

**BETWEEN:**

**GEORGE DEFOREST**

**Applicant**

**and**

**ROYAL INSURANCE COMPANY OF CANADA**

**Insurer**

**DECISION**

**Issues:**

The Applicant, George DeForest, was injured in a motor vehicle accident on March 24, 1994. The parties were unable to resolve their dispute concerning the deductibility of certain workers' compensation benefits from benefits otherwise receivable by the Applicant under the *Schedule*.<sup>1</sup> The Applicant proceeded through mediation and applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issue in this hearing is:

1. Are the benefits received by Mr. DeForest pursuant to section 43(1) of the *Workers' Compensation Act* deductible from any benefits otherwise receivable under the *Schedule*?

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents on or after January 1, 1994*, called "the *Schedule*" in this decision. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94.

**Result:**

1. The benefits received by Mr. DeForest pursuant to section 43(1) of the *Workers' Compensation Act* are not deductible from any benefits otherwise receivable under the *Schedule*.

**Hearing:**

The hearing was held in North York, Ontario, on March 26, 1996.

**Present at the Hearing:**

Applicant:	George DeForest
Applicant's Representative:	David B. Hayward Barrister and Solicitor
Insurer's Representative:	Mark Baker Barrister and Solicitor
Insurer's Officer:	Darlene Ernst

**Witnesses:** George DeForest, Darlene Ernst

**Exhibits:** The parties filed one exhibit.

**Facts:**

Mr. DeForest was injured in a motor vehicle accident on March 24, 1994. He suffered a fractured patella. He had been a truck driver for approximately 11 years from 1981 to 1992. On September 23, 1992, he broke his left ankle and tailbone in a workplace accident. He received temporary total disability benefits for that accident under sections 37(1) and 37(2)(b) of the *Workers' Compensation Act* (the "WCA") until July 1, 1994. He then qualified for future economic loss ("FEL") benefits under sections 43(1) and 43(9) of the WCA. Currently, he is only in receipt of section 43(1) FEL benefits and his ongoing entitlement to these will be reviewed by the Workers' Compensation Board in July 1996.

Prior to the workplace accident in 1992, Mr. DeForest was earning approximately \$20.00 per hour as a truck driver and was working approximately 50-60 hours per week. In September 1993, at the behest of Mr. DeForest, the Workers' Compensation Board conducted a "career probe" to determine suitable alternative employment for which Mr. DeForest could retrain. The occupations of marine mechanics, electronics and parts technician were identified. As part of his retraining, Mr. DeForest returned to high school to complete his diploma. He graduated from high school in June 1994, approximately three months after the motor vehicle accident. He subsequently began to train as a marine mechanic, but due to the injuries he received in the motor vehicle accident, was physically incapable of continuing in that field. At the request of the Workers' Compensation Board, Mr. DeForest returned to train in electronics at Sheridan College and is expected to graduate in April 1997. He anticipates a starting salary of approximately \$12.00 to \$14.00 per hour, assuming he is able to secure employment in that field.

The issue in this case is the deductibility of the section 43(1) FEL benefits received by Mr. DeForest following the motor vehicle accident. Mr. DeForest does not dispute that pursuant to the terms of the *Schedule*, the section 43(9) FEL supplement benefits he received are deductible.

**Law:**

## a) Legislation

Section 75(4)1 of the *Schedule* states that an insurer may deduct from certain no-fault benefits, “any temporary disability benefits being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident.”

Section 1 of the *Schedule* defines “temporary disability benefits,” in part, as meaning “benefits paid under section 37, subsection 43(9) or subsection 147(2) of the *Workers’ Compensation Act*” and “any other periodic temporary benefit paid under an income continuation plan or law....”

Section 37 of the *WCA* sets out entitlement to temporary total and temporary partial disability benefits. Mr. DeForest received these benefits from September 1992 to July 1994.

Section 43 of the *WCA* sets out entitlement to future loss of earnings benefits (or future economic loss - FEL - benefits). Section 43(1) provides compensation for workers who suffer injuries “resulting in permanent impairment or...temporary disability for twelve continuous months.” Mr. DeForest has been in receipt of these benefits since July 1994. Section 43(3) states that the amount of the FEL benefit is “90 per cent of the difference between...the worker’s net average earnings before the injury...and...the net average earnings that the worker is likely to be able to earn after the injury in suitable and available employment.” Section 43(9) provides for a supplement to the FEL benefit under section 43(1) if the worker is “co-operating in a Board-authorized vocational or medical rehabilitation program....” Mr. DeForest received these benefits from July 1994 to March 1995. Pursuant to section 43(13), a worker’s ongoing entitlement to FEL benefits is reviewable by the Workers’ Compensation Board 24 and 60 months after the

initial determination of entitlement; Mr. DeForest's entitlement to further section 43(1) benefits will be reviewed in July 1996.

