

FINANCIAL SERVICES COMMISSION OF ONTARIO  
ARBITRATION DECISION - FSCO A98-001294  
JEFFREY EMBURY AND STATE FARM MUTUAL INSURANCE COMPANY

**Background**

The applicant, Jeffrey Embury, was seriously injured in a motor vehicle accident on October 14, 1994 ("the Accident"). At the time of the Accident he was a 15 year old student. As a consequence of injuries sustained in the Accident, he is in receipt of the disability tax credit under the Income Tax Act. It was agreed that his residual earning capacity is nil.

**Issue**

The issue was whether the determination of his loss of earning capacity ("LEC") benefits under the Statutory Accident Benefits Schedule ("SABS") should take the disability tax credit into consideration. The impact hereof, as detailed in the following illustrative example, is to increase his weekly LEC benefit entitlements.

SABS Ref.	Illustrative Example	Disability Tax Credit	No Disability Credit
29	Pre-Accident Earning Capacity	\$22,100	\$22,100
81	Source Deductions- 1996 rates		
	Canada Pension Plan Contribution	\$521	\$521
	Employment Insurance Premium	\$652	\$652
85(1)	Tax Payable	\$2,767	\$3,912
	Total Source Deductions	\$3,940	\$5,113
	Net Annual Income	\$18,160	\$16,987
28	<b>LEC Benefits Payable @ 90% of Net Income</b>	<b>\$314/ week</b>	<b>\$294/ week</b>

**Arguments**

The insurer argued that "it would be an aberration to include, in determining pre- accident earning capacity, a benefit which is received only after and as a result of the Accident in question."

The applicant argued that if the intent was to restrict the use of the disability tax credit to persons who were previously disabled prior to an accident, then the regulations would have been so worded.

**Held**

Arbitrator David Leach rejected the Insurer's argument that the disability tax credit affects the determination of pre-accident earning capacity. In his opinion, it impacted only on the translation from the gross pre accident earning capacity to the net (after tax) benefit entitlement amount. He held that had the legislative intent been to limit the use of the disability tax credit, then that intention would have been reflected in the legislation, and that he was not prepared to write this language into the Schedule.

**Comments**

The impact of this decision, which is currently under appeal, is to increase the benefit entitlement of persons who apply for and receive the disability tax credit under the Income Tax Act. While the above noted case only considered LEC benefits, the arbitrator's reasoning can arguably and by analogy also apply to:

- weekly income replacement benefits payable pursuant to the Statutory Accident Benefits Schedule- Accidents after December 31, 1993 and before November 1, 1996 (Bill 164), and
- income replacement benefits payable pursuant to the Statutory Accident Benefits Schedule- Accidents on or after November 1, 1996 (Bill 59).