



FSCO A04-001188

**BETWEEN:**

**MERG KONG**

**Applicant**

**and**

**PERSONAL INSURANCE COMPANY OF CANADA**

**Insurer**

## **REASONS FOR INTERIM 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.

**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.

The issues in this hearing are:

1. Is Ms. Kong entitled to income replacement benefits after June 24, 2003 pursuant to section 4 of the *Schedule*?
2. Is Ms. Kong entitled to \$10,657.06 for chiropractic, physiotherapy and massage services provided by PhysioMed Davenport pursuant to section 14 of the *Schedule*?
3. Is Ms. Kong entitled to \$270 for the cost of an orthopaedic mattress cover pursuant to section 14 of the *Schedule*?
4. Is Ms. Kong entitled to interest on overdue payments pursuant to section 46 of the *Schedule*?
5. Is Ms. Kong entitled to a special award pursuant to section 282(10) of the *Insurance Act*?
6. Is either party entitled to expenses of the arbitration proceeding pursuant to section 282(11) of the *Insurance Act*?

**Result:**

1. Ms. Kong is entitled to income replacement benefits, together with interest under section 46 of the *Schedule*, from June 24, 2003 until Personal complies with the stoppage provisions contained in section 37 of the *Schedule* and subject to Personal's right to claim repayment.
2. Ms. Kong is not entitled to payment for services provided by PhysioMed Davenport.
3. Ms. Kong is entitled to payment of \$270 for the cost of an orthopaedic mattress cover, together with interest under section 46 of the *Schedule*, from February 23, 2004.
4. Ms. Kong is entitled to a special award in the amount of \$1,000.
5. I defer the issue of entitlement to expenses of the arbitration proceeding.

## **EVIDENCE AND ANALYSIS:**

The accident occurred on February 13, 2003, when Ms. Kong was 33 years old. She was the first vehicle in a line of four stationary vehicles stopped at a red light when the last vehicle was struck from the rear. The driver of the striking vehicle was rendered unconscious and kept her foot on the gas pedal. As a result, the line of vehicles was struck several times. The only damage to Ms. Kong's vehicle was a scratched rear bumper which was filled and repainted at a cost of \$513. Ms. Kong reported to a psychologist that she did not strike her head on the headrest. Ms. Kong's family doctor, Dr. W. Simmonds, completed a Disability Certificate a few days after the accident and reported that Ms. Kong suffered thoracic, lumbar and cervical strain. To the question "Can the applicant return to work, or modified work hours" he checked off the box "Yes" and noted "To avoid prolonged sitting or heavy lifting."

Ms. Kong claims that she is disabled due to pain in most parts of her body, sleeping difficulties and cognitive problems. Dr. Simmonds referred Ms. Kong to Dr. Shelly Dunne, a rheumatologist, who diagnosed fibromyalgia in September 2003. Dr. David Saul is a general practitioner specializing in chronic pain and he is treating Ms. Kong now.

After graduating from university with a Bachelor of Arts degree, Ms. Kong obtained employment in the computer industry. She learned on the job and held a succession of sales jobs with different companies selling computer hardware and software. She worked long hours, which included working from home, and visiting clients and prospective clients. The evidence is consistent that she was energetic and driven. She was enthusiastic about making "cold calls." Her annual income in the four years before the accident, from \$45,000 to \$68,000, does not represent a full year of work because she did not work for the full four years. During this period she had three jobs, each of which she left due to difficulties at work. These terminations were followed by periods of unemployment. At the time of the accident, she had been unemployed for about six months and she was actively looking for suitable employment.

Prior to the accident, Ms. Kong also enjoyed an active athletic and social life.

Ms. Kong had optional benefits in her auto insurance policy and the parties agreed that her income replacement benefit was \$432 per week.

Since the accident, Ms. Kong has continued to look for work and she has tried to work on two occasions for a total of about three months. She did not make any sales during these attempts. She is trying to remain optimistic but she has given up her athletic and social life and worries about her future.

