FSCO A97–000931

BETWEEN:

LEACHOY CHEN

Applicant

and

KINGSWAY GENERAL INSURANCE COMPANY

Insurer

DECISION ON A MOTION

Issues:

The Applicant, Leachoy Chen, was injured in a motor vehicle accident on May 30, 1996. In June 1996, he applied for statutory accident benefits from Kingsway General Insurance Company ("Kingsway"), payable under the *Schedule*.[1] Kingsway declined payment, asserting that the Applicant had cancelled his Kingsway automobile insurance policy on May 25, 1996.

In July 1996, Mr. Chen applied for mediation against Kingsway. The mediation failed in September 1996. That same month, the Applicant applied to Pafco Insurance Company ("Pafco") for payment of statutory accident benefits. Shortly thereafter, Pafco put Mr. Chen and Kingsway on written notice of its position that Kingsway was the insurer responsible for paying Mr. Chen accident benefits. In the interim, it agreed to pay Mr. Chen accident benefits "while the insurers attempt to resolve their dispute." No further formal steps have been taken by either Kingsway or

[1]The *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.

Pafco to resolve the question as to which insurer is responsible for paying Mr. Chen the statutory accident benefits to which he may be entitled.

In April 1997, Mr. Chen applied for arbitration against Kingsway at the Financial Services Commission of Ontario[2] under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended (the "*Act*"). The pre-hearing letter of December 17, 1997 lists the issues as follows:

1. Was there a valid automobile policy in force between Mr. Chen and Kingsway at the time of the accident?
2. Is Kingsway liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act*, R.S.O.1990, c. I.8, as amended, because it unreasonably withheld or delayed payments to Mr. Chen?
3. Is Kingsway liable to pay Mr. Chen's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8?
4. Is Kingsway entitled to a special assessment against Mr. Chen on the grounds that the arbitration undertaken by him is frivolous and vexatious?

The pre-hearing arbitrator also noted that Mr. Chen claimed interest on any amounts owing.

Kingsway now brings a motion pursuant to section 65 of the *Dispute Resolution Practice Code* for:

1. An Order dismissing the arbitration proceeding.

2. An Order for the costs of the within motion and of the within arbitration proceeding payable by the insured, Leachoy Chen, to the insurer, Kingsway General Insurance Company forthwith on a solicitor and client scale.

3. Such further and other relief as the Arbitrator may deem just.

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[2]Effective July 1, 1998, the Ontario Insurance Commission was changed to the Financial Services Commission of Ontario, pursuant to the *Financial Services Commission of Ontario Act*, S.O. 1997, c.28.

The grounds of the motion are essentially that the issues disputed herein are outside the jurisdiction of an Arbitrator at the Financial Services Commission of Ontario.

Result:

1. The question of whether there was a valid automobile policy in force between Mr. Chen and Kingsway at the time of the accident, is, in the present context, outside the jurisdiction of an Arbitrator at the Financial Services Commission of Ontario.

Hearing:

This motion was heard at the offices of the Financial Services Commission of Ontario in North York, Ontario, on Tuesday, October 27, 1998, before me, Lawrence Blackman, Arbitrator.

Present at the Hearing:

Applicant:	Leachoy Chen
Mr. Chen's Representative:	Kevin Doan Barrister and Solicitor
Kingsway's Representatives:	Stanley C. Tessis and Jamie R. Pollack Barristers and Solicitors
Kingsway's Officer:	Elizabeth Iwata

The proceedings were transcribed by Mr. John Tomczak, of Professional Court Reporters Inc.

Mr. Eric Grossman appeared as counsel for the witness, Ms. Deborah Hope and was allowed to object to questions asked of her. I upheld the objections of both parties to Mr. Grossman's request to give submissions in this motion on behalf of Pafco, as his principal had no standing in

this proceeding. I am advised that two mediations may have been commenced by Mr. Chen against Pafco, but that Mr. Chen has not proceeded to arbitration against Pafco.

