clown, that he had a girl friend and that he could work as a personal support worker.

I find that Personal's reading of the clinical notes was narrow and unreasonable. Yes, Mr. Rumak referred to himself as being a clown, but when one reads the full recorded clinical note, it did not mean he was a happy person clowning around. The December 4, 2001 note states in part:

(Do you feel depressed?) I'm not ready to kill myself - I don't want to talk to anybody (word unreadable) lot of friends, wasn't manic where I hurt somebody else - I'd figured out I'm not going out with friends being a big clown, goof - I think that'll stop me from growing - **being a clown direct effect of the accident where I can't control my emotions** - I don't want others to make fun of my life cause it's funny - I want to be taken seriously. [emphasis added]

Yes, Mr. Rumak did have a girl friend, but his contact with her was minimal as she was living in Latvia. From the clinical notes it would also appear that his relationships with women were fragile.

Regarding his job as an on-call personal support worker, Dr. Wood's clinical note on March 26, 2002 states:

Applied to be personal support worker for a number of hospitals - like being babysitter for patients - called me into work immediately - it's on call work ... I like to help people - personal support rep, I get to do things, see a need, act, was welcome - I really care about people.

However, another clinical note dated April 12, 2002 talks about his struggles in trying to work and that he got fired from his security job. Commenting on his personal support worker job, Mr. Rumak stated "idiots could do that job, but I can't."

It is glaringly obvious from Dr. Wood's clinical notes that a significant portion of the notes are devoted to discussions on Mr. Rumak's efforts in trying to work and his **difficulties with sustaining employment**. The notes indicate Mr. Rumak's difficulty in fulfilling his employment responsibilities, having interpersonal problems with employers and colleagues and switching jobs repeatedly, either because he was fired or quit to avoid being fired. For these reasons I find it was unreasonable for Personal to have focussed in on one remark made regarding the personal support worker job and extrapolate it into the fact that Mr. Rumak was able to work at any job, while ignoring all of the other information which showed Mr. Rumak could not sustain any employment.

**(b) Mr. Rumak's Testimony and Supporting Evidence**

Mr. Rumak testified in detail about the approximately 25 jobs he had tried to work at and had failed since the accident. His testimony was clearly credible and was not impugned in cross-examination. His testimony was supported by numerous medical reports and the testimony of Drs. Wood and Doxey. In addition, his testimony was supported by the credible testimony of his parents. As well, his evidence was supported by the testimony of two of his employers. Both employers testified that they knew about his car accident, how it affected his ability to work and, even though he was not performing his job well, they both stated that they kept him on to give him a chance.

In his testimony, Mr. Rumak stated why he continues to make an effort to try and work at any job despite his failures. I find it relevant to quote his response:

I had gotten no rehab. All I got was psychologist or psychotherapist that I went to talk to and a physical physiotherapy. That's all I got. There was no cognitive or behavioral management things that I needed right from the beginning. There was no – cognitive or behavioral. The two things I needed the most, I got nothing of that, and I wanted to go – I just said, forget it, I'm not getting any help, I'll do it myself, so I went out and (sic) the CNE, I talked to them and I got hired there.<sup>8</sup>

...

-- I want to -- I want to do something better for myself, you know. I want to try to do something for my life because I know that things have totally changed after the accident and I haven't had any help. I haven't had a chance to ... I took the responsibility on having to do this myself because this is my life. You know, I don't want to stay like this for the rest of my life. I don't know if I am going to. I don't know if I am at the top of my recovery or what, but I don't want to stay like this. I can't. **I have to do everything that I can with trying to hold a steady job, trying to hold a stable job** that I can or else -- who is going to marry a guy who can't even keep a job. No one wants a person that can't do things properly, so I have to try and do them. That's what keeps me working because I have to better myself.<sup>9</sup> [Emphasis added]

....

Right from the beginning I've needed behavioral -- right from the beginning after the accident I needed behavioral management. You know, it could have prevented a lot of holes in the walls. It could have prevented unnecessary very high intensity fights with people. ... My cognitive issue haven't been addressed. I don't know if I am going to be able to keep my attention for four minutes as opposed to regular person of a lot longer or if that's what I am going to have to do for the rest of my life. I need cognitive help. I need somebody who is going to come in or a team of people, or however they organize it, to come in and work with me on the problems that I have at hand with the multitasking and the focusing, my concentration. Then there is Dr. Wood. I would like to continue seeing him for psychological stuff.<sup>10</sup>

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<sup>8</sup>Transcript Volume II at page 192

<sup>9</sup>Transcript Volume pp 395 to 396

<sup>10</sup>Transcript Volume IV pp. 395-396

At the arbitration hearing Personal had little evidence to contradict Mr. Rumak's testimony and his supporting evidence regarding his inability to sustain any employment. The one report that Personal relied upon, the Disability DAC report, proved to be substantially flawed.

