



FSCO A04-001188

**BETWEEN:**

**MERG KONG**

**Applicant**

**and**

**PERSONAL INSURANCE COMPANY OF CANADA**

**Insurer**

## **REASONS FOR DECISION**

**Before:** William J. Renahan

**Heard:** April 18, 19, 20 and 21, 2005, at the offices of the  
Financial Services Commission of Ontario in Toronto.  
Written submissions were received on January 20, 2006.

**Appearances:** Adam Wagman for Ms. Kong  
Michael P. Taylor for Personal Insurance Company of Canada

**Issues:**

In an interim decision dated July 21, 2005, I made the following order:

1. Personal shall pay Ms. Kong income replacement benefits of \$432 per week from June 24, 2003, together with interest under section 46 of the *Schedule*, until Personal complies with the stoppage provisions contained in section 37 of the *Schedule* and subject to Personal's right to claim repayment.

This order followed my finding that Personal had not complied with the stoppage provisions in section 37 of the *Schedule*.<sup>1</sup> Among other things, it failed to offer Ms. Kong an assessment at a Designated Assessment Centre. I wrote:

Personal did not comply with section 37, and the section is clear that it must follow the procedures when it wishes to stop paying benefits. Accordingly, I find that Ms. Kong is entitled to income replacement benefits from June 24, 2003 until Personal complies with section 37.

This does not mean that Ms. Kong may not ultimately have to repay some or all of these benefits. In *Henry and Allstate Insurance Company of Canada*<sup>2</sup>, Director Draper, dealing with the termination provisions under the previous *Schedule*, wrote:

...section 64 deals with process, not entitlement. It protects the flow of benefits by controlling the insurer's right to cancel them. Benefits must be paid pending the DAC assessment even though the insurer claims the person is no longer entitled. This obligation to pay, however, does not create an entitlement that is immune from later challenge....the legislation was not intended to give insured persons an automatic right to extend their entitlement by requesting a DAC assessment, regardless of the merits of their claim.

I believe the same rationale applies to section 37.

I further wrote:

Since the DAC is an integral part of the dispute resolution practice, I will not deal with whether Ms. Kong is disabled from performing the essential tasks of her employment at this time, in the event she elects an assessment at a DAC . . .

. . . .

---

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

<sup>2</sup>(OIC P96-00064, July 23, 1997).

If, after Personal complies with section 37, the parties are unable to resolve this issue, I will determine if Ms. Kong is entitled to income replacement benefits after June 24, 2003 and whether she has to repay any benefits. If Ms. Kong does not elect an assessment at a DAC, I will decide the issue without further evidence or submissions. If Ms. Kong elects an assessment at a DAC, I will consider that new evidence and submissions.

Mr. Wagman advised me that Personal had complied with my order and then terminated Ms. Kong's income replacement benefits in accordance with section 37 and that Ms. Kong did not request an assessment at a Designated Assessment Centre. He asked for my decision on entitlement to income replacement benefits.

Without further evidence or submissions, I rendered a final decision on December 21, 2005. I found that Ms. Kong was not entitled to income replacement benefits after June 24, 2003.

Since Personal had paid benefits from June 24, 2003 until it terminated them in accordance with section 37, and since I had ruled previously that Ms. Kong may have to repay these benefits if I determined that she was not disabled from performing the essential tasks of her employment after June 24, 2003, I invited the parties to make written submissions "on the amount of repayment or the form of any order."

The parties have appealed my orders. Section 286 of the *Insurance Act* prohibits an arbitrator from making a new order to replace an order made by him or her if the order is under appeal. Since I have not made an order on the issue of whether Ms. Kong has to repay benefits to Personal, I am not prohibited by section 286 from doing so now.

After reviewing Director Draper's decision in *Henry and Allstate Insurance Company of Canada* again and taking into account the parties' written submissions on the issue of repayment, I believe the paragraph I quoted deals with an insurer's right to claim a repayment of weekly benefits which it is required to pay after it terminates weekly benefits and the insured elects an assessment at a Designated Assessment Centre ("DAC") which determines that the insured does

not meet the disability test. The insured may only have to repay those benefits for the period from the proper termination of benefits and a decision of the DAC that the insured was not entitled to benefits.

To require an insured to repay benefits before the insurer gives a notice of stoppage which complies with section 37 of the *Schedule* renders the stoppage provisions irrelevant. An insurer would have no incentive to comply with the stoppage provisions if it could put an insured's entitlement in issue prior to terminating benefits in accordance with the *Schedule*.

Under section 47(1)(a) of the *Schedule* I have authority to order an insured to repay to the insurer a benefit that was paid to the insured as a result of an error on the part of the insurer. As well, I have authority to award repayment of benefits paid as a result of an interim order I made. However, the termination provisions in section 37 of the *Schedule* give the insured certain rights to challenge an insurer's decision to terminate benefits and are in the nature of consumer protection. In this case of conflict between the consumer's rights and the insurer's rights, I do not believe that I should rely on section 47(1)(a) or my authority to revisit an interim order to negate or make meaningless the insurer's obligation to comply with the termination provisions set out in section 37 of the *Schedule*.

Accordingly, even though I found that Ms. Kong did not meet the functional test of disability after June 24, 2003, she is not required to repay any benefits I ordered Personal to pay from June 24, 2003 until it complied with the stoppage provisions in section 37 of the *Schedule*.

---

William Renahan  
Arbitrator

---

February 27, 2006

Date

Financial Services  
Commission  
of Ontario

Commission des  
services financiers  
de l'Ontario



FSCO A04-001188

**BETWEEN:**

**MERG KONG**

**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 ordered that:

1. Merg Kong need not repay any benefits I ordered Personal to pay her in my order dated July 21, 2005.

---

William Renahan  
Arbitrator

---

February 27, 2006

Date