

BETWEEN:

SHAWN P. LUNN

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION #2

Issues:

The Applicant, Shawn P. Lunn, was injured in a motor vehicle accident on December 25, 1993. He applied for and received statutory accident benefits from the Insurer, payable under Ontario Regulation 672.¹ The Insurer paid Mr. Lunn weekly income benefits under section 12 of the *Schedule* until September 30, 1994. By Order dated August 18, 1995, I found that Mr. Lunn was entitled to further weekly income benefits. I also held that the Insurer was not entitled to any repayment of weekly income benefits on the basis of error or fraud. The Insurer appealed my Order with respect to my conclusion concerning the issue of repayment only. The Director's Delegate referred back for hearing the issue of the amount of benefit to which Mr. Lunn was entitled, prior to dealing with the appeal on the repayment issue.

The issues to be determined in this hearing are:

¹ Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.

1. What is the amount of weekly income benefit to which Mr. Lunn is entitled?
2. Is Mr. Lunn entitled to receive a special award pursuant to section 282(10) of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended?
3. Is State Farm entitled to its costs pursuant to section 282(11.2) of the *Insurance Act*?

Mr. Lunn claims interest on any benefits owing and his expenses of this proceeding.

Result

1. The amount of weekly income benefit to which Mr. Lunn is entitled is \$250.22.
2. Mr. Lunn's request for a special award pursuant to section 282(10) of the *Insurance Act* is denied.
3. State Farm's request for its expenses pursuant to section 282(11.2) of the *Insurance Act* is denied.
4. State Farm shall pay Mr. Lunn's expenses, as submitted to it, forthwith upon receipt of this Order.

Hearing:

The hearing was held in North York, Ontario, on May 7, 1996, before me, Fern Kirsch, arbitrator.

Present at the Hearing:

Applicant: Shawn P. Lunn

Applicant's
Representative: Stanley Pasternak
Barrister and Solicitor

Insurer's
Representative: David Zarek
Barrister and Solicitor

Insurer's
Officer: T. O'Brien

Mr. Joseph Crngarov, Karen Collins and Cathy Rice from State Farm were also present and observed a portion of the proceedings.

Background

The history of this matter is complicated. Mr. Lunn was involved in a motor vehicle accident on December 25, 1993. The first hearing of this matter took place before me on June 28, and 29, 1995 and July 4, 1995, and my findings were recorded in my Order dated August 18, 1995.

I found that Mr. Lunn did not qualify for weekly income benefits under section 12(2)1.ii of the *Schedule* as being on temporary lay-off at the time of the accident. I concluded that he qualified for weekly income benefits within section 12(3) of the *Schedule* because he was employed for 180 days in the 12-month period preceding the accident. The Insurer did not appeal these conclusions. The parties agreed that Mr. Lunn is entitled to weekly income benefits for the period from October 1, 1994 to February 15, 1995, when Mr. Lunn returned to work.

I did not consider the issue of the quantum of Mr. Lunn's benefit in the first hearing. The Insurer requested its inclusion and counsel for the Applicant objected to its inclusion. At the hearing I ruled I would consider the issue of quantum in this proceeding only if it was necessary for me to

determine the amount of any repayment from Mr. Lunn. Since I found that State Farm was not entitled to a repayment, I found it was not necessary to consider the issue of quantum.

State Farm filed an appeal of certain aspects of my Order dated August 18, 1995. By letter dated March 10, 1996, Director's Delegate Draper confirmed that State Farm had appealed my Order regarding the issue of repayment and sought an order calculating the proper amount of such repayment.

In addition, the parties were unable to agree on the amount of Mr. Lunn's arbitration expenses from the first hearing and Mr. Lunn requested an assessment of these expenses. The assessment of expenses was referred back to me, and heard by me on February 8, 1996. My decision on the assessment was rendered March 15, 1996. State Farm requested a stay of my Order concerning expenses on the basis that it should not be required to pay Mr. Lunn's expenses until the appeal on the issue of repayment was determined, submitting that if it was successful on the appeal, it would be entitled to set off the arbitration expenses against any repayment Mr. Lunn was obligated to make. Director's Delegate David Draper denied State Farm's request for a stay of my August 18, 1995 Order and ordered that Mr. Lunn's expenses be paid pending the appeal.

A second arbitration hearing was ordered to deal with the issue of quantum of Mr. Lunn's benefit.