Witnesses:

1. Ms. Deborah Hope.
2. Ms. Elizabeth Iwata.

Exhibits:

Exhibit 1	Copy of two page facsimile transmission from Pafco Insurance Company to Mr. Jamie R. Pollack of Laxton, Glass & Swartz, dated October 22, 1998.
Exhibit 2	Copy of Application for Accident Benefits dated June 12, 1996 from the files of Pafco Insurance Company, but noting insurance coverage with "Kingsway."
Exhibit 3	Letter from Mr. David Carranza of Juan Carranza Law Office to Kingsway General Insurance Company, dated June 14, 1996.

Also before me was Kingsway's motion record.

Evidence and Findings:

Kingsway submits that the dispute in this proceeding clearly pertains to the question of which insurer is responsible for paying the statutory accident benefits to which Mr. Chen may be entitled. Kingsway argues that with the coming into force of Ontario Regulation 283/95 - Disputes Between Insurers, on May 27, 1995, this Commission no longer has the authority to deal with such disputes.

O. Reg. 283/95 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]

Pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the *Act*, the first insurer that receives a completed application for benefits is responsible for paying statutory accident benefits to the insured person.

Kingsway relies on the decision of Senior Arbitrator Rotter in *Brown and Allstate Insurance Company of Canada* (OIC A97-000579, May 29, 1997). In that case, the applicant first sought statutory accident benefits against Allstate. Allstate declined to pay benefits, arguing that it did not insure the applicant at the time of the accident. Mr. Brown then applied for benefits to two other insurance companies and to the Motor Vehicle Accident Claims Fund. Having apparently not received any benefits from any insurer, Mr. Brown applied to this Commission against all four possible insurers, seeking specific benefits. Only the claim against Allstate, the first insurer applied to, was allowed into the Commission. In rejecting Allstate's submission that before making any order for entitlement, there must first be a finding that Allstate had a valid policy in effect at the time of the accident, the arbitrator stated that:

> the forum for determining whether a particular insurance company is liable to pay benefits is no longer the Dispute Resolution Group of the Ontario Insurance Commission. Ontario Regulation 283/95 further provides that all disputes about which insurer is required to pay benefits shall be resolved through a private arbitration under the *Arbitrations Act, 1991* . . . I need not decide, as a preliminary matter, whether Allstate is an "insurer" for the purposes of the Regulation, since that is integral to the question which the arbitrator appointed under the *Arbitrations Act, 1991* must determine.

The Divisional Court, [1998] O.J. No. 2318, Court File No. 487/97, upheld this decision, stating that:

> the arbitrator was well aware of the policy of the *Act* and the change in forum for such disputes from the Commission to private arbitration. The arbitrator did not err in her view that the forum to determine whether where [sic] there was a dispute between insurers was governed by O. Reg. 283/95.

Mr. Chen submits that while O. Reg. 283/95 removed priority disputes from this Commission's jurisdiction, it did not remove coverage issues. He relies on the decision of Arbitrator Alves in *Mariona and Canadian General Insurance Company* (FSCO A96-000717, September 25, 1998) in this regard. In that case, the applicant received statutory accident benefits from Canadian General for a period of time. Mr. Mariona subsequently sought payment of certain specific accident benefits. Canadian General raised as a defence that Mr. Mariona was not its insured at the time of the accident. Over the objection of Mr. Mariona, Arbitrator Alves found that she did have jurisdiction to determine the question of coverage.

In coming to her decision, Arbitrator Alves relied on the decision of Arbitrator Palmer in *Abdulbaki and Royal Insurance Company of Canada* (OIC A-010205, December 12, 1995). Arbitrator Palmer, in determining that she had jurisdiction to determine whether parties had entered into a binding settlement, held that:

> The ***ultimate*** question before me at the arbitration hearing is whether Mr. Abdulbaki is entitled to further statutory accident benefits. In some cases, the question may be answered directly by the presentation of evidence about an applicant's medical condition. However, in other cases, arbitrators are first called upon to determine such questions as "was there an accident, as defined in the *Schedule*," "was the applicant an insured person, as defined in the *Schedule*," "did the applicant sustain an injury in the accident." In this case, in the first instance, the question is whether a settlement of the issue of entitlement has already taken place.
>
> [Emphasis added]

Arbitrator Alves, in *Mariona*, was not persuaded that the issue before her was a priority dispute within the scope of O. Reg. 283/95. Rather, she ruled that the question of coverage was a

preliminary question to be decided before the issue of Mr. Mariona's entitlement to and the amount of any statutory accident benefits could be determined.

