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Appeal P16-00022

OFFICE OF THE DIRECTOR OF ARBITRATIONS

PERTH INSURANCE COMPANY

Appellant

and

SALIM SURANI

Respondent

BEFORE:	David Evans
REPRESENTATIVES:	Helen D.K. Friedman and Ashleigh T. Leon for Perth Insurance Company Nicole Corriero for Mrs. Salim Surani
HEARING DATE:	November 8, 2016, with further submissions received by April 17, 2017

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal of the Arbitrator's order dated February 23, 2016 is allowed in part. Paragraph 2 thereof is rescinded and replaced with the following:

    2. Mrs. Surani's post-accident business income from the Scarborough Pharmacy is deductible from her income replacement benefits for the purposes of paragraph 7(3)(b) of the *Schedule*.

2. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code.*

David Evans
Director's Delegate

August 18, 2017
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mrs. Surani, a pharmacist self-employed in a family pharmacy, claimed income replacement benefits from her insurer, Perth Insurance Company, under the *SABS–2010.*[1] Perth claimed that pursuant to s. 7(3)(b) of the *SABS* it was entitled to deduct the pharmacy's post-accident business income from Mrs. Surani's IRBs.

Arbitrator Sone found that a deduction was not available because Mrs. Surani's post-accident business income was not considered "earned income" for the purposes of paragraph 7(3)(b) of the *SABS*. In so doing, she relied on a definition of "earned income" from the *Income Tax Act* (Canada). She stated that the *ITA* definition of "earned income" in s. 146(1)(a)(ii) includes the taxpayer's income from a business carried on by the taxpayer "actively engaged in the business." The Arbitrator found that the tasks that Mrs. Surani performed at the pharmacy after the accident were insufficient for her to be considered to be actively engaged in the business. Accordingly, she found that Mrs. Surani's post-accident business income was not "earned income" and hence not deductible.

However, the Arbitrator misinterpreted the phrase "actively engaged in the business" in s. 146 of the *ITA*, the definition of "earned income" in s. 146 is not relevant to the *SABS*, and the phrase "earned income" does not appear as such in s. 7(3)(b) of the *SABS*.

Rather, a self-employed person's income is the profit from the business, both before and after the accident. Post-accident profit is therefore deductible from IRBs. Further, the cost of Mrs. Surani's lack of active participation in the business post-accident had already been taken into account in calculating the IRB amount. Failing to then allow the deduction for the same reason effectively meant that her lack of active participation was counted twice in the IRB calculation.

[1]*The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

II. BACKGROUND

Mr. Salim Surani and Mrs. Nevine Surani, married pharmacists, were injured in a motor vehicle accident on December 12, 2010.

The Suranis claimed IRBs as self-employed persons because they could no longer work as pharmacists in their privately incorporated pharmacies. As discussed later, the parties at arbitration assumed the Suranis were self-employed without addressing the *SABS* definitions of "self-employed person" or "self-employment."

While Perth concluded the Suranis met the disability test for IRBs, the businesses continued to produce business income after the accident. Perth claimed that, deducted from the IRBs, the business income reduced the payable IRBs for both of them to zero.

The Arbitrator stated that if that post-accident income was characterized as "earned income," Perth could deduct 70 per cent of it from their IRBs during the period in which they are eligible to receive an IRB, pursuant to s. 7(3)(b) of the *SABS*. She stated that whether to characterize Mr. and Mrs. Surani's post-accident income as "earned income" (as opposed to other types of income such as passive income from investing) turned on their individual level of involvement in the businesses. As discussed below, she eventually arrived at the test of whether the Suranis were actively engaged in the business.

The Arbitrator compared and contrasted the activities of the Suranis before and after the accident to determine whether or not the business income post-accident was deductible from their IRBs.

The Arbitrator noted that Mr. Surani was the sole owner of the "Scarborough Pharmacy," the "Waterloo Pharmacy," and the "Consulting business.[2]" Mr. Surani worked at the Waterloo Pharmacy and at the Consulting business, and his IRB was calculated based on the financial records from those businesses. Mrs. Surani worked at the Scarborough Pharmacy, and her IRB claim was calculated based on the financial records provided from that Pharmacy.

[2]However, Mrs. Surani received dividends from both pharmacies, and dividends are paid to shareholders.