A/ QUANTUM OF BENEFIT

Agreed Statement of Facts

For the purposes of this hearing, the parties agreed to the following facts:

1. Mr. Lunn was employed at #690322 Ontario Incorporated carrying on business as Custom Insulation Systems (“Custom”), from February 8, 1993 until June 26, 1993.
2. During this time Mr. Lunn earned \$14,143.46 in 19 weeks.
3. Mr. Lunn earned additional income from Family Passions in the sum of \$2,121.00 which he earned during three weeks in October 1993.
4. Mr. Lunn worked for 22 weeks in total in the 52 weeks prior to the accident and earned a gross income of \$16,264.46.
5. The parties agree that Mr. Lunn’s weekly income benefit should either be \$591.43,² or \$250.22.³

Law and Findings

Weekly income benefits are calculated based on 80 per cent of an applicant's gross weekly income from occupation or employment in the four or 52 weeks immediately preceding the accident. From this figure are subtracted any payments for loss of income received or available to the insured person under the laws of any jurisdiction or income continuation benefit plan, or received under any sick leave plan. The gross weekly income is determined in accordance with the rules set out in section 12(7).

Section 12(7) provides that an applicant's gross weekly income from his or her occupation or employment is deemed to be the greatest of his average gross weekly income for the four or 52 weeks preceding the accident, or \$232.

²Applicant’s position-- *Scavuzzo and Canadian Home Assurance Company* (March 18, 1992), OIC A-000626.

³Insurer’s position-- *Vo and Maplex General Insurance Company* (October 4, 1993), OIC A-002777.

The Applicant wishes me to rely on his gross weekly income for the 52 weeks preceding the accident.

The *Schedule* does not address the question as to how to calculate income when the insured person worked for part, but not all, of the four or 52 weeks before the accident. Cases at the Commission deal with this issue in different ways.

Counsel for the Applicant relied on a line of cases from the Commission that follow the decision of *Scavuzzo*,⁴ and argued that in determining the amount of weekly income benefit, Mr. Lunn's income should be averaged over the 22 weeks that he worked.

If I accept the Applicant's submissions, it is agreed that Mr. Lunn would be entitled to receive \$591.43 per week.

Counsel for State Farm disputes the method of calculation used in *Scavuzzo* and relies on the decision of *Vo*,⁵ and the cases which follow it.⁶ State Farm proposes that Mr. Lunn's gross weekly income ought to be calculated by taking the \$16,264.46 that Mr. Lunn earned during the 22 weeks prior to the accident, and averaging it over 52 weeks.

⁴ *Supra* note # 2; *Scavuzzo* was affirmed on appeal to the Director's Delegate, dated June 19, 1992; followed in *Richardson and Royal Insurance Company of Canada* (November 3, 1992), OIC A-001141; *Alleyne and Royal Insurance Company of Canada* (February 18, 1993), OIC A-001107; and *Kotsiakos and State Farm Mutual Automobile Insurance Company* (June 21, 1995), OIC A-002354.

⁵ *Vo* *Supra* note # 3; *Bush and Pilot Insurance Company* (April 25, 1994), OIC A-004687; *Jerry Youden and Economical Insurance Company*, Cameron J., Ontario Court (General Division), May 14, 1996.

⁶ *Khanna and State Farm Mutual Automobile Insurance Company* (January 26, 1994), OIC A-001665; *Bush Ibid*; *Ahmed and Royal Insurance Company of Canada* (October 13, 1994), OIC A-004411; *Mouawad and Alpina Insurance Company* (June 30, 1994), OIC A-003226 (under appeal); *Wessels and CAA Insurance Company* (June 14, 1995), OIC A-013676; and *Furtado and York Fire & Casualty Insurance Company* (June 22, 1995), OIC A-008927.

If I accept the Insurer's submissions, it is agreed that Mr. Lunn would be entitled to receive a weekly income benefit of \$250.22 per week.

In *Scavuzzo*, Senior Arbitrator Susan Naylor restated the view she had expressed in *McCormick*⁷ that subsection 12(7)1 is ambiguous and admits of both interpretations. She states at page 17 and 18:

Where a statutory provision is ambiguous and capable of more than one meaning, it is necessary to have regard to the context of the wording used, and the purpose and objectives of the legislation in order to select the interpretation that best reflects the intent of the Legislature.