***Stoppage of income replacement benefits:***

The procedure for stopping the payment of income replacement benefits at the time of this termination is set out in section 37 of the *Schedule*. Among other things, section 37 requires the insurer:

- to specify a date for stopping the benefit which is at least 14 days after the person receives the notice of stoppage [s. 37(2) and 37(3)(a)];
- inform the person that she has the right to require an assessment by a DAC by giving the insured written notice before the date specified in s. 37(2) [s.37(3)(b)].

The notice under section 37(1) must be in a form approved by the Superintendent of Insurance. The approved form (OCF-17) has a place for the insurer to indicate the effective date of the stoppage. It advises the insured of her rights in the following language:

If you disagree with the stoppage of benefits described above, you have the right to ask for an assessment by a Designated Assessment Centre to determine whether your disability continues. If you ask for an assessment, the Designated Assessment Centre requires your permission to obtain and discuss your medical

history and to release its report. Please sign this form and the attached Permission to Disclose Health Information to the Designated Assessment Centre form. Please return both forms within 14 days of receiving this notice. If you do not return this Request for Assessment and the Permission to Disclose Health Information to the Designated Assessment Centre form within 14 days, your benefits will be stopped.

Above the place on the OCF-17 where the insured signs her name is the following:

I disagree with the stoppage of benefits as described. I request an assessment at a Designated Assessment Centre to determine whether my disability continues....

In what Ms. Kong described as a “flood of paper-work”, the form is meant to be a clear statement of an important right.

Personal terminated income replacement benefits by an Explanation of Benefits form it mailed to Ms. Kong. The form is dated July 22, 2003 and Personal stopped income replacement benefits on June 24, 2003. The writer noted that he had enclosed an “OCF 17 - Notice of Stoppage of Weekly Benefits and Request for Assessment” and an “OCF 14 - Permission to Disclose Health Information to the Designated Assessment Centre for disability” and advised Ms. Kong to complete and return the forms if she disagreed with the stopping of the benefit.

Personal’s representative, Ms. Anup Kaushal, testified that a blank insurance company copy of the “Notice of Stoppage of Weekly Benefits and Request for Assessment” form was in the Insurer’s file, behind the copy of the Explanation of Benefits. She testified that it was the Insurer’s policy to complete the form and forward it to the insured with the Explanation of Benefits when it was terminating benefits. Ms. Kaushal testified that the adjuster’s notes of July 22, 2003 read “send OCF 9, OCF 14 and OCF 17 advising of IRB stoppage.”

The inference that the adjuster followed his notes and mailed the “Notice of Stoppage of Weekly Benefits and Request for Assessment” form in accordance with Personal policy is countered by four pieces of evidence that Personal made mistakes and did not follow its policy:

(a) Ms. Kaushal admitted that Personal mailed Ms. Kong's income replacement benefits to a prior address of Ms. Kong even though the adjuster had noted Ms. Kong's new address before she moved; (b) Ms. Kaushal admitted that Personal did not follow its policy of completing its portion of the blank Notice of Stoppage form; (c) Ms. Kong testified that she did not remember receiving forms with the Explanation of Benefits and she did not remember discussing attendance at a disability DAC with her former representative; and (d) Personal did not give 14 days advance notice of stoppage as required by sections 37(2) and (3) of the *Schedule* because it gave notice of stoppage a month after it had already stopped paying benefits.

I do not accept that Personal followed its policy of mailing the approved Notice of Stoppage form when it did not follow its policy of completing its portion of the form and when it did not give advance notice of stoppage as required by the *Schedule*. Nor do I find the adjuster's note is reliable evidence that he did what he said he did when he sent cheques to the wrong address when he had the correct address in his file.

The DAC plays an important role in the resolution of disputes where the parties disagree about disability.<sup>2</sup> An insurer's failure to inform the insured of her right to an assessment at a DAC by using the form required by legislation is a significant departure from the legislated procedure for stopping benefits. Further, an insurer must comply with the notice provisions in a scheme designed to ensure the flow of income replacement benefits where the parties dispute entitlement.

