



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 October 19, 2005.

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

**Issues:**

The Applicant, Merg Kong, was injured in a motor vehicle accident on February 13, 2003. She applied for and received statutory accident benefits from Personal Insurance Company of Canada (“Personal”), payable under the *Schedule*.<sup>1</sup> Personal terminated weekly income replacement benefits on June 24, 2003. The parties were unable to resolve their disputes through mediation, and Ms. Kong applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

I rendered an interim decision on July 21, 2005. Among other things, I ordered Personal to pay Ms. Kong income replacement benefits, subject to Personal's right to claim a repayment once it had complied with the stoppage provisions in section 37 of the *Schedule*. I invited the parties to contact me if they could not resolve the outstanding issue of entitlement and repayment of income replacement benefits once Personal had complied with section 37.

On October 19, 2005, I received a letter from Mr. Wagman. He indicated 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.

The issues are:

1. Is Ms. Kong entitled to income replacement benefits after June 24, 2003?
2. Is either party entitled to expenses of the arbitration proceeding?

**Result:**

1. Ms. Kong is not entitled to income replacement benefits after June 24, 2003.
2. If the parties cannot resolve the issues of entitlement to or amount of expenses of the arbitration proceeding, they may make written submissions to me in accordance with the provisions of the *Dispute Resolution Practice Code* (4<sup>th</sup> edition).

## EVIDENCE AND ANALYSIS

### Background

On February 13, 2003, Ms. Kong was stopped in a line of traffic when her vehicle was struck from the rear several times in a chain reaction. She was in the last vehicle in a chain of four or five vehicles. Her vehicle did not strike the vehicle in front of her. She did not strike her head on any part of her vehicle. She drove her vehicle to a dealership where it was repaired. The vehicle suffered no structural damage, other than scrapes to the rear bumper. The bumper was repainted at a cost of \$513.

Ms. Kong claims that she has pain in most parts of her body which has gotten progressively worse since the motor vehicle accident. She also claims that she suffers a cognitive impairment. Dr. Sheely Dunne, a rheumatologist, has diagnosed fibromyalgia, which she said is a diagnosis of exclusion. Dr. David Saul is a general practitioner and treats Ms. Kong for fibromyalgia. He reported that all of Ms. Kong's symptoms, except cognitive impairment, cannot be objectively verified and are strictly subjective complaints.

For the first 104 weeks after the motor vehicle accident, Ms. Kong is entitled to income replacement benefits for the period she suffered a substantial inability to perform the essential tasks of her employment. Thereafter, she is entitled to income replacement benefits for the period she suffers a complete inability to engage in any employment for which she is reasonably suited by education, training or experience.

At the time of the accident Ms. Kong was unemployed and looking for work as a computer software and hardware sales representative. She claims that she is only suited for that type of work and that she is completely unable to engage in that employment because of overall body pain, poor sleep, lack of energy and an inability to concentrate and remember.

***Essential tasks of employment, work history and credibility***

It is necessary to review Ms. Kong's employment and education to determine what were the essential tasks of her employment for the pre-104 week test of entitlement and her education, training and experience for the post-104 week test of entitlement.

I found that Ms. Kong had a unique manner of testifying. Dr. Doxey, a psychologist, found her extremely articulate and talkative and that was my initial impression as well. Dr. Peter Marton performed a psychological assessment for Personal and he too found Ms. Kong articulate but that "she tended to use jargon and a style of speech which was not quite within her grasp." On reviewing Ms. Kong's testimony I found it was not clear and I had to carefully examine her testimony to determine what she meant.

In describing her work, Ms. Kong testified that she worked with national and provincial campaigns, she managed multi-site installations, she was involved in the logistics of configuring, she understood the engine of projects, she ran projects where the rules of engagement were strategic and analytical and she had to marry her employer's technology to make it relevant to her clients. Her role was to make sure every component was accurately deciphered and balanced.

I did not clearly understand what Ms. Kong did and it is not because her work was too technical for a non-technical person to understand. Mr. Paul Hunt hired Ms. Kong for a short period after the accident and he testified that he was in the business of selling hardware and software to small and large businesses to help them access the internet. I understood what Mr. Hunt did.

Nor do I accept that Ms. Kong suffers from a cognitive impairment which impairs her ability to communicate. She used the same type of language in her résumé which was prepared before the motor vehicle accident.