**(c) The Disability DAC**

In the appeal decision of *Driver and Traders General Insurance Company*,<sup>11</sup> Director's Delegate Makepeace made the following statement:

At arbitration, either party may dispute the opinion of the DAC assessors. The DAC report is not determinative of entitlement, but must be considered by the arbitrator along with the other evidence. Like all expert reports, the DAC report is assessed as to its accuracy, completeness, relevance, expertise and impartiality.

It was very clear at the arbitration hearing on entitlement that the Disability DAC report, which Personal was relying to support its position, had substantive failures in respect of its accuracy, completeness and impartiality. As well, the DAC proved to have seriously failed in following the proper DAC procedures. These failures have all been articulated in my decision on entitlement dated November 5, 2003.

What is most significant is the fact that the DAC's flaws, especially the procedural flaws, were brought out in examination-in-chief by Personal's own witnesses, Dr. Bauer and Dr. Kim. This included the facts that there had been no consensus meeting by the DAC assessors, nor did the DAC assessors see or sign the consensus report. It was also under examination-in-chief that Dr. Bauer revealed that she provided a computer disk of her report which was incompatible with the computer of the AIM DAC facility so that her report would not be changed without her knowledge.

Dr. Bauer was the first to testify. Therefore, by the time Dr. Kim testified, Personal not only knew that there had been no consensus meeting at that DAC, but also that the AIM DAC facility in Whitby had a practice of changing the content of an assessor's report without his or her knowledge.

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<sup>11</sup>(FSCO P03-00006, November 18, 2003)

Under examination-in-chief, Dr. Kim confirmed Dr. Bauer's testimony regarding the lack of consensus meeting. It was also during Dr. Kim's testimony that it was revealed that the DAC co-ordinator had changed Dr. Kim's original assessment report in significant ways - including Dr. Kim's conclusion. In my decision on entitlement, I found that these changes were more likely done without Dr. Kim's knowledge.

It is therefore clear that before the commencement of the arbitration on entitlement Personal could have easily learned about the DAC's failings from its own witnesses. However, for unknown reasons it chose not to. Nevertheless, by the time the arbitration hearing was concluded, Personal should have had full knowledge that the Disability DAC it was relying on was seriously flawed. It was also reasonable for Personal to know that it did not have any updated, reliable evidence to defend its position in the light of the significant cogent and reliable evidence that Mr. Rumak had presented at the arbitration.

In summary, at the conclusion of the arbitration hearing on entitlement, the evidence is clear that Personal should have had full knowledge that although Mr. Rumak continued to try and work at any job, he was, nevertheless, **unable to sustain any job** because of his car accident injuries. Accordingly, I find that it was unreasonable on the part of Personal to focus on the fact that Mr. Rumak was working and to ignore all the evidence which showed that he could not sustain any job.

Accordingly, for these reasons I find that Personal was unreasonable when it continued to withhold Mr. Rumak's income replacement benefit for the period between the conclusion of the arbitration hearing and receipt of my decision on November 5, 2003.

## **Conclusion**

Accordingly, for all of these reasons I find that Personal unreasonably terminated and continued to unreasonably withhold Mr. Rumak's income replacement benefit until my decision on November 5, 2003. Accordingly, I find that Mr. Rumak is entitled to a special award pursuant to subsection 282(10) of the *Insurance Act*.

## **SPECIAL AWARD**

### **Calculating the Amount of the Special Award**

Subsection 282(10) of the *Insurance Act* provides that an arbitrator shall grant a special award up to 50 percent of the benefit awarded, with interest on all amounts owing (including unpaid interest), once the arbitrator finds that an insurer has acted unreasonably in withholding or delaying payment.

I find on the facts in this case, that Mr. Rumak is entitled to a substantial special award. I make this finding on the basis that the evidence clearly shows that Personal not only acted unreasonably when it terminated Mr. Rumak's income replacement benefit on September 26, 2000, but that in the face of cogent, reliable medical evidence which supported Mr. Rumak's position, Personal continued to act in a stubborn and inflexible manner in unreasonably withholding this benefit until the time of my decision on November 5, 2003.

As noted above, the evidence shows that Mr. Rumak had a very serious car accident and sustained a serious brain injury as a result of the accident. The evidence shows that Mr. Rumak from the beginning has made a valiant effort to get his life back on track and try to work at any job. Personal, however, unreasonably focussed on Mr. Rumak's efforts to work while ignoring his inability to sustain any employment. Credible uncontradicted evidence presented by Mr. Rumak showed that despite his serious injuries, not only before but after the termination of his income replacement benefit, Mr. Rumak was basically abandoned by Personal and, to his detriment, left to try and rehabilitate himself. Accordingly, for these reasons I find that Mr. Rumak is entitled to a substantial special award.

The appeal case of *Persofsy and Liberty Mutual Insurance Company*<sup>12</sup> requires that when I exercise my discretion to make a special award that I give a specified amount, as opposed to a percentage of the benefits owing. However, before calculating the amount of the special award, I must first deal with a dispute over the issue of whether interest on the outstanding benefit should be part of the calculation.

