

BETWEEN:

SHANNON BRAUEN

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: David Evans

Heard: July 5, 1999, entirely by way of written submissions
received on May 31 and June 22, 1999.

Representation: Barbara L. Legate for Ms. Brauen
Eric K. Grossman for Personal Insurance Company of Canada

Issues:

The Applicant, Shannon Brauen, was injured in a motor vehicle accident on June 16, 1994. She applied for and received statutory accident benefits from Personal Insurance Company of Canada (“The Personal”), payable under the *Schedule*.¹ The Personal terminated weekly income

¹The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98. O.R. 776/93 was extensively modified by O.R. 781/94; accordingly, where necessary, “1994 *Schedule*” refers to the original O.R. 776/93, and “1995 *Schedule*” refers to O.R. 776/93 as amended.

replacement benefits on February 2, 1996. The parties were unable to resolve their disputes through mediation, and Ms. Brauen alleges that she applied for arbitration in January 1997 at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended (the “*Act*”). However, that application was apparently never received by the Commission, and it was resubmitted in April 1999. The Personal submits that Ms. Brauen is barred by subsection 281(5) of the *Act* from proceeding to arbitration because she failed to file for arbitration within the prescribed two-year limitation period. Ms. Brauen claims that the January 1997 application was lost either by the postal service or by the Commission and submits that she should be permitted to proceed to arbitration.

The preliminary issue is:

1. Is Ms. Brauen precluded from proceeding to arbitration because her application for arbitration was filed beyond the two-year limitation period set out in subsection 281(5) of the *Act* and subsection 72(1) of the *Schedule*?

Result:

1. Ms. Brauen is precluded from proceeding to arbitration, as she filed her arbitration application beyond the two-year period provided in subsection 281(5) of the *Act*.

EVIDENCE AND ANALYSIS:

On April 30, 1999, Ms. Legate transmitted a letter by facsimile to the offices of the Commission advising that Ms. Brauen’s application for arbitration had been forwarded on January 31, 1997 “but was apparently misplaced or not received” by the Commission. She asked that the Commission grant an extension of time for filing the application. By letter dated May 4, 1999, Ms.

Mary Joanne Sullivan, Manager, Administrative and Support Services, replied to Ms. Legate that an extension would not be contemplated unless she had documentation to indicate the Commission's receipt of the original file such as a cancelled cheque or correspondence, failing which the application would be considered a new application that was made out of time.

On May 25, 1999, Ms. Legate replied by facsimile enclosing her file copy of the correspondence forwarded to the Commission and advising that the \$100 application fee had been voided as a consequence of its being stale-dated and uncashed. Ms. Sullivan requested further submissions by counsel, and Ms. Legate replied on June 10, 1999, to which Mr. Grossman responded on June 22, 1999.

The submissions indicate that on January 16, 1996, The Personal wrote Ms. Brauen asking her to accept the letter as formal notice that her weekly indemnity benefits were being terminated effective February 2, 1996. Subsection 281(5) of the *Act* requires an insured person to commence a court action or an application for arbitration within two years of the date of the insurer's refusal to pay benefits; that is, in this case, by the end of January 1998. There is no allegation that this notice was in any way insufficient. As Ms. Legate herself notes, benefits were denied by The Personal and mediation was undertaken. The Report of Mediator, generated on August 29, 1996, indicates that the issues of the termination of weekly income replacement benefits and an overpayment of \$3,813.75 remained unresolved. Ms. Legate provided a copy of a letter directed to the Commission dated January 31, 1997, enclosing the Application for Arbitration. Although Ms. Legate submits that it appears "beyond dispute" that The Personal was served with a copy of the Application, Mr. Grossman submits that The Personal's first notification was a letter from Ms. Legate dated July 23, 1998 requesting their consent to a further filing of the Application.

The date that The Personal received notification of the Application is less relevant than the date the Commission received the Application. Ms. Legate was not able to produce documentation

indicating that the Commission had received the original file before the expiration of the limitation period — the original application fee was never cashed, and Ms. Legate had no correspondence from the Commission with respect to this file prior to April 1999. Accordingly, I find that the application was filed out of time.

Unless her application that was filed out of time can proceed, Ms. Brauen's claims die: the Divisional Court² upheld the Director's Delegate decision in *Kirkham and State Farm*³ that there is no "rolling limitation" such that the only thing lost by a late application are the claims that are more than two years old at the time of the application. However, the facts of this case are essentially identical to those in *Lopez and Commercial Union Assurance Company*,⁴ in which the Applicant also alleged that the Commission had misplaced the application. Although Ms. Legate's attempt to file the Application is better documented than in *Lopez*, the fact remains that she did not take steps to confirm the filing or remediate the situation until it was too late. In any event, as Arbitrator Allen noted, previous arbitration decisions have held that arbitrators have no jurisdiction to extend the two-year limitation period or grant an aggrieved party relief from forfeiture.⁵

Ms. Brauen is therefore barred from proceeding to arbitration, as she failed to comply with the limitation requirements under subsection 281(5) of the *Act*.

²Unreported, March 30, 1998; leave to appeal the Divisional Court decision to the Court of Appeal was denied.

³(OIC P96-00069, January 27, 1997)

⁴(FSCO A98-001223, April 13, 1999)

⁵See for instance, *Rahman and Co-operators General Insurance Company*, (OIC A-000854, December 21, 1993); *Zeppieri and Royal Insurance Company of Canada*, (OIC A-005237, February 17, 1994), confirmed on appeal, (OIC P-005237, December 22, 1994; and *Robertson and Royal Insurance Company of Canada*, (OIC A96-00361, July 11, 1996).

EXPENSES:

The Application for Arbitration in this matter was never accepted. Accordingly, neither an application fee nor an assessment fee has been paid. If necessary, I may be spoken to regarding expenses.

David Evans
Arbitrator

July 14, 1999

Date

FSCO A99-000441

BETWEEN:

SHANNON BRAUEN

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

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

1. The Application for Arbitration is refused. Ms. Brauen is precluded by subsection 281(5) of the *Act* from proceeding to arbitration.

David Evans
Arbitrator

July 14, 1999

Date