



Appeal P96-00070

OFFICE OF THE DIRECTOR OF ARBITRATIONS

SHAWN P. LUNN

Appellant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

BEFORE: David R. Draper, Director's Delegate

COUNSEL: Shawn P. Lunn represented himself
David Zarek (for State Farm)

APPEAL ORDER #2

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that:**

1. The appeal is dismissed and the arbitration order dated July 24, 1996 is confirmed.
2. No appeal expenses are payable.

David R. Draper
Director's Delegate

August 12, 1998

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This is an appeal by Shawn P. Lunn from an arbitration decision dated July 24, 1996, dealing with the calculation of his weekly income benefits. Mr. Lunn claims the arbitrator erred in averaging his pre-accident income over the full 52 weeks preceding the accident instead of over the 19 weeks he worked.

II. ANALYSIS

The history of the dispute between these parties is set out in my earlier decision dated April 30, 1997. They have disagreed about a number of issues concerning Mr. Lunn's entitlement to benefits under the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994*, O. Reg. 672, as amended ("the *Schedule*"), arising out of an automobile accident on December 25, 1993. The issue in this appeal, however, is extremely narrow.

At the second arbitration hearing in May 1996, the arbitrator was asked to determine the proper amount of Mr. Lunn's weekly income benefits. At issue was the calculation of his pre-accident income under subsection 12(7) of the *Schedule*, which provides as follows:

1. The person's gross weekly income shall be deemed to be the greatest of,
 - i. his or her average gross weekly income from his or her occupation or employment for the four weeks preceding the accident,
 - ii. his or her average gross weekly income from his or her occupation or employment for the fifty-two weeks preceding the accident,
 - iii. \$232.

At the time, there were conflicting decisions about whether the calculation should be done over

the full four or 52-week periods (“the *Vo* approach”¹), or only over the periods that the person was employed during the four or 52 weeks preceding the accident (“the *Scavuzzo* approach”²).

The arbitration hearing proceeded on an agreed statement of facts. The parties agreed that if the *Scavuzzo* approach was correct, Mr. Lunn’s benefits would be \$591.43 per week. However, if the *Vo* approach was to be used, he would only be entitled to receive \$250.22 per week.

The arbitrator released her decision on July 24, 1996, adopting the *Vo* approach. Through his lawyer, Mr. Lunn appealed. It was agreed, however, that the appeal would remain on hold pending the Director of Arbitration’s appeal decision in the *Vo* case.

In December 1997, the Director released her decision. She held that while the arbitrator was bound by the appeal decision in *Scavuzzo*, she was not. The Director went on to disagree with the decision in *Scavuzzo*, concluding that pre-accident income must be averaged over the full four or 52 weeks preceding the accident, whether or not the insured person earned income throughout these periods. The Director confirmed this approach in a subsequent decision - *Kotsiakos and State Farm Mutual Automobile Insurance Company*, (January 16, 1998, OIC P-002354).

Mr. Lunn was provided with the appeal decisions in *Vo* and *Kotsiakos*, but decided to proceed with his appeal. However, he was no longer represented by counsel.

Mr. Lunn was asked to submit his written submissions according to the provisions of the Dispute Resolution Practice Code. Due to the delay in receiving them, I set a deadline of June 1, 1998. At

Mr. Lunn’s request, the deadline was extended to July 15, 1998. However, that date passed

¹ *Vo and Maplex General Insurance Company*, (October 4, 1993, OIC A-002777). I was the arbitrator in this case, a decision released before I took my current position as an Appeals Officer.

² *Scavuzzo and Canadian Home Assurance*, (June 19, 1992, OIC P-000626).

without any contact from Mr. Lunn, despite efforts by the Appeals Administrator to contact him.

I agree with the analysis in *Vo* and *Kotsiakos*, and find no reason not to apply it here. Therefore, Mr. Lunn's pre-accident income must be averaged over the full four or 52 weeks preceeding the accident. Based on the agreed statement of facts filed at the arbitration, this means that the proper amount of his weekly income benefits is \$250.22 per week. This is the amount ordered by the arbitrator and, therefore, Mr. Lunn's appeal is dismissed.

In his *Notice of Appeal*, Mr. Lunn also challenged the arbitrator's refusal to order a special award. However, I find no basis for disturbing the arbitrator's conclusion.

III. APPEAL EXPENSES

When this appeal was filed, it raised a legitimate question on which there were conflicting decisions. Mr. Lunn took the responsible step of agreeing to put the matter on hold pending the Director's decision in *Vo*. However, once the *Vo* and *Kotsiakos* decisions were released, he should have reconsidered his position. Instead, he chose to proceed, but did not provide any reason why those decisions do not apply to his situation or should be reconsidered. In the circumstances, no appeal expenses will be ordered.

August 12, 1998

David R. Draper
Director's Delegate