Ms. Kong has a Bachelor of Arts degree with majors in Psychology and Political Science. She has had some on-the-job training in computers. She used language such as “expanding her skill sets” to describe her training, and again, her testimony about her training was not helpful.

I agree with the assessors and other witnesses who describe Ms. Kong as energetic, driven and positive. Ms. Kong testified that she made her clients like her and she made them comfortable, and again, I agree that she has those skills. However, it was difficult to understand Ms. Kong’s work history and any other marketable skills or knowledge she has.

In 1996 and 1997, Ms. Kong worked for “Compugen.” She left because her “job was not going to be there.” She admitted that she did not leave on good terms.

In 1997 and 1999, Ms. Kong worked for “Inacom.” Shortly before leaving, her family doctor recorded that Ms. Kong thought her boss was setting her up, that she was told to leave by the end of July and that she had poor self-esteem.

From Christmas 1999 to Christmas 2000, Ms. Kong worked for “Bell Canada.” She left because she realized she would not get very far with her boss and that “her team would not be there.”

From Christmas 2000 to Christmas 2001 she was mostly unemployed. She earned \$3,600 in 2001. She described that year as a break of a few months in which she went back to a couple of friends and ultimately ended at “Cail.”

Ms. Kong worked for Cail from Christmas 2001 to August 2002. She testified that she left Cail because she was given a “new remuneration package without any notice and she was shut out of strategic meetings with business partners.”

She described her six months of unemployment prior to the accident as self-employment “seeking direct relationships with clients.” She testified that nothing “had closed as of the time of the motor vehicle accident.”

In her Application for Accident Benefits, she certified that she was employed and working with “Clearcon”, as a Technical Consultant, at the time of the accident, earning \$1,250 per week. Ms. Kong testified that she used “Clearcon,” the name of a friend’s company, so as to “look more professional” in her search for work. She also explained that the \$1,250 she referred to in her Application for Accident Benefits was an estimate of what she would have earned had she been working.

Various assessors made comments which reflect upon Ms. Kong’s manner of communication. Dr. Doxey recorded a similar chronology for Ms. Kong’s work history as I did. In his concluding sentence of Ms. Kong’s employment status at the time of the accident he reported:

. . . she was in the process of negotiating a possible job with a Canadian reseller. (She explained it was a company, like Best Buy, that would resell technology to the general public). In this position, she would have earned about \$65,000 or \$70,000 plus bonuses and a car allowance.

The name of the potential employer was not identified and I heard no reliable evidence that Ms. Kong was close to finding employment at the time of the accident.

Two weeks after the accident, an occupational therapist conducted an assessment and reported that Ms. Kong had returned to work on modified hours (approximately 8 hours per week). Ms. Kong denied that she said this but testified that it was accurate in the sense that she was trying to find work.

People have different realities, and Ms. Kong has a positive interpretation of her work history. She described her terminations and lengthy periods of unemployment in such positive terms,

at the hearing and to various assessors, that her description, in my view, misrepresents her employment history and is not reliable.

Ms. Kong was 33 years old at the time of the accident and unemployed. In the previous seven years she had worked for four different employers as a sales representative, selling computer hardware and software. Over the last seven years she earned on average \$40,000 per year. In the last four years she averaged \$38,000 per year. In 2000, she earned \$68,000. In 2001, she was unemployed for about 11 months and earned \$3,600. In 2002, the year before the accident, she earned \$42,500. She was unemployed for about six months before the accident of February 13, 2003.

The testimony and documentary evidence on Ms. Kong's personality is clear. She is energetic, driven, positive, personable, rigid and demanding of herself and others. The evidence is not as clear as to what employment skills she had beside her personality. She left several jobs because of difficulties she had with her employer and in the two years prior to the accident she had lengthy periods of unemployment despite working very hard to find employment and despite her engaging personality. Part of the difficulties in finding employment were due to what she and her friend, Kevin David, described as a downturn in the computer market. Ms. Kong interpreted the events in her career in as positive a manner as possible. However, as I have illustrated from examples of her testimony, I do not share that positive interpretation. Ms. Kong speaks well. She did not directly answer questions about what she did. Although asked several times, she did not clearly describe what technical skills she had.