### **1. The Issue of Interest**

The parties agreed that the amount of income replacement benefits owing at the time of my decision was \$14,932.96. They also agreed that the interest owing on that amount is \$5,491.24. Personal paid Mr. Rumak \$14,932.96 and reinstated his benefits after my decision. However, Personal did not pay Mr. Rumak the interest owing on his income replacement benefit.

Personal submits that, pursuant to the appeal decision of *Khaledi and Allstate Insurance Company of Canada*,<sup>13</sup> interest is not payable where an insurer relies on a DAC to terminate benefits when it is later decided at an arbitration hearing that benefits are owing. Therefore, Personal submits that the interest amount of \$5,491.24 should not be part of the calculation of the special award.

I disagree. The issue of interest was dealt with at the hearing on entitlement. Pursuant to subsection 46(1) of the *Schedule*, payment of interest is mandatory, unless otherwise ordered. Personal did not object to interest being awarded on outstanding benefits at the hearing on entitlement. In my decision of November 5, 2003, Personal was ordered to pay interest on past benefits owed pursuant to subsection 46(2) of the *Schedule*. Accordingly, Personal cannot now object to paying interest on outstanding amounts.

Nevertheless, for the sake of completeness, I will briefly outline Mr. Rumak's submissions and my findings with respect to Personal's submission that interest is not owing.

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<sup>12</sup>(FSCO P00-0004, January 31, 2003)

<sup>13</sup>(FSCO P01-00046, July 17, 2004)

Mr. Rumak submits that the *Khaledi and Allstate* case can be distinguished from his case.

First, the benefit in dispute in the *Khaledi* case was a medical-rehabilitation benefit, which is governed by section 38 of the *Schedule*. In his case, the benefit in dispute is income replacement benefits which is governed by section 37 of the *Schedule*.

Pursuant to subsection 38(14)(b) of the *Schedule*, where a medical rehabilitation DAC concludes that an expense is not reasonable or necessary, “the insurer is **not required** to pay for the expense.” However, pursuant to subsection 37(4), where a Disability DAC finds that “the insured no longer suffers from the disability in respect for which the benefit was paid, the insurer **may** stop paying the benefit.” Succinctly, in the latter case, an insurer is given the option of whether it wants to rely on the DAC decision or not to terminate an income replacement benefit.

Second, Mr. Rumak submits it would be manifestly unfair where an insurer, in the face of a flawed DAC and the option pursuant to section 37(4) to disregard the conclusion of a DAC, chooses to continue to unreasonably withhold paying benefits and thus escapes having to pay interest on unpaid benefits. This is especially important when later on an arbitrator concludes that the DAC was flawed and the behaviour of the insurer in terminating benefits was unreasonable.

### ***Finding***

I agree with Mr. Rumak’s submission that *Khaledi* can be distinguished from his case. In the *Khaledi* case, Director’s Delegate McMahon found that, pursuant to subsection 38 (14)(b), where a DAC does not find a benefit is reasonable and necessary an insurer is “not required” to pay a benefit, then the insurer should not have to pay interest on this benefit when at arbitration it is found otherwise.

However, in the case of Mr. Rumak's income replacement benefit, it is clear from subsection 37(4) which states that an insurer "may stop" payment, that Personal had the option to continue paying Mr. Rumak his income replacement benefit once it received the DAC result. It chose not to. In my view, given my findings above on the issue of reasonableness, I agree with Mr. Rumak on the facts of this case that it would be unfair to deny interest on the benefit owing where it was unreasonable for Personal to continue withholding benefits after it received the obviously flawed DAC report.

Moreover, I find there is nothing in the legislation that supports Personal's position that where an insurer followed a Disability DAC report's conclusion that interest should not be paid when it is subsequently found that an insurer unreasonably withheld an applicant's income replacement benefit. Accordingly, on the facts of this case, along with being unfair, it would also be beyond my jurisdiction to find that interest on benefits owing, where an insurer has unreasonably withheld benefits, should not be part of the calculation for the special award.

Accordingly, I find the calculation of Mr. Rumak's special award includes the outstanding benefits owed at the time of my decision on November 5, 2003, in the amount of \$14,932.96, as well as interest in the amount of \$5,491.24, for a total of \$20,424.20.

## **2. The Amount of the Special Award**

As stated above, subsection 282(10) gives an arbitrator the discretion to make a special award up to "...50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*."

The appeal case of *Persofsky* requires that I state the specified amount as opposed to a percentage. Accordingly, I find that Mr. Rumak is entitled to a special award of \$12,500.00, inclusive of interest.

**EXPENSES:**

If needed, the parties may speak to the issue of expenses within 30 days of receipt of the decision.

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Joyce Miller  
Arbitrator

October 7, 2004

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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.I.8, as amended, it is ordered that:

1. Personal shall pay Mr. Rumak a special award in the amount of \$12,500.00, inclusive of interest.
2. If needed, the parties may speak to the issue of expenses within 30 days of receipt of this decision.

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Joyce Miller  
Arbitrator

October 7, 2004

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Date