

BETWEEN:

DELROY DUFFUS

Applicant

and

CGU INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: K. Julaine Palmer

Heard: May 28, 2002 in Toronto

Appearances: No one appeared for Mr. Duffus
Heather Kawaguchi for CGU Insurance Company of Canada

Issues:

Mr. Delroy Duffus was injured in a motor vehicle accident on April 9, 1999. He received statutory accident benefits from CGU Insurance Company of Canada (“CGU”), payable under the *Schedule*.¹ The parties disagreed about Mr. Duffus’ entitlement to income replacement benefits. They were unable to resolve their dispute through mediation and Mr. Duffus applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98 and 114/00.

The issues in this hearing are:

1. Is Mr. Duffus entitled to receive a weekly income replacement benefit from November 16, 1999, onward, pursuant to section 4 of the *Schedule*? If so, what is the amount of weekly income replacement benefit to which Mr. Duffus is entitled?
2. Is CGU or Mr. Duffus liable to pay the expenses of this proceeding under section 282(11) of the *Insurance Act*.

Mr. Duffus also claims entitlement to interest for overdue payments, pursuant to section 46(2) of the *Schedule*.

Result:

1. Messrs. Carranza and Associates are released as solicitors for the Applicant.
2. The Application for Arbitration is dismissed.
3. Delroy Duffus shall pay CGU Insurance Company of Canada \$3,000 under subsection 282(11.2) of the *Insurance Act*, representing the amount assessed against the Insurer, and \$1,000 under subsection 282 (11) of the *Act*, as expenses of the arbitration.

EVIDENCE AND ANALYSIS:

Representation

Solicitor Kelley Campbell appeared at the arbitration hearing and asked to withdraw as Mr. Duffus' representative. She filed a letter setting out the circumstances. Ms. Campbell indicated that Mr. Duffus had provided a new address and telephone number to her assistant a few weeks after the pre-hearing conference. Otherwise, they had been unable to contact him. Mr. Duffus did not attend the pre-hearing in December 2001, although he was notified of the date and time, apparently both by his lawyer and certainly by the Commission. No communication to Mr. Duffus was returned to the Commission by the post office as undeliverable.

I asked for submissions from both parties about the terms that should be required for the withdrawal of the solicitor, pursuant to Rule 9.8 of the *Dispute Resolution Practice Code (4th Edition - May 31, 2001)*. Ms. Campbell made no submissions. The Insurer did not oppose Ms. Campbell's motion to withdraw. However, the Insurer submitted that expenses should be paid, since the Applicant's solicitor had not informed them that she was unable to contact her client until just before the hearing, despite the fact that the situation had persisted for months, and despite the Insurer's letters complaining of the Applicant's failure to produce some of the documents which his solicitor had agreed to produce at the pre-hearing conference.

I permitted Ms. Campbell to withdraw from the arbitration without penalty, but with a warning to notify both the Commission and opposing counsel, in good time, if in the future she encountered similar problems in contacting her client.

The Main Issue

Mr. Duffus did not appear and no evidence on his behalf was filed. On December 19, 2001, the same day as the pre-hearing conference had taken place, a Notice of Hearing for May 28 and 29, 2002 was prepared by the case administrator at the Commission and forwarded by mail to Mr. Duffus at the address on the Application for Arbitration. This document was not returned by the post office as undeliverable. As set out in the Notice and Rule 37.7 of the *Dispute Resolution Practice Code*, where a notice of hearing has been sent to a party and the party does not attend, the arbitrator may proceed with the hearing in the party's absence and the party is not entitled to any further notice in the proceeding. I am satisfied that Mr. Duffus was effectively notified of the hearing.

The Insurer filed a brief of documents and the file of the Workplace Safety and Insurance Board relating to Mr. Duffus' workplace accident of December 14, 1995 in which he sustained serious injuries. Mr. Duffus fractured both the radius and ulna of his left arm and his left femur. He had returned to modified, part-time work on March 15, 1999, about three and a half weeks before this automobile accident on April 9, 1999.