In *McCormick*, the purpose of weekly income benefits was expressed in the following terms:

Income benefits are intended to compensate for the financial effects of the automobile accident. The purpose of the legislative scheme therefore is best served by an interpretation that results in the most accurate reflection of the applicant's employment income.this is achieved by averaging his employment income over the period of time that the applicant was in fact working, and disregarding the period of time in which he was incapacitated from work.

The *No-Fault Benefits Schedule* is remedial legislation and therefore must be construed in the manner that best serves the purposes of the legislation -the provision of fair, adequate and speedy compensation for loss of income from employment resulting from an automobile accident. These objectives are best served by calculating benefits based on the Applicant's average earnings over the period of time that he was in fact working, because this calculation better reflects the loss he sustained as a result of the accident.

In *Vo*, Arbitrator David Draper held that he was not bound to follow the appeal decision in

⁷*McCormick and Economical Mutual Insurance Company* (October 2, 1991), OIC A-000139.

Scavuzzo, and in his opinion, the issue was not settled. He found that the facts before him were different from the facts in *Scavuzzo* and *McCormick* in that the applicant in *Vo* was unemployed at the time of the accident, but was able to work and was looking for a job.

Arbitrator Draper held that subsection 12(7)1 was intended to provide “relatively clear rules about entitlement.” In his opinion, the plain language of the provision requires an applicant's gross weekly income to be averaged over four weeks or 52 weeks, even if the applicant's income was interrupted during those periods. He stated at page 22, “The section does not suggest that the applicant's gross weekly income is to be the most accurate reflection of his or her pre-accident income or anticipated income.”

I agree with this view.

Mr. Vo was indefinitely laid off from his employment in January 1992, and was receiving unemployment insurance benefits at the time of his accident, the following June. In the case of *Bush*, which follows *Vo*,⁸ Arbitrator Palmer heard evidence that, at the time of the accident, Mr. Bush was receiving temporary total disability benefits from the Workers' Compensation Board. She calculated his entitlement to weekly income benefits based on the income from employment amounts he earned in the 52 weeks preceding his accident, divided by 52 weeks.

In my first decision in this matter, I found that Mr. Lunn was entitled to receive weekly income benefits under section 12(3) as he had been employed for more than 180 days in the 12-month period preceding the accident. He had worked 22 weeks in the 52 weeks preceding the accident.

⁸*Bush*, *supra* note # 5

In the year prior to the accident, Mr. Lunn had been in receipt of worker's compensation benefits and at the time of the accident, he was in receipt of Unemployment Insurance Benefits, which continued to the date of the accident.

The facts of this case are similar to the facts in *Vo* as the applicant was unemployed at the time of the accident. I agree with Arbitrator Draper's finding that section 12(7)1 of the *Schedule* does not suggest that the applicant's gross weekly income is to be the most accurate reflection of his pre-accident income or anticipated income.

Accordingly, I accept the Insurer's submissions that Mr. Lunn's gross weekly income in the amount of \$16,264.46 should be divided by 52 weeks for a weekly income benefit of \$250.22 per week.

B/ SPECIAL AWARD

Mr. Lunn seeks a special award under section 282(10) of the *Insurance Act* on the ground that State Farm unreasonably withheld or delayed the payment of his weekly income benefits after the issuance of my Order on August 18, 1995 to date.

Section 282(10) states:

(10) If the arbitrator finds that an insurer has **unreasonably withheld or delayed payments**, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *No-Fault Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month,

compounded monthly, from the time the benefits first became payable under the *Schedule*.

[emphasis added]

My Order of August 18, 1995 has not been stayed to date. Furthermore, there is no appeal of my Order that Mr. Lunn's entitlement arises under section 12 of the *Schedule*. Accordingly, my Order continues in full force and effect. Nevertheless, both counsel confirmed that to date, State Farm has paid no further weekly income benefits to Mr. Lunn in accordance with my Order of August 18, 1995 -- not even the minimum amount of \$185.60 per week. Counsel for the Applicant submits that by failing to pay pursuant to my Order, State Farm has unreasonably withheld Mr. Lunn's payments.

I am concerned by State Farm's disregard for my Order of August 18, 1995. The fact that State Farm may be successful on its appeal for repayment does not relieve it of its obligations under the *Schedule* and under my Order to pay weekly income benefits. I would ordinarily have found that State Farm had unreasonably withheld Mr. Lunn's weekly income benefits from August 18, 1995. However, in this case there are extenuating circumstances to mitigate against the perceived unreasonableness of State Farm's position.