I find that Ms. Kong's essential tasks of employment are selling computer hardware and software and telecommunication products through strong interpersonal skills and high energy level. She did research on the internet, studied technical documentation, wrote proposals and made presentations. She spent a lot of time talking to people on the telephone and in person. She worked more than 40 hours a week from home, from an office and at the premises of potential corporate customers.

I find that suitable employment having regard to her education, training and experience is contract work doing any type of corporate sales which pays approximately \$40,000 per year.

Before deciding whether Ms. Kong suffers a substantial inability to perform the essential tasks of her employment, it is necessary to identify the impairment she sustained as the result of the accident.

### ***Impairment***

Four days after the accident, Ms. Kong's family doctor, Dr. W. Simmonds, certified in his Disability Certificate that Ms. Kong suffered thoracic, lumbar and cervical strain and that she could return to work on modified hours so long as she avoided prolonged sitting or lifting. Five months later, Dr. Simmonds reported to Personal that Ms. Kong had "not progressed as well as anticipated in respect of this type of injury." Dr. Simmonds referred Ms. Kong to Dr. Sheely Dunne, a rheumatologist. Dr. Dunne noted that Ms. Kong complained of soreness all over her body and diagnosed fibromyalgia. She wrote:

Certainly, one would have expected that these soft tissue injuries would have completely resolved or at least improved significantly by this point after the MVA. As I told her today, fibromyalgia is a diagnosis of exclusion.

In January 2005, Dr. Dunne reported that she had anticipated that Ms. Kong would have returned to her pre-accident state with therapy but that her prognosis now was "guarded."

Ms. Kong's complaints of pain throughout her body and fatigue have progressed. Dr. David Saul is a general practitioner who specializes in chronic pain and men's sexual health. He has treated Ms. Kong since December 2003 for fibromyalgia and chronic pain. He noted that some doctors, notably psychiatrists, believe that fibromyalgia is a psychiatric condition, and others, notably rheumatologists, believe that fibromyalgia is a form of neuropathic pain which is not completely understood. His report of February 3, 2005, addresses one of the key issues of this hearing:

All of these symptoms (except cognitive impairment) cannot be objectively verified and are strictly subjective complaints. As such, pain and fatigue levels for a patient can be disabling only if the patient experiences the symptoms as disabling. If the examiner believes and understands the levels of subjective impairment, which the patient describes, then those symptoms are characterized as disabling. Merg is not malingering, has no secondary or psychogenic gains, and is truly suffering.

Ms. Kong testified that despite weekly treatment she is getting progressively worse and that her pain has moved from one side of her body to the other. She has difficulty paying bills and processing information and she is essentially housebound.

Ms. Kong was assessed by four psychologists.

Dr. Peter Marton assessed Ms. Kong in June 6, 2003 for Personal. He found that she was not malingering. He also found that the stress she suffered from pre-existing factors of “economic difficulties as well as her job-related stress” were exacerbated by the motor vehicle accident. He concluded that she met some, but not all, of the diagnostic criteria for an Adjustment Disorder and that she was not disabled from work.

Dr. Rhonda Nemeth saw Ms. Kong in June 2003 at a Designated Assessment Centre to assess a treatment plan for proposed psychological treatment. She noted that Ms. Kong did not appear to exaggerate or minimize her difficulties. Dr. Nemeth concluded:

Ms. Kong is a highly driven and perfectionistic person, and she has grown extremely frustrated not only with her own limitations, but with her perception of the way her insurer is handling her case. Her frustration and agitation is likely serving to cause increased muscle tension, which is slowing her recovery. She would benefit from psychological therapy designed to address her symptoms of irritability and to teach her some relaxation and sleep hygiene skills.

Dr. Nemeth did not express an opinion on disability.

I heard very little about the 10 to 12 sessions of psychological therapy proposed by Dr. Leo Steiner and approved by the Designated Assessment Centre. Ms. Kong admitted going to therapy “briefly” and that it was helpful to manage stress and sleep “a bit.” She recalls someone assessing her at Dr. Steiner’s office and she thinks it was a psychologist. In his assessment in support of his treatment plan, Dr. Brian Levitt, of Dr. Steiner’s office, thought that Ms. Kong owned her own business as a full-time contractor in technology consulting. Among other things, he proposed:

- An examination of negative thought patterns and cognitive restructuring techniques to deal with feelings and cognitions regarding the accident, as well as unrelenting worries related to her future and her pain.
- Instruction in sleep enhancement techniques to help break the vicious cycles of poor sleep, heightened emotional distress and unrelenting pain.