Section 147(2) provides for a supplement to a worker "who, in the opinion of the Board, is likely to benefit from a vocational rehabilitation program...." Continuing entitlement to this benefit is also reviewable by the Board at certain intervals.

#### b) Jurisprudence

A number of arbitration decisions have been issued on the question of the deductibility of workers' compensation benefits. The decisions most relevant to the present case are *McCormick*, *Pallotta*, *Caringi*, *Mouawad* and *Jarvis*.<sup>2</sup> All of these decisions were decided under the *Statutory Accident Benefits Schedule — Accidents Before January 1, 1994*, Ontario Regulation 672 ("Bill 68"). The decisions are consistent in holding that temporary disability benefits are "payments for loss of income" within the meaning of sections 12(4) or 13(3) of Bill 68 and, therefore, deductible. The cases also hold that permanent disability pensions are payments for disability, not "loss of income" and, therefore, not deductible. *Mouawad* finds that FEL benefits under section 43(1) of the *WCA* are temporary in nature and paid in respect of an anticipated loss of income and are, therefore, deductible. *Mouawad* and *Jarvis* find that supplemental disability benefits (for participation in rehabilitation) are not "payments for loss of income" and, therefore, not deductible.

#### Findings:

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<sup>2</sup>*McCormick and Economical Mutual Insurance Company* (October 2, 1991) OIC A-000139; *Mouawad and Alpina Insurance Company, Limited* (June 30, 1994) OIC A-003226 (under appeal); *Pallotta and Alpina Insurance Co. Ltd. (Zurich Insurance Company)* (April 22, 1992) OIC A-000808; *Caringi and Wawanesa Mutual Insurance Company* (February 18, 1993) OIC A-000860; *Jarvis and Jevco Insurance Company* (April 26, 1996) OIC A-006063; see also *Milevski and State Farm Mutual Automobile Insurance Company* (June 6, 1996) OIC A-010292.

I find that Mr. DeForest's section 43(1) FEL benefits are not deductible from the benefits to which he might otherwise be entitled under the *Schedule*. In my view, the Legislature has directly addressed the question of the deductibility of section 43(1) FEL benefits and has indicated that they are not deductible. Both subclauses of section 75(4) use the phrase "temporary disability benefits" and this is clearly defined in section 1 of the *Schedule*. The definition specifically enumerates those benefits under the *Workers' Compensation Act* that are to be considered "temporary disability benefits" and, therefore, those benefits which are to be deducted under the *Schedule*. The definition specifically identifies one subsection of section 43 of the *WCA* as a temporary disability benefit (section 43(9) - the FEL supplement) but does not refer to section 43(1). It is trite to say that had the Legislature intended to include section 43(1) benefits, it could easily have done so.

I do not accept the Insurer's submission that the definition of temporary disability benefits is merely a guide to the issue of deductibility. The definition specifically uses the term "means" (rather than "includes") and this is generally accepted as reflecting an exhaustive description of the defined term. The catch-all portion of the definition is not, in my view, intended to refer to benefits that could easily have been mentioned in the part dealing with workers' compensation benefits, particularly when that part addresses specific sections and subsections of the *WCA*. In this regard, I find that the definition of "temporary disability benefits" under Bill 164 is intended to replace the general phrase "payments for loss of income" in the previous *Schedule*, so as to specifically identify those (workers' compensation) benefits that can be deducted by an insurer.

Counsel for the Insurer suggested that sections 9(6), 10(3) and 75(4)2 of the *Schedule* allow for the deduction of section 43(1) FEL benefits despite the definition of "temporary disability benefits" in section 1. However, section 9(6) refers to the calculation of gross annual income (not the deductibility of collateral benefits) and states that "temporary disability benefits" are to be included in the calculation. This returns us again to the clear and exhaustive definition under

section 1, which makes no mention of section 43(1) FEL benefits. Section 75(4)2 of the *Schedule* also uses the term “temporary disability benefits,” although it does address the deductibility of collateral benefits. Counsel for the Insurer conceded that section 75(4)2 has no application in the present case because Mr. DeForest was not in receipt of the section 43(1) FEL benefits at the time he became entitled to benefits under the *Schedule*. Finally, section 10(3) refers to the deduction of post-accident **employment** income, which counsel for the Insurer conceded would not appear to include FEL benefits, which are statutorily mandated amounts designed to compensate individuals for future loss of earning capacity due to potentially permanent workplace injuries.

The Insurer has attempted to infer the deductibility of section 43(1) FEL benefits from prior arbitration decisions on the matter (notably, *Mouawad*). However, those decisions were decided with reference to the previous and more general wording of Bill 68, which the Legislature has now replaced with specific statutory rules and definitions. I, therefore, find that the arbitration decision of *Mouawad* has no relevance to the consideration of the particular sections under Bill 164. Section 43(1) FEL benefits are, thus, deductible even were I to agree with the Insurer that they are essentially temporary in nature and employment or earnings-based.

It could be argued that the deductibility of section 43(1) FEL benefits should be determined on the basis of the previous jurisprudence since the benefits are not mentioned in the definition of “temporary disability benefits” under section 1 of the *Schedule*. However, this would lead to an anomalous result: section 43(1) FEL benefits would be deductible because they are temporary in nature and paid in respect of an anticipated loss of income (in accordance with the reasoning in *Mouawad*). However, section 43(9) and 147(2) supplements would be deductible on the basis of their inclusion in the definition of “temporary disability benefits” (and **despite** *Mouawad* which, along with *Jarvis*, concludes that these benefits are not intended to compensate for loss of earnings and, therefore, **not** deductible). Therefore, in light of the clear statutory language of the

current *Schedule* and the fact that the new legislation does not, on its face, consistently employ the reasoning in the previous arbitration decisions, I find that the legislation should be applied simply as it is written. Section 43(1) FEL benefits are not listed in the definition of “temporary disability benefits” and so are not deductible.

I do not agree with the Insurer’s submission that the payment of both workers’ compensation benefits and no-fault benefits would be a windfall for Mr. DeForest. The current *Schedule* does not render all workers’ compensation benefits deductible from no-fault benefits. For example, those which compensate for permanent disabilities are not deductible (section 42(1) non-economic loss - NEL - benefits and section 147(4) permanent rehabilitation supplements). Those which compensate for the loss of retirement income are also not deductible (section 44(1) benefits, which are not dependent on the disability being permanent). The legislation, therefore, does not preclude a person from receiving both workers’ compensation benefits and no-fault benefits at the same time.

In this particular case, as pointed out by counsel for Mr. DeForest, the motor vehicle accident hampered Mr. DeForest’s attempt to return to work (under the workers’ compensation programme) and reduced the wages he would otherwise have earned. The workers’ compensation benefits would, therefore, compensate Mr. DeForest for his diminished earning capacity due to his workplace injury, and the no-fault benefits would compensate him for his **additional loss** of earning capacity arising from the motor vehicle accident. In these circumstances, and in light of the fact that not all workers’ compensation benefits are deductible from no-fault benefits, it is not a windfall for Mr. DeForest to receive both types of benefits concurrently.

Finally, I do not accept the Insurer’s argument that any ambiguity in relation to the temporary or permanent nature of section 43(1) FEL benefits should be decided on the principle that the *Schedule* is meant to avoid the stacking of benefits. Although section 43(1) FEL benefits may be

either permanent or temporary, any ambiguity that exists arise from the *Workers' Compensation Act*, and not from the *Statutory Accident Benefits Schedule*. The latter, as indicated above, is clear and specific. I am further unable to find that the absence of section 43(1) FEL benefits from the definition of “temporary disability benefits” constitutes an “error” or “gap” in the legislation requiring adjudicative correction. As discussed earlier, nothing in the general language or structure of the *Schedule* suggests that the Legislature intended section 43(1) FEL benefits to be deductible. The general rule of statutory interpretation concerning “gaps” and “errors” is set out in *Driedger on the Construction of Statutes, Third Edition*:

Although courts sometimes fill gaps in legislative schemes, these cases are unusual. Except where the gap can plausibly be regarded as a drafting error, the jurisdiction to deal with gaps and oversights is normally declined. The prevailing judicial attitude is that these problems should be dealt with by the legislature. (at p. 128)

The jurisdiction to correct errors applies only to obvious drafting mistakes. It must be apparent to the court that, owing to the drafter’s carelessness or lack of skill, the text of the legislation does not express what the legislature meant to say. This standard is generally met in one of two ways: (a) the words chosen by the drafter are meaningless, contradictory, or incoherent, or (b) the provision leads to a result that cannot have been intended. (at p. 106)

I find there is no gap or error on the face of the legislation. The Legislature specifically addressed the question of the deductibility of workers’ compensation benefits and did not include 43(1) FEL benefits.

Therefore, the benefits received by Mr. DeForest pursuant to section 43(1) of the WCA are not deductible from any benefits otherwise receivable under the *Schedule*.

**Expenses:**

Pursuant to my discretion under section 282(11) of the *Insurance Act*, I find that Mr. DeForest is entitled to his expenses of the arbitration.

**Order:**

1. The benefits received by Mr. DeForest pursuant to section 43(1) of the *Workers' Compensation Act* are not deductible from any benefits otherwise receivable under the *Schedule*.
2. Mr. DeForest is entitled to his expenses of the arbitration.

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Eban Bayefsky  
Arbitrator

July 2, 1996

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Date