At the first hearing, counsel for the Insurer requested that the issue of quantum of benefit payable to Mr. Lunn be included as an issue in the hearing. Counsel for the Applicant strenuously objected to the inclusion of this issue as it had not been mediated. The pre-hearing arbitrator had earlier considered the issue and stated that "[T]he calculation of any benefit to which the Applicant is entitled was not mediated and the Applicant does not consent to it being included in the arbitration." I advised counsel for the Applicant that failure to include the issue in the first hearing would result in an Order dealing exclusively with the issue of entitlement. Nevertheless, counsel for the Applicant maintained his objection to its inclusion.

Accordingly, I made a ruling excluding the issue of the quantum of Mr. Lunn's benefit from the first hearing except insofar as it might be necessary to determine the amount of a repayment owing to the Insurer. As I found that no repayment was owing, I did not consider the quantum issue.

In my view, the delay in paying Mr. Lunn's benefits pursuant to my Order is partly attributable to the Applicant's counsel's failure to agree to have the issue of quantum included in the original hearing. The Insurer made it clear that it did not know what amount of benefit to pay. If quantum had been determined, State Farm might have paid the benefit without the necessity of Mr. Lunn now waiting for determination of this further issue and the appeal. Mr. Lunn chose not to include the issue of quantum of benefit in the first proceeding. He cannot now rely on this decision and the delay that resulted to claim a special award from the Insurer.

In my view, in these unusual and special circumstances, Mr. Lunn cannot allege that the Insurer unreasonably withheld the payment of benefits. Although I have sympathy for Mr. Lunn, I am not prepared to find in this case that State Farm's withholding of benefits was unreasonable under section 282(10) of the *Insurance Act*. Accordingly, Mr. Lunn is not entitled to receive a special award.

C/ INSURER'S EXPENSES

The Insurer seeks payment of an amount up to its assessment fee of \$2,000.00 on the basis that this proceeding was frivolous and vexatious pursuant to section 282(11.2) of the *Insurance Act*. State Farm relies on the fact that there has been a multiplicity of proceedings in this case.

It is true that there have been a number of proceedings in this case. Nevertheless, cases at the

Commission have held and I agree, that it is the right of the applicant to determine which issues to put before an arbitrator. The issue of the amount of Mr. Lunn's benefit must now be determined as a result of the Insurer's request for an appeal on the issue of repayment. Were it not for this request, the matter might not have been sent back to me by the Director's Delegate for a further hearing. The Director's Delegate, not the Applicant, determined that the issue of quantum must now be decided. No other evidence supports the Insurer's submission that this hearing was frivolous and vexatious. Accordingly, the Insurer's request for its costs pursuant to section 282(11.2) of the *Insurance Act* is denied.

D/ APPLICANT'S EXPENSES

Mr. Lunn seeks an award of the expenses he has incurred in this arbitration. Under section 282(11) of *Insurance Act*, an arbitrator may exercise discretion in awarding expenses. It has been held that it is appropriate to award an applicant his or her expenses unless it is established that the application for arbitration was "manifestly frivolous or vexatious, or that the applicant's conduct unreasonably prolonged the proceedings."⁹ I have not found this to be the case here.

I choose to exercise my discretion in this case and find that Mr. Lunn is entitled to his expenses as set out in Schedule 1 of the *Dispute Resolution Practice Code*. At the time of this hearing, I anticipated that another assessment of expense hearing might be requested by counsel. Accordingly, the parties were given until May 29, 1996 to review the Applicant's expenses from the date of the last hearing and advise me in writing of any concerns. The parties did not respond by that date. I therefore assume that there is no issue as to the reasonableness of the Applicant's expenses. Accordingly, State Farm shall pay Mr. Lunn's expenses, as submitted to it, forthwith

⁹ *McCormick, supra note # 7*

upon receipt of this Order.

ORDER

1. The amount of weekly income benefit to which Mr. Lunn is entitled is \$250.22.
2. Mr. Lunn's request for a special award pursuant to section 282(10) of the *Insurance Act* is denied.
3. State Farm's request for its expenses pursuant to section 282(11.2) of the *Insurance Act* is denied.
4. State Farm shall pay Mr. Lunn's expenses, as submitted to it, forthwith upon receipt of this Order.

July 24, 1996

Fern Kirsch
Arbitrator

Date