Dr. Shahira Khoury, a psychiatrist, reported that:

She had seen a psychotherapist for up to 12 sessions, but did not find the treatments helpful as she could not connect with her therapeutically. She feels she can benefit from psychological counselling.

I find it likely that Dr. Khoury is referring to someone from Dr. Steiner’s office. I received no notes or report from this treating psychologist.

Dr. Doxey assessed Ms. Kong in February 2003 for her lawyer and diagnosed Adjustment Disorder with Mixed Anxiety and Depressed Mood, Chronic. He found that Ms. Kong was disabled from returning to work.

### ***Attempts to return to work***

Ms. Kong attempted to return to work on two occasions.

In *Foden v. Co-Operators Insurance Association (Guelph)*, (1978) 20 O.R. (2d) 728, Reid J. said:

No one, in my opinion, should be discouraged from attempting to take up their former work, or any work, out of fear that the attempt might be held against him. Far from necessarily proving that an insured has the capacity to perform his task it may, as in my opinion it does here, prove the reverse. There is no better evidence of incapacity to perform a task than the failure of an honest and sustained attempt to do it.

In the summer of 2004, on the recommendation of a friend, Ms. Kong obtained employment with Paul Hunt, the owner of a small electronics company in the business of selling computer hardware and software to small and large businesses to facilitate internet access. He planned a marketing campaign of six to eight weeks. He had purchased a mailing list of potential customers from Dun and Bradstreet and mailed promotional material to those with more than 50 employees. He hired Ms. Kong to call the potential customers from her home. He provided her with newsletters and technical documentation for her to use to answer questions she might get. She provided him with spreadsheets showing the status of the potential customers. Mr. Hunt would then contact those potential customers who had expressed interest. He paid Ms. Kong \$2,500 as an advance on commissions. He said the employment ended without any sales.

Ms. Kong testified that she found the work taxing because she couldn't engage in high level conversations, couldn't read the brochures, didn't understand what the products were for and wasn't functional for Mr. Hunt.

The only information Mr. Hunt had about Ms. Kong's condition is that she told him that she had back pain and the second time he met her she had a cane. He was satisfied about her working knowledge. He said her condition was fine for his application but that it is not acceptable to a regular business if you can't sit for four or five hours.

Ms. Kong testified that if she had made some sales she would have continued working for Mr. Hunt.

Kevin David recommended Ms. Kong for her second attempt to return to work. When Mr. David first met Ms. Kong, he assembled and built computers and parts. Ms. Kong acted for a firm on purchasing computer hardware and she purchased the equipment through Mr. David's employer. She by-passed the sales people and dealt with Mr. David directly. They became friends and continued to socialize after the accident.

In December 2004, Mr. David worked in retail computer sales at Northstar. He recommended Mr. Kong to his employer who was looking to expand into corporate sales. Ms. Kong started around December 15 under a six month contract. She was to work two days in the office and one day from home. Her pay was \$3000 per month. Mr. David was struck at how Ms. Kong's energy level had decreased. The employer terminated Ms. Kong after about one month. Ms. Kong had not made any sales in that period. Mr. David felt that Ms. Kong deserved a longer tryout because corporate sales often take three to six months before tangible results are achieved. Ms. Kong also thought that one month was too short. Northstar terminated Mr. David shortly after Ms. Kong's termination because of financial difficulties. Ms. Kong testified that she would have continued at Northstar if it had not terminated her employment.

## **ANALYSIS**

I found no physical explanation as to how, following a relatively mild collision, Ms. Kong has gone from a point where she was continuing in her employment search and capable of modified work according to her family doctor to a point where she is essentially housebound. Dr. Saul is convinced that Ms. Kong is suffering. He testified and reported that he believes her but provided no reliable explanation for this belief. He admitted that her condition may have a psychiatric foundation but he gives no reasonable explanation for his conclusion that Ms. Kong is not receiving any psychogenic gain.

Dr. L. Puodziukas is a general practitioner who examined Ms. Kong for Personal. He found that she was not substantially disabled from her work. He testified that he planted questions in his report which he thought were relevant to a psychological assessment.