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.

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<sup>2</sup>*M.D. and Halifax Insurance Company*, (FSCO P00-00049, May 16, 2001).

In *Henry and Allstate Insurance Company of Canada*<sup>3</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.

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 for three reasons. First, the dispute resolution process envisages that the DAC take place before arbitration; second, a DAC assessment may resolve or help the parties resolve the dispute, as it was designed to do. Third, a DAC assessment may help an arbitrator better determine the issues.

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.

***Services provided by PhysioMed Davenport:***

PhysioMed Davenport is a clinic operated by Dr. Katie Malone, a chiropractor. Besides chiropractic treatment, it offers massage and physiotherapy. Ms. Kong first attended this clinic a few days after the accident on the advice of her lawyer at that time. Personal paid for treatment

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<sup>3</sup>(OIC P96-00064, July 23, 1997).

up to November 2003 when a medical/rehabilitation DAC found that further treatment was not reasonable. Ms. Kong testified that she continues to obtain treatment about once a week, although the records of PhysioMed show that Ms. Kong has attended treatment at various degrees of frequency. The invoice for outstanding treatment since November 2003 is \$10,657.

Ms. Kong testified as to the benefits of treatment at PhysioMed. She said that the treatment helped her. On the other hand, she said that she is getting progressively worse and that the pain which was on the left side is now on the right side. She said that the treatment allowed her to get out of bed and function. On the other hand, she said that her life is laying on the sofa and that she is essentially housebound. Ms. Kong's testimony was not clear or persuasive.

Although Dr. Malone reported that Ms. Kong regressed without treatment, the only clinical record of PhysioMed that supports this allegation that Ms. Kong regressed when treatment was interrupted is noted on January 19, 2004: "feeling pretty bad no change. Feels worse without therapy." However, the biggest gap in treatment, from March to September 2004, was followed by a note "knee still bothering her and LBP." Other gaps in treatment were followed with these notes: August 1, 2003 "feeling a little sore," and, December 1, 2003 "sore today, hasn't been in."

Besides the opinion of Dr. James Pringle, in the medical/rehabilitation DAC report of November 2003, Ms. Kong's family doctor and her rheumatologist reported facts relevant to the reasonableness of physical therapies after November 2003.

In June and July 2004, Dr. W. Simmonds, Ms. Kong's family doctor, reported that Ms. Kong had no significant improvement and was still going to chiropractic treatment with no significant change. He reported to Ms. Kong's lawyer "a lack of response to therapy." In January 2005, Dr. Shelly Dunne, a rheumatologist, reported to Ms. Kong's lawyer that "She has had numerous types of therapy including physiotherapy, chiropractic treatment and massage therapy with minimal clinical improvement." Dr. Saul testified that Ms. Kong is getting progressively worse and he found no medical reason to explain why pain was spreading from her neck and back to

other parts of her body. He did not explain why he thought physiotherapy and chiropractic treatment helped Ms. Kong with function.

I do not find that Ms. Kong has received any benefit for the treatment provided by PhysioMed since November 2003. It has not helped Ms. Kong and it was unreasonable and unnecessary.

***Mattress cover:***

Ms. Kong asked her family doctor and Dr. Dunne to support her request that Personal pay her claim for an orthopaedic mattress cover to help her sleep and Dr. Dunne submitted a treatment plan for a mattress cover. Ms. Kong purchased one for \$270. The only evidence I heard to explain the need for a mattress cover was Ms. Kong's testimony. She said that it absorbed her body weight and it helped a bit and that it "closed some of the sleep cycles." Dr. Brian Levitt reported in February 2003 that he instructed Ms. Kong in "sleep enhancement techniques to help break the vicious cycle of poor sleep, heightened emotional distress, and unrelenting pain." I accept that Ms. Kong has difficulty sleeping, that she explored the usual methods for trying to obtain regular sleep and that the purchase of the mattress cover with the support of her doctors at a cost of \$270 was a reasonable attempt at regular sleep and that Personal should therefore pay for it.