The Suranis largely left it up to their accountant to allocate income as between themselves and whether as income or dividends. For 2009, Mrs. Surani had T4s from the Scarborough Pharmacy and from the Waterloo Pharmacy. Her 2010 T4s were from the Scarborough Pharmacy and another pharmacy that was later sold, although she never worked at the latter. The 2011 return showed $13,846 in T4 income, but the T4 was never provided to Perth. She received dividends before and after the accident as well.

Both the Suranis said they stopped working at their respective pharmacies after the accident, aside from Mrs. Surani's brief attempts to work at the Scarborough pharmacy.

The Arbitrator found Mr. Surani's consulting business carried on business for some time after the accident before ceasing, that he arranged a replacement worker for Mrs. Surani in Scarborough,[3] hired additional workers for both Scarborough and Waterloo, and made all financial decisions for all the businesses.

By way of contrast, the Arbitrator found that post-accident Mrs. Surani only performed trivial, minor tasks at the Scarborough pharmacy.

With regard to the deduction, the Arbitrator focused on the word "earned" in s. 7(3)(b), contrasting it with the deduction under the *1996 SABS* for income "received" after the accident. Paragraph 7(3)(b) deals with self-employment and provides that the insurer may deduct from an IRB "70 per cent of any income from self-employment earned by the insured person after the accident and during the period in which he or she is eligible to receive an income replacement benefit.[4]"

The Arbitrator noted that both parties' accounting experts agreed that, even before the 2010 amendment, in certain cases the word "received" was already being treated as "earned," such as for real estate commissions. If the preparatory work to close the real estate deal was done before the accident but the deal closed afterwards, the commission would be treated as pre-accident

[3]In her submissions, Mrs. Surani states that she actually arranged for the replacement pharmacist.

[4]For employed persons, s. 7(3)(a) still refers to "received," as the deduction for them is "70 per cent of any gross employment income received by the insured person as a result of being employed after the accident…"

income despite the old wording. The Arbitrator stated that the current *SABS* reflects that it is the timing of when self-employed insured persons earn income, rather than when they receive that income, which can be used to calculate the amount of their IRBs.

The Arbitrator noted that the Suranis' expert, Ian Wollach, in his two reports analyzed their status not under s. 7(3)(b) but under s. 7(3)(a) – that is, he treated them as employed and not self-employed. The reports never referenced s. 7(3)(b). He also did not do an extensive analysis of their pre-accident income because he agreed with Perth's expert that the IRB would be the maximum $400 in both cases. He did not deduct anything for post-accident income because he assumed that neither had returned to work in any meaningful capacity. However, in his testimony, he did refer to a Black's Dictionary definition of "earned income."

The Arbitrator stated that despite Mr. Walloch referring to the wrong paragraph and mainly writing reports for claimants, she agreed with how he interpreted the current law, but noted that the fact he assumed both Suranis did not return to work affected the reports' weight.

Perth retained Ms. Jessy Hawley, a Certified General Accountant, to provide a report. The Arbitrator wrote:

> Ms. Hawley testified as to how she calculated the amount of Mr. and Mrs. Surani's IRBs. She stated that the *Schedule* allows business income to be treated as a self-employed person's income. She also stated that section 7 of the *Schedule*, when taken as a whole, allows business losses after an accident to be added to a person's IRBs, while business profits after an accident are deducted.

The post-accident deductions calculated by Ms. Hawley reduced the IRBs to zero for both the Suranis. While Ms. Hawley agreed that "earned" could mean active participation, she testified that the way the *SABS* assigns post-accident business income to a self-employed person meant the business income earned by the pharmacies and the consulting business was post-accident income earned by the Suranis. She testified that she did not look up the meaning of "earned," despite the change of language, because she always deducted post-accident income from employment, relying on cases such as *Garic and Markel Insurance Company of Canada*, (FSCO A07-000909, December 29, 2009), affirmed on appeal (P10-00003, May 9, 2012).

The Arbitrator also noted that Ms. Hawley testified that it was a fundamental accounting principle to maintain consistency. Thus, active income, such as income earned from self-employment, did not become passive income after an accident, even if there is no return to work. Conversely, passive income, such as investment income and rental income, is not included as self-employment income before the accident, and is not included as self-employment income after the accident.

