



FSCO A05-000378

BETWEEN:

DANYA DESAI

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Edward Lee

Heard: February 8, 2006 and May 24, 2006, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Shawn H. Patey for Ms. Desai
David Zarek for Personal Insurance Company of Canada

Issues:

The Applicant, Danya Desai, was injured in a motor vehicle accident on July 25, 2003. She applied for statutory accident benefits from Personal Insurance Company of Canada (“Personal”), payable under the *Schedule*.¹ The Personal paid some of the benefits sought by Ms. Desai but refused other parts of the claim. The parties were unable to resolve their disputes

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

through mediation, and Ms. Desai applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended (“*Insurance Act*”).

The preliminary issue is:

1. Did Ms. Desai know or ought reasonably to have known that she was operating the automobile while it was not insured under a motor vehicle policy pursuant to section 30(1) of the *Schedule*?

Result:

1. Ms. Desai knew or ought reasonably have known that she was operating the automobile while it was not insured under a motor vehicle policy pursuant to section 30(1) of the *Schedule*.

EVIDENCE AND ANALYSIS:

Both parties agreed that Ms. Desai placed insurance on her 1998 Honda with the Personal in January 2003. Both sides also agreed that some time afterward Ms. Desai cancelled her insurance on the Honda. Ms. Desai then called and placed the insurance back on her 1998 Honda. The Personal alleged this took place on May 27, 2003, but Ms. Desai could not remember when this phone call occurred.

At this point, the versions of the story diverged. The Personal alleged that Ms. Desai again cancelled her policy on the Honda on June 24, 2003. Because of this final cancellation, the Personal submitted that Ms. Desai did not have a valid insurance policy on her 1998 Honda when her motor vehicle accident occurred on July 25, 2003. As a result, it is the Personal’s position that Ms. Desai falls under the exclusions of section 30(1) of the *Schedule*.

The onus is on the Insurer to prove that the policy was validly cancelled in accordance with the provisions of the *Insurance Act*. Despite this, the parties agreed that Ms. Desai would present her case first.

Ms. Danya Desai's Testimony:

Ms. Desai testified that she purchased a 1998 Honda in January 2003 or in early 2003. She placed insurance on that vehicle with the Personal. Several days later, she cancelled the insurance on the Honda because she was not sure that she would pick up the car. She did not pick up the Honda until March 2003. Some time after initially cancelling the insurance, she placed insurance back on the Honda through a telephone call to the Personal. This was because the Lexus she had been driving at that time had been stolen.

Ms. Desai said that she had received some of the pink registration slips for the Honda and the Lexus but could not recall which ones. After her accident, she phoned the Personal and was told that there was no insurance on the Honda. She stated that she never received any certified letters confirming the cancellation of the insurance policy for the Honda.

In cross-examination, Ms. Desai remembered cancelling the insurance on the Honda in January 2003. She admitted having possession of the car but also that she had returned it to the dealer at some time because there were issues with it. She admitted leasing a Lexus on April 2, 2003, and placing insurance on it with the Personal. She admitted that the Lexus was stolen on August 1st or 2nd 2003.

Ms. Desai could not remember whether she took out the Honda policy on January 11, 2003. She could not remember cancelling the policy on January 13, 2003. She could not remember picking

up the Honda on January 16, 2003. She denied contacting the Personal on March 31, 2003 to place insurance on the Lexus. She did not recall putting the insurance back on the Honda on May 27, 2003. She did not remember calling the Personal on June 24, 2003 to delete the Honda from the insurance policy. She could not remember contacting the Personal on July 26, 2003 to inquire about her pink slips for the Honda. She could not remember telling the Personal that she had been involved in a car accident during that same telephone call, or any other details of that conversation.

The Personal's Case:

After Ms. Desai completed her case, the Personal sought to enter exhibits R-2 and R-4 into the evidence. Exhibits R-2 and R-4 were computerized log notes of telephone conversations recorded between employees of the Personal and Ms. Desai. Ms. Desai objected to this evidence as the persons who had created those records were not present at the hearing to be cross-examined. The hearing was adjourned to allow the Personal to convoke those witnesses.

When the hearing resumed before me, Ms. Desai admitted the truth of all the contents of the printouts contained in exhibits R-2 and R-4, with the exception of the entries prepared by Marjorie Reid and Mandy Wiedenhoft. These two employees of the Personal recorded the discussions that took place on May 27, 2003 and July 26, 2003 respectively.

