

BETWEEN:

LEACHOY CHEN

Applicant

and

PAFCO INSURANCE COMPANY LIMITED

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Joyce Miller, Arbitrator

Heard: By written submissions received January 18, 1999.

Appearances: Kevin Doan for Mr. Chen
Eric K. Grossman for Pafco Insurance Company Limited

Issues:

The Applicant, Leachoy Chen, was injured in a motor vehicle accident on May 30, 1996. He applied for and received statutory accident benefits from Pafco Insurance Company Limited (“Pafco”), payable under the *Schedule*.¹ Pafco terminated weekly income replacement benefits on January 19, 1997. The parties were unable to resolve their disputes through mediation, and

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 and 463/96.

Mr. Chen applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issues in this motion brought pursuant to section 65 of the *Dispute Resolution Code* are:

1. Is Mr. Chen entitled to interim income replacement benefits pursuant to subsection 279(4.1) of the *Insurance Act*?
2. Is Mr. Chen entitled to a Loss of Earning Capacity (“LEC”) offer pursuant to section 21 of the *Schedule*?
3. Is Mr. Chen entitled to a special award pursuant to subsection 282(10) of the *Insurance Act*?
4. Is Mr. Chen entitled to his expenses for this motion?

Result:

1. Mr. Chen is not entitled to interim weekly income replacement benefits.
2. Pafco is not required to make an LEC offer to Mr. Chen.
3. Mr. Chen is not entitled to a special award.
4. Mr. Chen is not entitled to his expenses for this motion.

BACKGROUND

Mr. Chen was involved in an accident on May 30, 1996. Five days before the accident, he had advised his insurer, Kingsway General Insurance Company (“Kingsway”), in a handwritten note, that as of May 25, 1996 he was cancelling his policy with Kingsway.² After the accident, Mr. Chen applied to Kingsway for accident benefits, but Kingsway denied his claim on the basis that he was no longer insured.

Mr. Chen then applied for benefits to Pafco, who was the insurer of the other vehicle involved in the accident. Pafco submitted that it paid Mr. Chen accident benefits on the basis that Kingsway had adduced sufficient evidence contemporaneous to the accident to prove that Mr. Chen had indeed cancelled his insurance policy before the accident.

In November 1996, Mr. Chen underwent an Insurer’s Medical Examination (“IME”), for Pafco, in which a graduated return to work was recommended. In December 1996, Mr. Chen underwent a Medical and Rehabilitation Designated Assessment Centre (“DAC”) examination which concluded that Mr. Chen could resume all pre-accident activities. In January 1997, Pafco advised Mr. Chen that his benefits would be terminated. Mr. Chen disputed the termination and a DAC appointment was made. Mr. Chen did not attend the DAC appointment. Pafco terminated Mr. Chen’s weekly benefits on January 19, 1997.

Mr. Chen applied for mediation regarding Pafco’s termination of his benefits. Mediations were held on February 10 and March 24, 1997. The mediator’s report of March 24, 1997 stated that the issues remaining in dispute were entitlement to income replacement benefits, housekeeping and supplementary medical benefits.

²The note stated: “I Lechoy Chen wish to cancel insurance policy #171842 with Kingsway General Insurance as of noon time 25 May — 1996. Too Expensive”

On February 25, 1997, Mr. Chen was convicted under the *Highway Traffic Act* of the offence of “Driving a vehicle without automobile insurance.” As a result of this conviction, pursuant to paragraph 58(1)(c) of the *Schedule*,³ Pafco was not required to pay income replacement benefits.

On February 27, 1997, Pafco informed Mr. Chen about this fact and asked for a repayment of any weekly benefits already paid.

Mr. Chen appealed his conviction and, in April 1997, he applied for arbitration against Kingsway for a determination as to whether he was insured with Kingsway at the time of the accident.

On January 8, 1998, Mr. Chen asked the Provincial Court Judge to adjourn the appeal hearing and stay his conviction pending the determination by an arbitrator as to whether he had a valid contract of insurance with Kingsway at the time of the accident. The Judge agreed to Mr. Chen’s request and adjourned the appeal until the determination of the arbitration.

On September 11, 1998, about a year and a half after the mediator’s report, Mr. Chen attended a DAC which found that he was unable to work because of the accident.

On November 4, 1998, Mr. Chen applied for arbitration against Pafco based on the failed issues in the mediator’s report of March 24, 1997.

On November 10, 1998, an arbitrator at the FSCO held he did not have the jurisdiction to determine whether a valid automobile policy was in force between Mr. Chen and Kingsway at the

³ Section 58(1) provides:

The insurer is not required to pay income replacement benefits under Part II ... in respect of a person who was the driver of an automobile at the time of the accident,...