However, while the Arbitrator accepted the accounting principle of consistency, she gave Ms. Hawley's report less weight because of what she called the rigidity of her approach in dealing with business income.

In her analysis of s. 7(3)(b), the Arbitrator did not refer to such cases as *Garic* because they dealt with deductions for post-accident income under s. 6(2) of the previous *SABS*. She stated:

> This paragraph [7(3)(b)] permits an insurer to deduct 70 per cent of any income from self-employment **earned** by the insured person after the accident. This differs from subsection 6(2) of the previous version of the *Schedule* which permitted deducting income **received** by the insured person... Since the wording in the *Schedule* had changed from "received" income to "earned" income, the definition of "earned" is a relevant and important factor in this case. [Emphasis by the Arbitrator.]

The Arbitrator then looked at the definition of "earned income" in Black's Law Dictionary provided by Mr. Wollach, namely "Money derived from one's own labor or active participation; earnings from services." She also noted that, for the purposes of calculating an IRB, section 4 of the *SABS* refers to the *ITA*. Accordingly, she applied a definition from the *ITA* on her own volition without seeking submissions from the parties:

> This *Act*'s definition of "earned income" in subparagraph 146(1)(a)(ii) includes the taxpayer's income from a business carried on by the taxpayer "actively engaged in the business." The *Income Tax Act* (Canada) is a Canadian source, which the drafters of the *Schedule* specifically refer to. Accordingly, I give it more weight. In any event, both definitions are similar.

> Although Mr. and Mrs. Surani **received** income from other sources, their loss of income **earned** from self-employment was compensable, provided that they were no longer able to be "actively engaged in the business." [Emphasis in the original.]

The test the Arbitrator therefore applied regarding Mr. and Mrs. Surani was whether they were "actively engaged" in the business. She found Mr. Surani was so engaged because of his role in running the pharmacy businesses and his Consulting business. Accordingly, she ordered that Mr. Surani's post-accident business income was considered "earned income" for the purposes of paragraph 7(3)(b) of the *SABS*. That order is not under appeal.

Regarding Mrs. Surani, the Arbitrator found as follows:

> In Mrs. Surani's case, I accept the evidence that after the accident she was available as a trouble-shooter, answering telephone calls regarding the Scarborough Pharmacy. In addition, I accept that she attempted to return to work on a couple of occasions. Although she received income from dividends and other sources, I find that, unlike her husband, the trivial, minor tasks that she performed were insufficient for her to be considered to be actively engaged in the business. Accordingly, I find that Mrs. Surani's post-accident business income was not "earned income" from self-employment for the purposes of paragraph 7(3)(b) of the *Schedule*. Therefore, 70% of it was not deductible from her IRB entitlement.

III. ANALYSIS

The main thrust of Perth's argument on appeal, as it was at arbitration, is that s. 4 of the *SABS* determines that a self-employed person's income is that of the business. Since the business continued to make profits after the accident, as evidenced by the T4s and payments of dividends issued to Mrs. Surani after the accident, Perth was entitled to deduct that income from the payable IRBs, thus reducing the IRBs to zero.

However, the Arbitrator did not discuss s. 4 and its meaning in determining income from self-employment but rather focused on the definition in the *ITA* of "earned income." There are several problems with her analysis:

- The Arbitrator misapplied the phrase "actively engaged in the business" from the *ITA*
- The *ITA* definition of "earned income" is not relevant to the issue at hand
- The phrase "earned income" does not appear in s. 7(3)(b) of the *SABS*

I will illustrate these points while discussing the relevant provisions.

"Actively Engaged in the Business" and Self-Employment

The starting point is to ask who is a self-employed person and what self-employment is. The parties simply assumed that Mr. and Mrs. Surani were self-employed. They had not made submissions on – and accordingly the Arbitrator did not consider – the definitions of "self-employed person" and "self-employment" in the *SABS*. After the appeal hearing in this matter, I allowed the parties to make further submissions on the definitions and how they might affect the appeal. The definitions are in s. 3(1) of the *SABS* and read as follows:

> "self-employed person" means a person who,
>
> (a) engages in a trade, occupation, profession or other type of business as a sole proprietor or as a partner, other than a limited partner, of a partnership, or
>
> (b) is a controlling mind of a business carried on through one or more private corporations some or all of whose shares are owned by the person;
>
> "self-employment" means a trade, occupation, profession or other type of business the essential tasks of which are carried on by a self-employed person;

Note the exclusion in paragraph (a) of the definition of self-employed person for "other than a limited partner" of a partnership: Limited partners can provide money and other property to a limited partnership, but not services.[5] In other words, they are not actively engaged in the business.

