

BETWEEN:

MANFRED SCHULER

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: William J. Renahan

Heard: July 19, 1999, at the Offices of the Financial Services
Commission of Ontario in Toronto.

Appearances: Mr. Schuler represented himself
Eric K. Grossman for Economical Mutual Insurance Company

Issues:

The Applicant, Manfred Schuler, was involved in motor vehicle accidents on February 11 and February 16, 1997. He applied for and received statutory accident benefits from Economical Mutual Insurance Company (“Economical”), payable under the *Schedule*.¹ Economical terminated weekly income replacement benefits effective May 10, 1998. The parties were unable to resolve

¹The *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.

their disputes through mediation, and Mr. Schuler applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Is Mr. Schuler entitled to income replacement benefits from February 18, 1997 to April 14, 1997 and after May 10, 1997 pursuant to paragraph 4. 2 of the *Schedule*?
2. Is Economical entitled to a repayment of the income replacement benefits it paid pursuant to section 47?
3. Is Economical entitled to an assessment against Mr. Schuler pursuant to subsection 282(11.2) of the *Insurance Act*?
4. Is either party entitled to its expenses of the arbitration proceeding pursuant to subsection 282(11) of the *Insurance Act*?

Result:

1. Mr. Schuler is not entitled to income replacement benefits.
2. Economical is not entitled to a repayment of income replacement benefits.
3. Economical is entitled to an assessment against Mr. Schuler in the amount of \$3,000 pursuant to subsection 282(11.2).
4. Economical is entitled to its expenses of the arbitration proceeding.

EVIDENCE:

At the outset of the hearing, Mr. Schuler consented to the dismissal of his application for income replacement benefits and he sought permission to withdraw his application for payment of \$350 which represented the outstanding balance of a treatment plan prepared by Dr. Harris. Liberty made no submissions on terms of a withdrawal and I allowed the withdrawal.

The only testimony was that of Angie McGowan, an employee of Economical. She was involved in the adjustment of Mr. Schuler's claim from mediation onwards. The only other evidence was a number of documents submitted by Economical. Mr. Schuler did not dispute the relevant evidence advanced by Economical. The relevant evidence was generally consistent and I accept it.

Mr. Schuler was involved in motor vehicle accidents on February 11, 1997 and February 16, 1997. At the time of the accidents, he was receiving unemployment insurance benefits and had just started a training course sponsored by his union to upgrade his skills so that he could obtain employment working on subway construction. He completed the course on March 7, 1997.

He signed applications for accident benefits on February 20, 1997. Economical received the applications on March 10, 1997. On March 20th, Economical wrote to Mr. Schuler's then lawyer asking for further information. Throughout the dealings between the parties, Economical refers to this letter and Mr. Schuler's failure to produce the requested information as grounds for not paying benefits. Under section 33 of the *Schedule*, the benefit is not payable for any period before the insured complies with his duty to provide information, including:

1. Any information reasonably required to assist the insurer in determining the person's entitlement to a benefit.
2. A statutory declaration as to the circumstances that gave rise to the application for a benefit.

In the letter of March 20, 1997, Economical asked for completion of those parts of the Application for Accident Benefits dealing with particulars of attendance at school and dealing with other insurance or collateral benefits and for a completed Employer's Confirmation of Income. Economical also asked for the statutory declaration referred to in section 33. In his Application for Accident Benefits Mr. Schuler wrote that in the 52 week period before the accident he worked for Herman's Contracting as a landscape technician and had earned \$711 for the period. Economical was entitled to a complete application for benefits and statutory declaration. As well, I find that Economical's request for the Employer's Confirmation of Income was reasonable and that Economical was entitled to this document. Therefore, Economical was entitled to rely on section 33 of the *Schedule* and not pay benefits until Mr. Schuler provided that information.

In August 1997, Mr. Schuler participated in mediation at the Financial Services Commission and undertook to provide the information requested by Economical in its letter of March 20, 1997. Mr. Schuler also maintained that, except for a few weeks work, he had not returned to work because he was disabled. Mr. Schuler filed for arbitration on October 24, 1997. On December 29, 1997, Mr. Schuler's new lawyer faxed to Economical confirmation of income from Herman's Contracting and information on the amount of unemployment insurance benefits Mr. Schuler received. At the arbitration pre-hearing on April 20, 1998, Mr. Schuler maintained that except for one month's work in the spring of 1997 with Deep Foundations, a subway contractor, he could not work because he was disabled.

Economical arranged a medical examination of Mr. Schuler with Dr. Goldstein who reported on April 16, 1998 that Mr. Schuler was not disabled from working. Dr. Goldstein also noted Mr. Schuler's statement that he had not worked since Deep Foundations. Economical decided to pay income replacement benefits from December 29, 1997, the date it received the information which it could use to calculate the benefit, to May 10, 1998, the date it received Dr. Goldstein's opinion

that Mr. Schuler was not disabled. The cheque payment included interest. I heard no evidence on the total amount of the cheque or the amount of interest. I calculate that Economical paid 19 weeks at \$222.86 per week for a total of \$4,234.34. On May 10, 1998, it sent Mr. Schuler a Notice of Stoppage which set out Mr. Schuler's right to ask for an assessment at a Designated Assessment Centre if he did not agree. Mr. Schuler did not ask for the assessment.