Based on the admissions in exhibits R-2 and R-4, it is clear that Ms. Desai did indeed place insurance policy (K0321653) on her 1998 Honda on January 11, 2003, to be effective January 12, 2003. The insurance was then cancelled by Ms. Desai on January 13, 2003, because, as Ms. Desai informed the Personal on that date, she had not picked up the Honda.

Exhibit R-4 proves that Ms. Desai obtained an insurance policy (K0936021) for her Lexus on March 31, 2003 to be effective April 1, 2003. It also proves that Ms. Desai added the 1998 Honda to this policy with the Lexus on May 27, 2003.

Marjorie Reid and Mandy Wiedenhoft then testified in regard to the contested portions of R-2 and R-4.

Marjorie Reid:

Marjorie Reid was the telephone representative who stated that she spoke with Ms. Desai on June 24, 2003, as recorded on page 10 of exhibit R-4. Although she had no independent recall of that conversation, she knew that she had taken the call because her name and system code were automatically keyed into the printout. She testified that she knew she was speaking to Ms. Desai because she was required to verify the identity of the caller by confirming the caller's name (first and last), address, home and business numbers, and date of birth. She stated that she deleted the Honda from the insurance policy because Ms. Desai had decided not to pick it up. She then informed Ms. Desai that her monthly premium would be reduced from \$912.00 to \$639.52.

In cross-examination, Ms. Reid explained that the system automatically sent out documentation and a pink slip to confirm a cancellation or change in policy, although she admitted that she did not personally know whether such documentation had been sent to Ms. Desai.

Mandy Wiedenhoft:

Mandy Wiedenhoft was the Personal employee who stated that she spoke with Ms. Desai on July 26, 2003, as recorded on pages 20 and 21 of exhibit R-4. Her testimony was that the computerized printout automatically stamped her name and system code to the transaction

accompanying the inputting of the conversation. She testified that Ms. Desai called and stated that she had not yet received her pink slips for her Honda. Ms. Wiedenhoft then informed Ms. Desai that she had not received pink skips for the Honda because Ms. Desai had deleted the Honda from her insurance policy on June 24, 2003. After this, Ms. Desai disclosed that she had been in an accident the day before.

Ms. Wiedenhoft testified that Ms. Desai would receive a modification of the insurance policy in writing because the system would send it out automatically the next day, but also admitted that she did not personally know if such confirmation had been sent to Ms. Desai.

ANALYSIS:

This case turns on credibility of Ms. Desai. Did Ms. Desai indeed cancel her insurance on the Honda on June 24, 2003 as alleged by the Personal?

In testimony, Ms. Desai showed a poor recollection of many of the events in regard to this case. She could not remember when she initially placed insurance on her Honda, when she first cancelled that insurance, and when she picked up her Honda from Signature Motors. She could not remember when she later added the Honda coverage to her policy on the Lexus. She also was unable to remember which pink slips she received for her Honda or her Lexus, although she admitted receiving some of them. She could not even recall calling the Personal on July 26, 2003 to report the accident which led to this very application.

There were other inconsistencies and contradictions in her testimony. In her original hand written statement to the Personal at exhibit R-1, tab 3, page 2, Ms. Desai stated that she was the only lessee on the Lexus and that there was "no other". In cross-examination, she admitted that there was another lessee on the Lexus. In Schedule "A" to her application found at A-1, Ms. Desai stated that prior to the accident, her Lexus was stolen. Because of the theft, she contacted the Personal to transfer coverage to her Honda. Nevertheless, in cross- examination,

Ms. Desai admitted that the Lexus was stolen on August 1st or 2nd 2003, *after the accident*. When presented with these contradictions, no reasonable explanations were given for any of these contradictions or inconsistencies.

I did not find Ms. Desai to be a reliable witness. She demonstrated frequent memory lapses during her examination and cross-examination. The most telling detail was this: *Ms. Desai did not deny cancelling the insurance on her Honda on June 24, 2003*. In reply to this direct question in cross-examination, Ms. Desai stated that she could not recall. She denied that there were financial reasons for which she might have deleted the insurance for her Honda on June 24, 2003.

I noted also that despite Ms. Desai's assertions that she had not received many of the pink slips that the Personal stated had been sent to her over the course of six or seven months, there was no evidence that she ever made any inquiries as to the missing slips, except for the one occasion on July 26, 2003, after her accident.