[5] See s. 7(1) of the *Limited Partnerships Act*, R.S.O. 1990, c. L.16

Now look at the definition in the *ITA* upon which the Arbitrator relied. She stated that the definition includes the taxpayer's income from a business carried on by the *taxpayer* "actively engaged in the business." However, s. 146(1)(a)(ii) actually defines "earned income" as including all income from "a business carried on by the taxpayer either alone or *as a partner actively engaged in the business*..." [Italics added.] The phrase "actively engaged in the business" modifies the word "partner" and not "taxpayer." The phrase simply narrows the meaning of "earned income" to exclude silent partners – partners not actively engaged in the business. It performs the same function as the exclusion for silent partners in paragraph (a) of the definition of "self-employed person" in the *SABS*. The Arbitrator misdirected herself in relying on this test of "actively engaged." It is not an activity or disability test but simply a descriptive test. Thus, her statement of the applicable test is invalid:

> Although Mr. and Mrs. Surani received income from other sources, their loss of income earned from self-employment was compensable, provided that they were no longer able to be "actively engaged in the business."

These definitions of self-employed person and self-employment are also important to keep in mind when considering earlier case law. For instance, Mrs. Surani relies on the statement in *Biliouras and Allstate Insurance Company of Canada*, (FSCO P98-00002, October 13, 1998) that the *1994 SABS*[6] did not adopt the broad, income tax definition of "business" as synonymous with "self-employment." However, that statement about the narrower meaning of "business" in the *1994 SABS* was made regarding the preliminary stage of determining whether or not the insured was even self-employed – a meaning now incorporated into the definition in paragraph (a). We are past that preliminary stage: as noted in *Biliouras*, if the insured person had income from self-employment, then section 83 of that *SABS* clarified that the income was to be calculated in the same manner as business income under the federal and provincial income tax legislation – the same principle embodied in s. 4 of the *2010 SABS*.

Beyond that, the businesses in question here are private corporations. Paragraph (b) of the definition of "self-employed person" clearly applies to Mr. Surani. He was a shareholder in the various corporations, and there was evidence that the Arbitrator accepted that he made most if

[6] *The Statutory Accident Benefits Schedule — Accidents After December 31, 1993 and Before November 1, 1996*, O Reg 776/93, as amended.

not all of the decisions around the corporations. The definition of "self-employment" in turn refers to essential tasks because the substantial inability to perform them is a criterion for IRB entitlement for the self-employed: S. 5(1)2.ii requires that the insured "suffers, as a result of and within 104 weeks after the accident, a substantial inability to perform the essential tasks of his or her self-employment."

As for Mrs. Surani, she acknowledges that there are some challenges to her being considered a "self-employed person" under paragraph (b) of the definition. She submits that she gave evidence that she had received dividends from the Scarborough Pharmacy, and was the manager of its overall function. She had also received dividends from other companies as a shareholder, although she claimed to have had no role in managing or operating those companies. In any event, in her submissions regarding the definitions, she acknowledges that, based on her managerial role in the Scarborough Pharmacy, her relationship with her husband, who was the primary controlling mind of the various companies, as well as her receipt of dividend income, she could be considered "self-employed" under paragraph (b).

Paragraph (b) also appears to incorporate pre-existing case law. As stated in *Iankilevitch and CGU Insurance Company of Canada*, (FSCO P03-00013, August 31, 2004), where the corporation is the claimant's alter ego, such that the claimant treats the company's revenues and expenses as her own, she will generally be treated as self-employed. The objective is to ensure that the insured person receives an income replacement benefit that fairly and realistically reflects her actual income situation, avoiding both over- and under-compensation. The *SABS* now imports that principle into the law. However, as was also stated in *Iankilevitch*, it is difficult to know how an insurer could reliably assess income without access to corporate documents, where the insured has control of corporate revenues and expenses. There seems to have been a lack of cooperation on that score in this case.