If Ms. Kong suffers from an impairment, I found no reliable evidence that it is physical.

The attempted returns to work are not determinative.

I accept Paul Hunt's testimony that he was satisfied with Ms. Kong's working knowledge and that her condition was fine for his application. I find it likely that he would not have wasted the expense of his marketing campaign if he had reason to believe that Ms. Kong could not sell to potential customers.

Mr. David socialized with Ms. Kong after the accident and was therefore aware of her condition. I do not accept that he would recommend her for a job with his employer if he thought she was incapable of doing it. Further, he and Ms. Kong both testified that they thought she deserved a longer tryout. This is not evidence that she could not do the work. Further, I find it likely that Ms. Kong was terminated because Northstar had financial difficulties, the same reason Mr. David was terminated.

Lastly, I accept Ms. Kong's evidence that she would have continued with both employers had they not terminated her employment. Her failure to keep these jobs is not evidence of her inability to do them. Rather, it is evidence of the downturn in the computer market which both Ms. Kong and Mr. David testified to.

If Ms. Kong has an impairment, the consensus of medical opinion is that it is likely psychological.

Dr. Doxey found that Ms. Kong was disabled. However, Dr. Doxey's conclusions are based on factual findings which I do not accept. Dr. Doxey does not deal with the stress Ms. Kong underwent as result of unemployment and employment terminations prior to the accident. Instead, he repeats the same positive interpretation of those events which Ms. Kong tried to communicate at the hearing, which I found amounted to a misrepresentation of her career. He concluded his summary of Ms. Kong's employment history with the statement that "At the time of the accident, Ms. Kong was unemployed but in the process of negotiating a possible new job with a Canadian reseller." Ms. Kong did not identify any potential employer in her evidence.

Similarly, his conclusions about her attempts to return to work are contrary to the evidence I heard. Dr. Doxey reported that Ms. Kong could not manage the first attempt to return to work because she was too fatigued and in too much pain to get up in the mornings and could not think clearly, all contrary to her evidence and the evidence of Paul Hunt. With respect to the second job, he concluded that she could not continue because of pain and stress, contrary to both her evidence and that of Kevin David that she should have had a longer tryout.

His findings of difficulties with memory and concentration due to pain and emotional distress and his conclusion that Ms. Kong's ability to study and acquire new information were "quite seriously compromised" and are contrary to the evidence of Paul Hunt that he was satisfied with Ms. Kong's working knowledge. Further, because he placed little weight on Ms. Kong's pre-accident unemployment and terminations, he did not deal with how Ms. Kong's history affected her emotional distress and any cognitive impairment he found.

I do not find Dr. Doxey's opinion reliable.

Dr. Peter Marton assessed Ms. Kong for Personal in June 2003 and found that Ms. Kong was not substantially disabled from returning to work. He concluded:

On presentation, Ms. Kong reports harbouring resentment towards her family's and especially her mother's treatment of her throughout her life, which continues to make her angry and distressed. Such feelings are easily evoked by other situations in which there is an absence of empathy and her needs are not met.

Ms. Kong has also been experiencing considerable stress because of economic difficulties in the Information Technology industry in general, as well as emotional distress. This opinion is based on her report and her family physician's clinical notes. These personality issues, as well as her job-related stress, appear to be pre-existing factors which have been exacerbated by the motor vehicle accident.

In my view, Dr. Marton's assessment demonstrates the best understanding of Ms. Kong's personality and history and therefore, I find that his opinion that Ms. Kong is not disabled from the essential tasks of her employment, is likely the most reliable opinion.

Having regard to all the evidence, I find that Ms. Kong was not substantially disabled from performing the essential tasks of her employment after June 24, 2003 and is not entitled to income replacement benefits beyond that date.

If the parties cannot agree on the amount of repayment or the form of any order, they may make written submissions to me within 30 days.

**EXPENSES:**

If the parties cannot agree on the entitlement to or the amount of the expenses of the proceeding, either party may request an appointment for me to determine the issue in accordance with the provisions of Rule 79 of the *Dispute Resolution Practice Code*, (4<sup>th</sup> Edition).

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William Renahan  
Arbitrator

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December 21, 2005

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. The Application for Arbitration is dismissed.

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William Renahan  
Arbitrator

December 21, 2005

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Date