(c) if, as a result of the accident, the driver is convicted of operating the automobile while it was not insured under a motor vehicle liability policy;

time of the accident. He stated that the forum for such a determination was private arbitration under O.Reg. 283/95.⁴

On November 30, 1998, Mr. Chen applied for interim benefits against Pafco pursuant to section 65 of the *Dispute Resolution Code*.

Mr. Chen submitted that he is no longer subject to the penalty of paragraph 58(1)(c) on the basis that his conviction is stayed. He, therefore, requests that Pafco pay him income replacement benefits of \$272.53 a week from January 20, 1997 and ongoing, plus interest, and indexation, as well as an order that Pafco make Mr. Chen an LEC offer within seven days of the order.

Pafco's position is that Mr. Chen was not insured by Kingsway at the time of the accident and that is why it paid accident benefits to Mr. Chen. In its submissions, Pafco stated:

... Kingsway General furnished correspondence generated by Mr. Chen himself in which Mr. Chen notified Kingsway General of his request to immediately cancel the policy before the date of the accident on May 30, 1996. Indeed, there is no evidence capable of belief that has been so far amassed to suggest that Mr. Chen did not intend to cancel this policy before May 30, 1996. Moreover, the evidence on its face makes it very clear that Mr. Chen both had the intention and manifested that intention to terminate his policy with Kingsway General before the date of the accident.

Pafco submitted that its position is supported by the fact that Mr. Chen was convicted of the offence of driving a vehicle without automobile insurance. Pafco further submitted that on the facts of this case Mr. Chen should not be allowed to rely on the stay of his conviction since the

⁴O. Reg. 283/95 1 provides that "*All* disputes as to which insurer is required to pay benefits under section 268 of the Act *shall* be settled in accordance with this Regulation" [emphasis added].

Subsection 7(1) states that: If the insurers cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute *shall* be resolved through an arbitration under the *Arbitration Act, 1991*. [emphasis added]

stay was only granted pending the disposition of Mr. Chen's arbitration proceeding against Kingsway.

Analysis and Findings

In the case of *Pham and Progressive Casualty Insurance Company*,⁵ Arbitrator William Renahan reviewed the cases to determine the test to apply on an application for interim benefits. In his decision he stated:

In my view, the cases fall into two groups. First, are those cases where the applicant claims that the insurer failed to comply with a procedural provision which requires the insurer to pay certain benefits notwithstanding the insurer has decided that the insured is not entitled to those benefits. These provisions include section 64 which sets out the circumstances under which the insurer must continue to pay weekly benefits after it has decided that the insured is no longer entitled to weekly benefits. The second group of cases on interim benefits are those where the applicant claims that he urgently requires benefits on an interim basis and that it would be unfair to make him wait for a hearing. In my view, the two cases involve two different tests and two standards of proof.

Mr. Chen did not present any evidence or submissions that he urgently required benefits. Nor, did he clearly specify that he is relying on a lack of compliance with a procedural provision. Even if I were to infer from his very brief submissions that he was relying on a lack of compliance with a procedural provision, I find that on the facts of this case it is not appropriate to award him interim benefits.

I find that Mr. Chen cannot rely on the stay of his conviction alone to get interim income replacement benefits from Pafco. In my view, although Mr. Chen's conviction was stayed, it was

⁵(FSCO A98-001209, A97-000490, November 4, 1998, p.3)

only stayed pending the determination by an arbitrator whether Mr. Chen was insured by Kingsway at the time of the accident. Mr. Chen, however, did not get this determination.

I conclude that the evidence clearly shows that Mr. Chen's conviction has not been overturned. Until the appeal of his conviction is concluded, it would be premature on my part to determine that the exclusion clause does not apply. The final determination of whether or not the exclusion clause is in effect, in my view, should be left for the arbitration hearing after all of the relevant evidence has been fully and completely presented.

Accordingly, I find that Mr. Chen is not entitled to income replacement benefits from January 20, 1997, nor to an order that Pafco make him an LEC offer and, consequently, he is not entitled to a special award.

EXPENSES:

I exercise my discretion not to award Mr. Chen his expenses incurred in this preliminary issue hearing.

Joyce Miller
Arbitrator

February 9, 1999

Date

FSCO A98-001423

BETWEEN:

LEACHOY CHEN

Applicant

and

PAFCO INSURANCE COMPANY LIMITED

Insurer

ARBITRATION ORDER

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

1. Mr. Chen's request for interim benefits is dismissed.

Joyce Miller
Arbitrator

February 9, 1999

Date