I will now turn to the relevance of the *ITA* definition of "earned income" and Perth's thesis that the business's post-accident income is that of the insured, regardless of the insured's active participation or not in that business.

"Earned income" and the *ITA*

First, I will provide a brief overview of the relevant sections in the *SABS* to give context. Section 4, entitled "Interpretation," includes definitions for both a self-employed person's weekly income or loss from self-employment at the time of the accident and a self-employed person's loss from self-employment after an accident. These definitions are applied later in determining the payable IRB and are discussed in more detail shortly. The eligibility criterion of substantial inability to engage in the essential tasks of self-employment within 104 weeks of the accident is set out in s. 5. The period of the benefit is set out in s. 6.

Section 7 sets out how to determine the amount of the payable IRB. Two important concepts are the "weekly base amount" and the payable IRB:

- Determine the "weekly base amount" in s. 7(2), which is 70% of employment and self-employment income that exceeds weekly loss from self-employment: both self-employment income and loss from self-employment are thus tied to the business income.

- Add back in 70 per cent of the amount of the insured person's weekly loss from self-employment incurred as a result of the accident, including loss from hiring a worker to replace the insured's active participation in the business: again, weekly loss from self-employment is tied to the business, and the insured's lack of active participation in the business is taken into account at this point.

- Subtract from the weekly base amount the total of all other income replacement assistance, if any, [as defined in s. 4(1)] for the particular week the benefit is payable.

- Determine the payable IRB by comparing the net weekly base amount and the weekly maximum (almost always $400, as in this case); the lesser amount is the payable IRB [s. 7(1)].

- Deduct post-accident income from the payable IRB.

Note that while weekly losses from self-employment are added to the weekly base amount, the payable IRB is capped at $400 (unless optional benefits were purchased), and any deduction for post-accident income is taken from that payable IRB and not the weekly base amount.

I will now return to the definitions of pre-accident self-employment income and loss and post-accident self-employment loss and the relevance of the *ITA*. The Arbitrator proceeded as if any reference in s. 4 of the *SABS* to the *ITA* imports all of the *ITA* into the *SABS*. However, a reference to an *Act* does not necessarily mean every provision thereof is imported: see *Scarlett v. Belair Insurance Company Inc.*, 2015 ONSC 3635 and the discussion about the Minor Injury Guideline. Further, with respect to those definitions, the Arbitrator relied on a definition of "earned income" that is irrelevant because she applied a definition that was not of general application in the *ITA* but limited to specific circumstances not dealing with determining income or loss.

Instead, one must look to the context to see what is relevant. In that regard, for the purposes of determining pre-accident income or loss from self-employment, s. 4(3) provides that this is "the amount that would be 1/52 of the amount of the person's income or loss from the business for the last completed taxation year as determined in accordance with Part I of the *Income Tax Act* (Canada)." What is relevant in Part I of the *ITA* are therefore those sections devoted to determining *the amount of the person's income or loss from the business*. The relevant part of the *ITA* is Subdivision B of Part 1, entitled "Income or Loss from a Business or Property." Subdivision B appears at sections 9-37, but the Arbitrator cited s. 146, which is outside that Subdivision.

As to business income, subsection 9(1) of the *ITA*, under "Basic Rules," provides as follows:

> **Income**
>
> 9(1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

Thus, the *general principle is that the taxpayer's income is the business's profit*. This obviates the whole problem of whether one looks at T4s or dividend income in the allocation of profit.

For instance, the Suranis themselves had no idea how their accountant allocated the businesses' profits. What matters for the purposes of the *SABS* is simply the profit of the business.

As for a self-employed person's loss from self-employment after an accident, s. 4(4) provides that it is determined *in the same manner as losses from the business* in which the person was self-employed would be determined under s. 9 (2) of the *ITA* but without making any deductions for unreasonable or unnecessary expenses to prevent a loss of revenue or to pay to replace the self-employed person's active participation in the business. The complete subsection reads as follows:

> (4) A self-employed person's loss from self-employment after an accident is determined in the same manner as losses from the business in which the person was self-employed would be determined under subsection 9 (2) of the *Income Tax Act* (Canada)[7] without making any deductions for,
>
> (a) any expenses that were not reasonable or necessary to prevent a loss of revenue;
>
> (b) *any salary expenses paid to replace the self-employed person's active participation in the business, except to the extent that the expenses are reasonable in the circumstances*; [italics added] and
>
> (c) any non-salary expenses that are different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses are reasonable in the circumstances and necessary to prevent or reduce any losses resulting from the accident.