At the Insurer's request, Mr. Duffus was examined by Dr. David Simmonds, an orthopaedic surgeon in Mississauga, on October 1, 1999. Dr. Simmonds had previously examined Mr. Duffus in August 1999. By the October examination, Mr. Duffus had completed a course of physiotherapy following the motor vehicle accident. Dr. Simmonds' opinion was that Mr. Duffus had reached maximum medical improvement as far as his soft-tissue injuries to his neck and back resulting from the car accident were concerned. Dr. Simmonds wrote:

I think having examined this man twice; that the major disability or functional disability relates to the accident that he sustained in 1995. In my mind this has left him with a permanent disability of weakness in the left leg and the left arm. He certainly has the desire to return to work. I do not think it is any impairment related to the recent motor vehicle accident is going to prevent him from taking over his old job.

In this arbitration, Mr. Duffus bears the legal burden of proof that after November 16, 1999 he continued to suffer a substantial inability to perform the essential tasks of his employment, as a result of injuries he sustained in the motor vehicle accident of April 9, 1999. He has not discharged this burden. The Insurer's evidence suggests Mr. Duffus had substantially improved by early October 1999.

For these reasons, I dismiss Mr. Duffus' claim for income replacement benefits from November 16, 1999, onward.

EXPENSES:

The Insurer seeks both its expenses of the arbitration under subsection 282(11) of the *Insurance Act*, and an assessment against Mr. Duffus under the provisions of subsection 282(11.2) of the *Act*. Subsection 282(11.2) permits an arbitrator to award an amount to the insurer if the insured person commenced an arbitration that is frivolous, vexatious or an abuse of process. The upper limit on the award is the amount which the insurer paid in respect of the arbitration under section 14 of the *Act*, which in this case would be \$3,000.

Arbitration and appeal decisions which have interpreted the word "commences" in subsection 282(11.2) have held that this word does not restrict the focus of the inquiry to the commencement of the arbitration application, and that subsequent steps in the arbitration process can also be considered in deciding whether the applicant commenced an arbitration proceeding that is frivolous, vexatious or an abuse of process.²

² *Gawronski and Allstate Insurance Company of Canada*, (OIC P98-00004, May 13, 1998), *Cassman and Wawanesa Mutual Insurance Company*, (OIC A96-000419, August 14, 1998), *Tedla and Royal & Sunalliance Insurance Company of Canada*, (FSCO A98-001414, September 26, 2000).

Mr. Duffus commenced an arbitration seeking continued income replacement benefits. He then failed to appear at the pre-hearing conference or the arbitration hearing. He also failed to maintain contact with his solicitors, although he provided an updated mailing address after the pre-hearing. As a result, the Commission, his former lawyer, and the Insurer have been put to unnecessary expense and wasted time and resources. The Insurer filed evidence which indicated that Mr. Duffus had earlier failed to attend a disability DAC assessment scheduled for June 26, 2000, almost a year before the mediation in this matter. I find Mr. Duffus should pay the Insurer \$3,000—the amount it had to pay to participate in this arbitration.

The Insurer also seeks its expenses of this arbitration. Insurer's counsel indicates that she has spent approximately 25 hours on this file, including substantial time following up on documentary productions which were never provided by Mr. Duffus or his lawyers at the time. Time was spent preparing for the hearing, because it was not clear whether Mr. Duffus would appear or not. No bill of costs was provided by Insurer's counsel.

I have considered amounts that have been awarded in other cases like this and I find that Mr. Duffus should pay the Insurer's expenses, in the sum of \$1,000.

K. Julaine Palmer
Arbitrator

June 14, 2002

Date

FSCO A01-001030

BETWEEN:

DELROY DUFFUS

Applicant

and

CGU INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. Messrs. Carranza and Associates are released as solicitors for the Applicant.
2. The Application for Arbitration is dismissed.
3. Delroy Duffus shall pay CGU Insurance Company of Canada \$3,000 under subsection 282(11.2) of the *Insurance Act*, representing the amount assessed against the insurer, and \$1,000 under subsection 282(11) of the *Act*, as expenses of the arbitration.

June 14, 2002

K. Julaine Palmer
Arbitrator

Date