In March 1999, Economical received surveillance evidence that Mr. Schuler was working at Bombardier. On July 6, 1999, Economical received Mr. Schuler's income tax returns which showed that from the date of the accidents in February 1997 to the end of the year, he earned \$25,681 and that in 1998 he earned \$19,815. On the day of this hearing, a representative from Bombardier appeared under summons and produced an employment file which indicated that Mr. Schuler started work for Bombardier the day after he left Deep Foundations and that he is still employed at Bombardier.

Analysis:

Repayment:

An insurer's right to a repayment is set out in section 47 which includes the following:

- (1) A person shall repay to the insurer,
 - (a) any benefit under this Regulation that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud;
 - (b) . . .
 - (c) any income replacement, non-earner or caregiver benefit or any benefit under Part VI, to the extent of any payments received by the person that are deductible from those benefits under this Regulation.
- (2) If a person is required to repay an amount to an insurer under this section,

(a) the insurer shall give the person notice of the amount that is required to be repaid; and

(b) if the person is receiving an income replacement or caregiver benefit, the insurer may give the person notice that the insurer intends to collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit.

(3) The obligation to repay a benefit does not apply unless the notice under subsection (2) is given within 12 months after the payment was made.

(4) Subsection (3) does not apply if the benefit was paid as a result of wilful misrepresentation or fraud.

Counsel for Economical raised the issue of repayment for the first time in his opening submissions at this hearing. In his closing submissions he conceded that Economical had not provided Mr. Schuler with notice under section 47. He argued that an insurer is not required to provide notice under section 47 where the claim for repayment is based on wilful misrepresentation or fraud on the part of the insured. I disagree. Not only does the duty of fairness require that a person know the case to be made against them, subsection 47(4) does not relieve the insurer from providing the notice stipulated in paragraph 47(2)(a). Subsection 47(4) only relieves the insurer from complying with the 12-month limitation period set out in subsection 47(3). Economical gave no notice.

What constitutes sufficient notice in the case of wilful misrepresentation or fraud will depend on the circumstances of the particular case. In this case, Economical received the income tax records, which showed that it had overpaid Mr. Schuler, about two weeks before the hearing. I heard no explanation why Economical could not have given Mr. Schuler notice before this hearing that it sought repayment, the amount of the repayment and the grounds. Nor did I hear submissions that I should adjourn the hearing so that Economical could give Mr. Schuler proper notice.

Since Economical did not give Mr. Schuler notice under section 47, it is not entitled to a repayment of income replacement benefits.

Assessment under subsection 282(11.2) of the Insurance Act:

The arbitrator who conducted the pre-hearing reported to the parties in a letter dated April 22, 1998. Among other things, she advised that the hearing arbitrator had authority to order an applicant to pay the insurer up to \$3,000 if the hearing arbitrator found the arbitration frivolous, vexatious or an abuse of process.

Economical paid Mr. Schuler income replacement benefits for the period December 29, 1997 to May 10, 1998 at the rate of \$222.86 per week for a total of \$4,234.34. I find that during this period Mr. Schuler worked for Bombardier. He earned \$25,681 in 1997 and \$19,815 in 1998. His 1998 earnings averaged \$381.05 per week and exceeded his weekly income replacement benefit.

Since Mr. Schuler's post-accident earnings exceeded the income replacement benefit paid by Economical, the application of subsection 6(2) of the *Schedule* would have reduced the benefit to zero. Further, I find that Mr. Schuler wilfully misrepresented to Ms. McGowan at the mediation and the arbitration pre-hearing and to Dr. Goldstein at his medical examination that, except for a couple of weeks in the spring of 1997, he was disabled from working when in fact he worked continuously for Deep Foundations and Bombardier from April 14, 1997. Further, when he applied for arbitration on October 24, 1997, Mr. Schuler had not provided Economical with the information it requested from him and to which it was entitled, including information it needed to calculate any income replacement benefit.

I find that Mr. Schuler knew that his application had no merit. I find that his application for arbitration was frivolous and an abuse of process and I assess \$3,000 against him pursuant to subsection 282(11.2) of the *Insurance Act*, which is the full amount of the assessment Economical had to pay to the Commission in order to respond to Mr. Schuler's claim.

EXPENSES:

The criteria for awarding expenses in this case are contained in Ontario Regulation 464/96 and include each party's degrees of success, conduct of a party that tended to prolong, obstruct or hinder the proceeding, and whether the position taken by a party was manifestly unfounded. Mr. Schuler's application was without merit. As well, he did not produce highly relevant documents in a timely manner. He did not produce his employment records until the day of the hearing and he did not produce his income tax records until shortly before the hearing. He failed to produce other documents including his unemployment insurance file and his union employment file. I find that he prolonged and hindered the proceedings. Considering these and all the other circumstances, I award Economical its expenses of the arbitration proceeding.

William J. Renahan
Arbitrator

August 19, 1999

Date

FSCO A97-001955

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ARBITRATION ORDER

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

1. The application for arbitration is dismissed.
2. Economical is entitled to recover from Manfred Schuler \$3,000.00.
3. Economical is entitled to its expenses of the arbitration proceeding.

William J. Renahan
Arbitrator

August 19, 1999

Date