Mr. Chen submits that this arbitration proceeding is not about insurer priority. Rather, the Applicant submits that the issue herein is his entitlement to statutory accident benefits. Mr. Chen submits that entitlement is the very essence of the Commission's jurisdiction given by subsection 279(1) of the *Act*, which states:

> Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled shall be resolved in accordance with sections 280 to 283 and the *statutory accident benefits* Schedule.

I note that the issues set out in the pre-hearing letter of December 17, 1997 do not include a claim for entitlement to any specific benefit under the *Schedule*. Rather, the pre-hearing arbitrator stated that:

> The extent of [Mr. Chen's] injuries and the quantum of benefits and entitlement to Supplementary Medical Benefits have not yet been mediated. Should the parties wish to include these or other relevant issues in this arbitration, they are encouraged to apply for mediation of these issues in a timely manner.

There is no indication that any specific entitlement or quantum issues have been brought into arbitration. Mr. Chen's counsel, in fact, confirmed that no specific benefits are being sought in this proceeding. Unlike *Brown* or *Mariona* (where specific benefits were being sought), the claim here is for benefits generally. The Applicant agreed that the order he was seeking in this proceeding was that Kingsway is the proper insurer against which he is entitled to claim benefits.

I do not find that all "coverage" questions have been removed from the jurisdiction of this Commission by O. Reg. 283/95. The determining factor as to whether this Commission has jurisdiction to determine such a question is the context in which the issue is raised.

What is being sought by the Applicant in this proceeding is not a order for specific benefits against which a preliminary issue is raised as to whether the responding insurance company is ***"an"*** insurer (as in *Brown* and *Mariona*). Rather, the crux of this proceeding is whether Kingsway is ***"the"*** insurer responsible for paying the benefits to which the Applicant may be entitled.

I find that the "ultimate question" in this proceeding, unlike *Mariona*, is not "what" entitlement to statutory benefits Mr. Chen may have or the quantum of such benefits. The "ultimate question" is, rather, "from whom" may Mr. Chen claim such entitlement. If this Commission decides that there was a valid policy in force between Mr. Chen and Kingsway at the time of the accident, then it has decided, at least in the Applicant's view, that Kingsway is the insurer responsible for paying benefits to Mr. Chen. If coverage is not established, then by implication, the Commission will have determined that Pafco is the responsible insurer.

Seeking a determination that a particular insurer should pay benefits (where another insurer has been paying benefits) is but another way of asking "which insurer is required to pay benefits." This is the very issue encompassed by the O. Reg. 283/95 and which the legislature intended no longer to be dealt with by this Commission, as explicitly stated by Practice Note 9 of the *Dispute Resolution Practice Code*.

Mr. Chen, however, submits that this proceeding does not come under O. Reg. 283/95, because that regulation is entitled "Disputes between Insurers" and this case is not a dispute between insurers, but rather a dispute between an insurer and an insured person.

I do not accept this argument. Section 9 of *The Interpretation Act*, R.S.O. 1990, c. I.11 states:

> The marginal notes and headings in the body of an Act and reference to former enactments form no part of the Act but shall be deemed to be inserted for convenience of reference only.