The treatment plan for the mattress cover is dated February 9, 2004. Section 38(8) requires the insurer to advise the insured within 14 days of receiving the treatment plan whether it will pay for the goods and services contemplated. Section 38(12) requires the insurer to arrange a DAC assessment for those goods and services that it will not pay. I have no information that Personal arranged a DAC assessment. Accordingly, the payment for the mattress cover was due on February 23, 2004 and Ms. Kong is entitled to interest on \$270 in accordance with section 46 of the *Schedule* from that date.

**Special award:**

Under section 282(10) of the *Insurance Act* I am required to make a special award where the insurer has unreasonably withheld or delayed payments. The calculation is based on a percentage of what the insured is entitled to. Since I may ultimately determine that Ms. Kong is not entitled to weekly income replacement benefits beyond June 24, 2003, I will not make a decision on whether Personal unreasonably withheld or delayed payments of these income replacement benefits.

However, at the hearing, Personal agreed to pay for certain weekly income replacement benefits and the issue is whether the payment of these benefits was unreasonably delayed.

In her Application for Accident Benefits, Ms. Kong describes herself as employed at the time of the accident and during the previous year by "Clearcom" as a technical consultant earning \$1,250 per week. In her Employer's Confirmation of Income she names "Clearcom" as her employer but the dates of employment are from December 2001 to September 2002. Under Part 4, Applicant's Income, she wrote: "I work for myself to look for contracted work." In her income tax summary for 2002, her income is \$42,500 from T4 earnings from employment and \$5,782 employment insurance benefits. At the hearing, Ms. Kong explained that she used "Clearcom", the name of a friend's company, because it looked "more professional" when she met potential employers and the figure of \$1,250 was an estimate of what she would earn if she was working. I find that Ms. Kong misrepresented to Personal that she was working and making \$1,250 per week when she was unemployed and that part of the delay in the payment of income replacement benefits was due to the time it took Personal to resolve these misrepresentations.

Personal asked Ms. Kong for income tax returns and Notices of Assessment shortly after it received her application for benefits. It received the required information May 22, 2003 and sent it to its accountant on May 28, 2003. In a report dated June 20, 2003, the accountant calculated the income replacement benefit at \$400 per week. Although, Personal had Ms. Kong's correct address, it sent the cheques to Ms. Kong's former address. The cheques were mailed to the

correct address on July 11, 2003. I find that the payment of the income replacement benefit was unreasonably delayed one week, from the time Personal had the requisite information until it sent the information to its accountant, and a further three weeks from the time it had the accountant's report until it mailed the cheques to Ms. Kong's correct address, a total of four weeks.

As well, Personal's adjuster admitted that it did not pay a number of items until the hearing: the first weekly income replacement benefit, the difference between the \$400 paid and the \$432 Ms. Kong was entitled to, under the optional coverage, and interest on the delayed payments. The delay in paying these amounts was approximately two years. Even taking into account Ms. Kong's initial misrepresentations and the time it took to resolve them, I am concerned that it took the parties two years to do the mathematical calculations necessary to resolve these issues. I award \$1,000 special award for the unreasonable delay in paying these items.

**EXPENSES:**

I defer a decision on the issue of entitlement of expenses of this arbitration pending Personal complying with the statutory stoppage provisions and any further evidence or submissions that may arise from that.

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William J. Renahan  
Arbitrator

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July 21, 2005

Date



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. 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.
2. Ms. Kong is not entitled to payment for services provided by PhysioMed Davenport.
3. Personal shall pay Ms. Kong \$270 for the cost of an orthopaedic mattress cover, together with interest under section 46 of the *Schedule*, from February 23, 2004.
4. Ms. Kong is entitled to a special award in the amount of \$1,000 pursuant to section 282(10) of the *Insurance Act*.
5. I defer the issue of entitlement to expenses of the arbitration proceeding.

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William J. Renahan  
Arbitrator

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July 21, 2005

Date