As can be seen, a loss incurred to replace the self-employed person's *active participation in the business* is included in s. 4(4)(b), and moreover, the concept of post-accident loss from self-employment goes beyond active participation to include broader business expenses.

These, then, are the subsections importing the *ITA* into the *SABS*. The relevant provisions of the *ITA* determine profit or loss of a business. However, as already noted, the Arbitrator quoted from s. 146(1)(a)(ii). Section 146 deals with RRSPs, in Division G, which deals with deferred and

[7]Subsection 9 (2) reads as follows: "Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require."

other special income arrangements, and not with determining the amount of the person's profit or loss from the business. Section 146 also states at its very beginning that the definitions listed – including "earned income" – only apply to that section. The other places in the *ITA* that either refer to that definition of "earned income" or a similar one likewise are not relevant for the purposes of determining the amount of the person's income or loss from the business.[8] Accordingly, that definition is not relevant in determining the profit or loss of a business, which as we have seen is treated as the self-employed person's income.

Certainly, broad definitions from the *ITA* could be useful in interpreting the *SABS* where the *SABS* refers to or incorporates portions of the *ITA*. Part XVII of the *ITA* is entitled **Interpretation**, and s. 248(1) has a number of definitions that apply in the *ITA* in general, including, for instance, business, employment and office. But the definition in s. 146 of "earned income" is not of that type.

Accordingly, a self-employed person's pre-accident income and loss as defined in s. 4(3), and post-accident loss as defined in s. 4(4), is that of the business. If anything, the current *SABS* is even more oriented towards the calculation of self-employment income as business income – that is, profit as calculated under the *ITA*. Section 83 in the *1994 SABS* as discussed in *Bilouras* was the equivalent of s. 4 in the current *SABS* where it deals with calculating income from self-employment. Section 83 specifically provided exceptions for expenses that were eligible for capital cost allowance or an allowance on eligible capital property and capital gains or losses. The calculation of pre-accident income or loss now in s. 4(3) simply relies on the *ITA*, as does s. 4(4) for post-accident losses.

I will now turn to the deduction for post-accident income.

[8]The definition is also cross-referenced in s. 147.5, which deals with Pooled Registered Pension Plans. That is not the only definition of "earned income," either, as there is one in s. 63, which deals with child care expenses. The definition in s. 63(3)(c) of "earned income" also includes the taxpayer's incomes from all businesses carried on either alone or as a partner actively engaged in the business. That definition, too, is cross-referenced in the section for charitable gifts, s. 110(2).

"Earned Income" and the *SABS* Deduction for Post-Accident Income

The chief submission by Perth is that the insured's level of activity after the accident is not relevant when it comes to the deduction, as income or loss is that of the business. We have seen that principle tying business income to that of the self-employed person regarding pre-accident income and loss in s. 4(3), and regarding post-accident loss in s. 4(4). As for post-accident income, Perth submits that, while it is not specifically defined, it should also be focused on the business income.

First, I had sketched out above how the calculation of the IRB turns on the amount by which the weekly income from self-employment exceeds the amount of the loss from self-employment. Both of these measures are predicated on the income or loss of the business. Similarly, post-accident business loss is taken into account in the IRB calculation in s. 7.

The deduction from IRBs in turn is set out in s. 7(3):

> 7(3) The insurer may deduct from the amount of an income replacement benefit payable to an insured person,
>
> (a) 70 per cent of any gross employment income received by the insured person as a result of being employed after the accident and during the period in which he or she is eligible to receive an income replacement benefit; and
>
> (b) 70 per cent of any income from self-employment earned by the insured person after the accident and during the period in which he or she is eligible to receive an income replacement benefit.

A fundamental problem with the Arbitrator relying on the phrase "earned income" to determine deductibility is that it does not even appear in s. 7(3)(b). As the discussion above has shown, the term "earned income" in the *ITA* is a term of art with a meaning limited by its context such that it is not relevant to the determination of profit.