The pertinent portion of O. Reg. 283/95 is section 1, which states that ***all*** disputes as to which insurer is required to pay benefits under section 268 of the *Act* ***shall*** be settled in accordance with the Regulation. The language is mandatory. Under section 268, "the insurer of an automobile in respect of which" either an occupant or non-occupant is "an insured" is first in priority to pay benefits. Any dispute to determine whether an applicant was "an insured," where the issue is not entitlement to benefits but which insurer is responsible for paying benefits, must, in my view be settled in accordance with O. Reg. 283/95, whether the issue is raised by the insurer or the putative insured. I note that the Regulation provides specific rights to "an insured person" to participate in the private arbitration if he or she objects to the transfer of the claim by the "first insurer" or disagrees with an agreement between the insurers. I do not accept that the Applicant has the right to determine the issue of which insurer is responsible for paying his or her benefits outside the legislatively mandated scheme and in the absence of a possible insurer.

Mr. Chen submits, in the alternative, that he is entitled to a determination of the coverage issue, because section 2 of O. Reg. 283/95 requires the first insurer that receives a "completed" application for benefits to pay statutory accident benefits. Mr. Chen submits that Kingsway is the first insurer and has not paid benefits as required under the regulation. Kingsway, however, argues that it was not the first insurer to receive a "completed" application.

The purpose of O. Reg. 283/95 includes ensuring that a claimant will receive benefits pending the resolution of a priority dispute. Practice Note 9 reiterates that concern, stating "[t]his Regulation ensures that accident victims will not be denied statutory accident benefits simply because the first insurer applied to for benefits thinks another insurer should pay . . . The Regulation is intended to ensure that a claimant is not caught between two insurers, both of which are disputing their liability to pay benefits."

Mr. Chen is not caught between two insurers, both of which dispute their liability to pay benefits. Pafco agreed to pay statutory accident benefits and has, in fact, paid $10,779.82 in medical expenses, $865 in housekeeping expenses and $6,213.45 in income replacement expenses covering June 7, 1996 until January 20, 1997 (as well as incurring $11,590 in insurer's medical examinations and disability assessments).

I have no evidence that Mr. Chen is being denied any benefits by Pafco by reason of a priority dispute. Rather, Pafco ceased paying medical benefits because of a designated assessment centre report and because no further accounts were submitted. Weekly income replacement benefits were stopped on the basis of the paragraph 58(1)(c) exclusion that entitles an insurer not to pay weekly benefits where "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." I am advised, however, that Mr. Chen's conviction is presently under appeal.

It would appear to me that Mr. Chen's true "entitlement" dispute concerns issues of whether certain specific medical expenses were reasonably incurred or whether he has been ***convicted*** of operating an uninsured vehicle. Such issues would seem, at this point, to properly involve Pafco, subject to any agreement to the contrary between the parties or an order by a private arbitrator, under the *Arbitration Act, 1991*. That no further steps have apparently been taken towards resolution of the priority dispute in accordance with the *Arbitration Act, 1991*, does not give this Commission jurisdiction to deal with this priority dispute.

If, however, I am found to have erred in declining jurisdiction, I agree with Senior Arbitrator Rotter in *Brown*, that "[w]hether or not a valid policy exists in a particular case is a question of fact and law, which can only be determined after a full hearing on the merits." I also agree with the comments of O'Leary J. in the dissenting appellate decision in *Brown*, that "[e]conomy of time and fairness to the parties in such a case dictate that all should participate in the one proceeding."

Both Kingsway and Pafco should be parties to that proceeding, both having full opportunity to obtain pre-hearing disclosure, present evidence, cross-examine, give submissions and have the same appeal rights. As important, both should be equally bound by the decision of the adjudicator, so as to prevent a multiplicity of proceedings.

This motion was brought pursuant to section 65 of the *Dispute Resolution Practice Code*. That provision allows an arbitrator to make a preliminary or interim order within a proceeding, pending a final order. I did not receive submissions on my authority to dismiss an arbitration pursuant to this provision. Nor did I receive submissions on the question of expenses. I leave it to the Registrar to set an early resumption date of this proceeding, to deal with these matters.

Order:

1. The question of whether there was a valid automobile policy in force between Mr. Chen and Kingsway at the time of the accident, is, in the present context, outside the jurisdiction of an Arbitrator at the Financial Services Commission of Ontario.

November 10, 1998

Lawrence Blackman
Arbitrator

Date