I was satisfied that Ms. Reid and Ms. Wiedenhoft recorded the information from discussions they had with Ms. Desai accurately and contemporaneously. Ms. Reid noted that the reason Ms. Desai gave for cancelling her Honda coverage on May 25, 2003, was because Ms. Desai had not picked up the Honda. This is significant because in a conversation admitted for its truth, Ms. Desai previously cancelled the insurance on the Honda for the very same reason. I find it highly unlikely that Ms. Reid would have invented this whole conversation.

I also accept the version of the conversation that took place on July 26, 2003, as set out by Ms. Wiedenhoft. I found it difficult to believe that Ms. Desai had no memory of this conversation whatsoever. She stated that she did not even recall reporting her accident to Ms. Wiedenhoft. In her own testimony, she made this call within a week of the accident, but gave no other details.

The Personal also filed evidence in the form of the various confirmations, modifications, and cancellations of the insurance coverage on both the Honda and the Lexus. These pink slips were entered as exhibit R-3. Ms. Desai's testimony was that she received some of those slips but not all. These slips were sent to the correct address. I find that the confirmations, modifications, and cancellations, as documented by the pink slips, corroborated the sequence of events in regard to the issuance and cancellations of insurance on both the Honda and the Lexus. They also corroborate the testimony given by Ms. Reid and Ms. Wiedenhof.

Ms. Desai stated she was receiving social assistance during the time of these events. She also lived in subsidized housing. She stated that she had no income on July 25, 2003. Exhibits R-2 and R-4 showed that she had been having some difficulty making the payments on the insurance policies. She had admitted to previously placing and cancelling insurance on the Honda several months before. Given all of the above, I find that in weighing the conflicting evidence, the most likely and reasonable explanation for what transpired is that Ms. Desai did indeed call the Personal and cancel her insurance on the Honda on June 24, 2003, possibly because it was financially difficult for her to carry insurance on both the Honda and the Lexus.

Submissions In Regard to Notice Requirements:

Counsel for Ms. Desai argued that the Personal could not validly cancel the insurance policy on the Honda because it had not fulfilled the requirements of the *Statutory Conditions*². He referred me to sections 11(1), 11(2) and 12 of those conditions. He argued that those provisions required a prudent insurer to provide Ms. Desai with written notice of the cancellation of her insurance coverage in the form of a letter, through registered mail and signed return slip, or through personal delivery. He stated that there was no evidence that Ms. Desai had received such notice.

²*Ontario Regulations 777/93 Statutory Conditions - Automobile Insurance*

The Personal argued that the operative provision was section 11(2) which states that an insured may terminate the contract "... at any time on request". I agree with the Personal. In the present case, it was the Insured, Ms. Desai, who initiated the cancellation by making the call to the Personal. In the decision of *Budd and Personal Insurance Company of Canada*,³ the Director's Delegate made the following ruling:

The concluding words of the endorsement are that "all other terms and conditions of your policy remain the same." Statutory condition 11(2) states that a contract may be terminated by the insured at any time, without mention of a notice requirement. In this case the arbitrator found that the insured had requested such a termination, and effect should be given to those instructions to the fullest extent possible.

In *Budd*,⁴ the Insurer's computer log was not even updated until two weeks after the Insured made her request to cancel the policy. The accident occurred during the interim and no written notice had gone out at that time, but the termination by the Insured was held to be valid.

Nor do I find that Ms. Desai is aided by the ruling in *Acheampong and Kingsway and Western*.⁵ In that case, the arbitrator held that it was the Insurer who had terminated the policy, not the Insured, and thus the Insurer was required to issue the appropriate written notice. This fact distinguishes this case from the one at hand.

I find that Ms. Desai knew or ought reasonably to have known that she was operating the automobile while it was not insured under a motor vehicle liability policy.

³*Budd and Personal Insurance Company of Canada* (FSCO Appeal P99-00032, January 8, 2000) at page 16

⁴*Supra* at note 3

⁵*Acheampong and Kingsway and Western* (OIC A-015929, August 20, 1997)

EXPENSES:

I exercise my discretion to award the Personal its reasonable expenses incurred in this preliminary issue hearing. If the parties are unable to agree on the amount, an assessment may be requested pursuant to Rules 75-79 of the *Dispute Resolution Practice Code*.

Edward Lee
Arbitrator

June 23, 2006

Date



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BETWEEN:

DANYA DESAI

Applicant

and

PERSONAL 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 determined that:

1. Ms. Desai knew or ought reasonably have known that she was operating the automobile while it was not insured under a motor vehicle policy pursuant to section 30(1) of the *Schedule*.

Edward Lee
Arbitrator

June 23, 2006

Date