Beyond that, Perth submits that the Arbitrator erred in her focus on the change from "received" to "earned," noting that there is no presumption that a change to legislation means a change to the law.[9] Note that the term "received" is still used for employment income, so the law did not change in that respect. Rather, I find that the law simply reflects the pre-existing practice that both accountants referred to, namely that the word "received" was already being treated as "earned" in some cases, such as for real estate commissions. To that extent, the amendment simply clarifies that practice. The word "earned," then, relates to timing.

Perth submits that, if Mrs. Surani's approach to s. 7(3)(b) is correct, and the only income deductible from her IRB is income she herself "earned" from engaging in the essential tasks of her pre-accident employment, the section would be rendered redundant. It is already agreed that she could not engage in the essential tasks of her self-employment, which is why she qualified for the benefit in the first place.

I find there is merit in that submission. It is clearest in reviewing the case of Mr. Surani. What the Arbitrator really found is that he could carry out the essential tasks of keeping the corporations running. However, it is equally applicable to Mrs. Surani. The Arbitrator's analysis confirmed that Mrs. Surani could not carry out the essential tasks of running the business, but that exercise was redundant.

Perth submits that an interpretation that allows self-employed persons to be compensated for post-accident losses, the cost of replacing their "active participation," continued receipt of an IRB and income from their continuing business, all without deduction, produces a windfall.

Mrs. Surani submits that she was forced to hire several pharmacists to replace her role at the Scarborough Pharmacy and paid them a greater income than what she drew from the company. She submits that the resulting reduced profits post-accident show that an award of IRBs would not be a "windfall."

[9] *Legislation Act*, 2006, S.O., c. 31, s. 56.

However, Mrs. Surani's submission shows a failure to appreciate the role of accident benefits. They are not meant to put insureds back in the same position they were pre-accident. So the mere fact that the company profits were reduced does not entitle her to benefits. But beyond that, if the replacement person effectively cost the pharmacy more, the reduced post-accident profits would reduce the amount of the deduction. There is thus a balance in the system.

In conclusion, pre-accident self-employed income and loss is determined based on profits under the *ITA*, and post-accident loss is also based on that of the business, subject to limitations to prevent exaggerated losses. The evidence showed that it was left up to the Suranis' accountant to determine whether the profit was allocated by T4s or dividends. After the accident, Mrs. Surani received both T4 and dividend income, although the T4s from 2011 were not provided to Perth. The Canada Revenue Agency determined she should have reported $26,191 in taxable dividends for 2011, and in 2012 she reported $74,577 in taxable dividends.

I find it would be inconsistent to say that the companies' profits are relevant in determining pre-accident income but irrelevant in determining post-accident income. I find that the legislature could not have intended that an insured could continue to profit from a business, yet not have that profit deducted from her IRBs as post-accident income. I find that, just as with post-accident loss, post-accident income is broader than just the person's active participation in the business. Not only that, but Mrs. Surani's active participation was already accounted for in the determination of post-accident loss, so I do not see why her active participation has to be again accounted for in determining post-accident income. That is, the company earns income thanks to the replacement person, so it makes no sense that the income earned can only be deducted from post-accident income if Mrs. Surani *herself* actively participates in the company. The fact that the incurred loss does not actually benefit Mrs. Surani because the weekly base amount already exceeds the $400 maximum does not affect the analysis. Mrs. Surani could have elected the optional IRB of $1,000 a week, representing a pre-accident income of around $74,000, so the addition of the post-accident loss to the weekly base amount might have made a difference.

Accordingly, I find the Arbitrator erred in finding that the deduction of post-accident income from the IRBs is only available if Mrs. Surani herself was "actively engaged" or actively participating in the business. It is more consistent to find that, just as with pre-accident income

and loss and post-accident loss, post-accident income of the self-employed person is the post-accident profit of the person's business. That income is deductible from any IRBs.

The appeal is therefore allowed, regarding Mrs. Surani. Since Mrs. Surani's income and IRBs were based on the business income from the Scarborough Pharmacy, Perth is entitled to deduct business income earned at the Scarborough Pharmacy from Mrs. Surani's IRBs.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

___________________________	August 18, 2017
David Evans Director's Delegate	Date