

BETWEEN:

SHAWN P. LUNN

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION

Issues:

The Applicant, Shawn P. Lunn, was injured in a motor vehicle accident on December 25, 1993. He applied for and received statutory accident benefits from the Insurer, payable under Ontario Regulation 672¹. The Insurer paid Mr. Lunn weekly income benefits until September 30, 1994. He is seeking further benefits for the period October 1, 1994 to February 15, 1995. State Farm Mutual Automobile Insurance Company ("State Farm") claimed that Mr. Lunn did not qualify to receive benefits under section 12, but conceded that if he did qualify to receive benefits, disability was not in dispute. The Insurer claimed in addition that it paid benefits under section 12 in error and was therefore entitled to a repayment. The parties were unable to resolve their disputes through mediation and the Applicant applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹ Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.

The issues to be determined in this hearing are:

1. Is Mr. Lunn eligible to receive further weekly income benefits pursuant to section 12 of the *Schedule* as a person "on a temporary lay-off or in the alternative, was he "employed for any 180 days in the twelve month period before the accident"?
2. a) Is State Farm entitled to repayment pursuant to section 27(1) on the basis of error or fraud?

b) If so, what is the quantum of repayment?

Mr. Lunn also claims interest on any amounts owing, and his expenses incurred in the hearing.

Result:

1. Mr. Lunn was unemployed at the time of the accident but was "employed for a period of 180 days in the twelve months preceding the accident" and therefore qualifies for reinstatement of weekly income benefits.
2. Mr. Lunn was not on "temporary lay-off" at the time of the accident.
3. State Farm is not entitled to a repayment on the basis of error or fraud.
4. The issue of calculation of quantum of benefits does not have to be determined as State Farm is not entitled to a repayment.

5. Interest is payable on benefits owing as provided under section 24 of the *Schedule*.

Mr. Lunn is entitled to his expenses incurred in respect to the arbitration.

Hearing:

The hearing was held in North York, Ontario, on June 28, and 29, 1995 and July 4, 1995, before me, Fern Kirsch, arbitrator.

Present at the Hearing:

Applicant:	Shawn P. Lunn
Applicant's Representative:	Stanley Pasternak Barrister and Solicitor
Insurer's Representative:	David Zarek Barrister and Solicitor
Insurer's Officer:	Kevin Kwong

Mr. Terry O'Brien attended as an observer for State Farm on June 29, 1995.

Witnesses:

Shawn Lunn
Josef Fabing
Kevin Kwong

Exhibits:

The exhibits are noted at Appendix 1.

Cases referred to:

Case authorities are listed at Appendix 2.

Background:

Mr. Lunn was involved in an automobile accident on December 25, 1993. He received weekly income benefits until September 30, 1994. Mr. Lunn proposes that his weekly income benefits be reinstated for the period October 1, 1994 to February 15, 1995.

Mr. Lunn was employed full time as a pipe insulation mechanic for #690322 Ontario Incorporated carrying on business as Custom Insulation Systems ("Custom") from 1989 until the week ending July 10, 1993. During this time, he collected workers' compensation benefits from July 9, 1992 until January 7, 1993. He returned to work from February 8, 1993 until June 26, 1993 at which time he was laid off. He was kept on the company payroll for a further two weeks until July 10, 1993, during which time he received unemployment insurance sick leave benefits which continued until sometime in September 1993. He obtained three weeks' work in October 1993 at a Cineplex Studio's company called Family Passions Inc.

After stopping work at Family Passions Inc., Mr. Lunn received regular unemployment insurance benefits which continued to the date of the accident.

Mr. Lunn returned to work on February 15, 1995.

The parties agree that the issue I must decide is whether Mr. Lunn qualifies for ongoing weekly income benefits under section 12 on the basis that he was either unemployed at the time of the accident but "employed 180 days in the twelve month period before the accident", or in the alternative that he was on "temporary lay-off" at the time of the accident.

The parties further agree that if I find that Mr. Lunn is entitled to receive benefits under section 12, then disability is conceded and State Farm will reinstate Mr. Lunn's weekly income benefits for the period October 1, 1994 to February 15, 1995. If Mr. Lunn is not entitled to receive weekly income benefits, then disability is not conceded. The question whether Mr. Lunn was entitled to weekly benefits under section 13 of the *Schedule* was not before me at this Arbitration proceeding.

A) Was Mr. Lunn "employed for 180 days in the previous 12 months?"

Mr. Fabing, the owner of Custom confirmed that while on his company's payroll, Mr. Lunn was in receipt of workers' compensation benefits as a result of a work-related injury.

A Supplementary Record of Claim dated August 18, 1993² was submitted into evidence jointly by the parties. This confirms that Mr. Lunn was in receipt of total temporary workers' compensation benefits from July 9, 1992 to January 7, 1993, although he was shown on Custom's books to be on workers' compensation until the week ending February 6, 1993³.

Custom considered that Mr. Lunn was still employed by them after his workers' compensation benefits ended in January 1993.

² Exhibit 20

³ Exhibit 11

This is confirmed in two letters sent to Mr. Lunn by Mr. Fabing of Custom, dated January 28, 1993⁴, and February 5, 1993⁵.

The letter dated January 28, 1993⁶ states as follows:

“On Friday January 15, 1993 the Workers’ Compensation Board advised us that you were able to return to work.

You were instructed to report for work to the Oakville Trafalger Hospital site on Monday, January 18th.

Steve Pileggi, Job Superintendent, advised that you requested an additional week off work. You advised him that you would report to the Oakville Trafalger Hospital job site on Monday, January 25th.

Since you have not reported to work, we are advising you that failure to report to work or to notify the office if you are unable to report to work will result in termination.”

A further letter dated February 5, 1993⁷ was sent to Mr. Lunn but returned unopened. It states as follows:

“ Further to our letter of January 28, 1993 which was sent to you by registered mail, we have still not received notice from you as to why you have failed to report to work. This is the second notice. Failure to report to work will result in termination.

If you are unable to report for work, it is your responsibility to notify the office.”

⁴ Exhibit 12

⁵ Exhibit 13

⁶ Exhibit 12

⁷ Exhibit 13

Mr. Lunn actually returned to work for Custom on February 8, 1993. He continued to work there until June 26, 1993, when he was laid off.

Mr. Fabing confirmed that he considered this lay-off permanent, because Mr. Lunn had poor attendance at work, but he indicated that Mr. Lunn might not have been aware of this fact at the time. Mr. Lunn confirmed this in his testimony.

While still listed on the company payroll, Mr. Lunn received unemployment insurance benefits (sick leave benefits) from June 26, 1993 until July 10, 1993⁸. These benefits continued until some time in September 1993.

I find that during the period December 25, 1992 to July 10, 1993, Custom considered Mr. