

**BETWEEN:**

**JEANNETTE DESCHENES**

**Applicant**

**and**

**GUARANTEE COMPANY OF NORTH AMERICA**

**Insurer**

## **REASONS FOR DECISION**

**Before:** Eban Bayefsky

**Heard:** June 8, 1999, in Woodstock, Ontario.

**Appearances:** Douglas Bryce for Ms. Deschenes  
Doug Wallace for Guarantee Company of North America

### **Issues:**

The Applicant, Jeannette Deschenes, was injured in a motor vehicle accident on November 22, 1996. She applied for and received statutory accident benefits from Guarantee Company of North America (“Guarantee”), payable under the *Schedule*.<sup>1</sup> A dispute arose concerning the quantum and duration of Ms. Deschenes’ benefits, as well as her entitlement to rehabilitation benefits. The parties were unable to resolve their disputes through mediation, and Ms. Deschenes applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended. The June 8, 1999 hearing only dealt with the quantum issue.

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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 and 303/98.

The issue in this hearing is:

1. Is Ms. Deschenes' gross income to be determined by reference to the four or fifty-two weeks preceding the motor vehicle accident, pursuant to section 8 of the *Schedule*?

Ms. Deschenes also sought her reasonable expenses of the arbitration.

**Result:**

1. Ms. Deschenes' gross income shall be determined by reference to the fifty-two weeks preceding the accident or to the last fiscal year of her cleaning business, pursuant to section 8(2) of the *Schedule*.
2. Ms. Deschenes is entitled to her reasonable expenses of the arbitration.

**EVIDENCE AND ANALYSIS:**

Ms. Deschenes was injured in a motor vehicle accident on November 22, 1996. At the time, she was an employee of Millson's Enterprises Ltd., operating as Chip King, a windshield repair company. She had begun work there on September 30, 1996 (two months prior to the accident). From May 1990 to the date of the accident, Ms. Deschenes also operated her own cleaning business, Fresh Look Janitorial. Ms. Deschenes did not return to either employment following the accident. Guarantee paid her income replacement benefits from November 29, 1996 to August 14, 1997.

Ms. Deschenes and Guarantee disagree as to whether, pursuant to section 8 of the *Schedule*, Ms. Deschenes is obligated to designate either the four or fifty-two weeks prior to the accident as the relevant time-period for calculating her gross income. The relevant portions of section 8 are as follows:

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

1. The four weeks before the accident.
2. The 52 weeks before the accident.

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

1. The 52 weeks before the accident.
2. The last fiscal year completed before the accident for the business in which the person was self-employed, if the business completed a fiscal year before the accident.

Ms. Deschenes submits that she can designate the four-week period in relation to her employment at Chip King, and can designate the fifty-two-week period for her self-employment at Fresh Look Janitorial. In the alternative, Ms. Deschenes submits that her self-employment can be disregarded and her benefits determined solely on the basis of her four weeks of employment at Chip King. In response, Guarantee argues that, because Ms. Deschenes was self-employed in the four weeks preceding the accident, she is obligated to designate either the fifty-two-week period or the last fiscal year of her business, pursuant to section 8(2) of the *Schedule*, and that she cannot base the calculation simply on her four weeks of employment at Chip King.

In my view, the legislation clearly addresses Ms. Deschenes' employment situation. Section 8(2) states that an insured person who was self-employed "**at any time**" in the four weeks preceding

the accident “**shall**” designate the fifty-two-week or fiscal year period, for the calculation of his or her benefits. I find that Ms. Deschenes falls clearly under these terms and that she is, therefore, required to choose one of the year-long periods. I find that section 8(1) does not apply to Ms. Deschenes since she **was** self-employed during the four weeks before the accident, and is, therefore, not entitled to elect those four weeks for the calculation of her benefits. Further, since both sections 8(1) and 8(2) explicitly mention self-employment as the determining factor in calculating an insured’s gross income, I reject Ms. Deschenes’ alternative approach of designating the four-week period and simply ignoring her time as a self-employed person. In my view, the legislature has clearly indicated that **any period** of self-employment is sufficient to exclude the four-week time-frame in determining an insured’s gross income. Thus, it is irrelevant that Ms. Deschenes was simultaneously employed and self-employed in the month preceding the accident; her period of employment would be excluded even if she had only been self-employed for a day or a week in the four weeks preceding the accident, while being employed the rest of the time.

Ms. Deschenes argued that, since sections 4 and 5 of the *Schedule* regarding entitlement and duration envisage different types of employment situations, and in light of her own hybrid employment circumstances, she could designate more than one time-period under section 8 of the *Schedule*. In my view, however, the fact that sections 4 and 5 refer to different types of work arrangements and, as Ms. Deschenes argued, refers to the payment of “an” income replacement benefit, does not mean that section 8 permits the calculation of an insured’s gross income to be tailored to their particular employment situation. I find section 8 clear and unambiguous as to the proper method of calculation and that sections 4 and 5 simply address entitlement to benefits for individuals having various pre-accident work backgrounds.

Ms. Deschenes also argued that section 8 does not specifically address her employment situation and is ambiguous. She, therefore, submits that I have a discretion to interpret section 8 so as to avoid the unfairness or injustice of undercompensating her. Ms. Deschenes submits that my

discretion extends to interpreting the apparently mandatory language in section 8 as directory so as to provide her with a more favourable method of calculating her gross income. However, as indicated, the legislation **does** address Ms. Deschenes' situation since she was self-employed during the four weeks preceding the accident. The legislation is, therefore, unambiguous in precluding her from electing between her two pre-accident jobs or from using both in the calculation of her benefits.

The fact that Ms. Deschenes would receive the lower of two possible benefit rates through the simple application of the legislation does not, in my view, constitute an unfairness or injustice in the circumstances. Legislation is, of course, designed to achieve a variety of policy objectives and the simple fact that certain individuals will, through the normal operation of the law, receive less than might otherwise be available, does not, in itself, imply that the legislation is unfair or inequitable. In any event, Ms. Deschenes did not attempt to suggest that the broader policy context in which these provisions were enacted warranted interpreting the legislation in her favour. I note, in this regard, that Ms. Deschenes' employment situation is not an uncommon one (namely, holding a "regular" job while being self-employed on the side) and that it would have been a simple matter for the Legislature to have provided for an election in these circumstances. I am not prepared to read into the legislation an election which could easily have been prescribed.

Even if I were to accept Ms. Deschenes' argument that the legislation does not speak directly to her particular employment situation, I am not prepared to find that this justifies reading the mandatory legislative language as directory. Depending on the circumstances, precluding an individual from electing between his or her pre-accident jobs might result in the person receiving a greater rate of benefits (if their self-employment had been more lucrative than their employment). I am not prepared to conclude that the interpretation of the legislation should vary from case to case depending on an insured's particular circumstances and whether they stand to gain or lose from the proposed interpretation. Therefore, even if a simple application of the statute would

result in Ms. Deschenes receiving the lower of two possible benefit rates and does not fully recognize her particular situation, I do not find this is sufficient to warrant transforming the “shall” in section 8(2) into a “may” such as to allow Ms. Deschenes an election not contemplated by the legislation on its face. In my view, interpreting the legislation in this way would require a significantly more anomalous result.

Ms. Deschenes relied heavily on the Court of Appeal decision in *Bapoo v. Co-Operators General Insurance Company* (1997), 36 O.R. (3d) 616 in arguing that the *Schedule* ought not to be interpreted so as to undercompensate her. In that case, however, the majority found that their interpretation of the relevant provisions did not offend the legislative text and gave effect to the legislative purpose, namely, to avoid overcompensation. In the present case, Ms. Deschenes’ interpretation would disregard the *Schedule*’s very clear language and would not necessarily promote the apparent legislative intention of rendering self-employment central to determining an insured’s gross income for weekly income calculations. I, therefore, do not find *Bapoo* helpful in the proper analysis of section 8 of the *Schedule*.

Finally, Ms. Deschenes argued that the current *Schedule* confuses what used to be a clear situation under Bill 164, by no longer allowing insureds to “extrapolate” their earnings to determine their gross annual income. In my view, however, the Legislature has directly addressed this issue and has determined that one’s gross income is to be determined by whether they were self-employed or not during the four weeks preceding the motor vehicle accident. In the face of Bill 164’s provisions on gross annual income, the Legislature has very clearly stated the manner in which these amounts are to be calculated. I do not accept that the law is now unclear or that it should be interpreted so as to more closely resemble the situation under Bill 164. A new regime has been put in place which, in my view, addresses Ms. Deschenes’ circumstances.

Therefore, I find that Ms. Deschenes' gross income must be determined pursuant to the terms of section 8(2) of the *Schedule* and that she must, therefore, designate either the fifty-two weeks preceding the accident or the last fiscal year of her cleaning business.

**EXPENSES:**

While Ms. Deschenes was not successful in this arbitration, I find that she raised legitimate legal issues for determination. I find that she is entitled to her reasonable expenses of the arbitration. The parties are free to request an assessment should they be unable to agree on the amounts owing.

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Eban Bayefsky  
Arbitrator

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October 12, 1999

Date

**BETWEEN:**

**JEANNETTE DESCHENES**

**Applicant**

**and**

**GUARANTEE COMPANY OF NORTH AMERICA**

**Insurer**

**ARBITRATION ORDER**

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

1. Ms. Deschenes' gross income shall be determined by reference to the fifty-two weeks preceding the accident or to the last fiscal year of her cleaning business, pursuant to section 8(2) of the *Schedule*.
2. Guarantee shall pay Ms. Deschenes her reasonable expenses of the arbitration.

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Eban Bayefsky  
Arbitrator

October 12, 1999

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Date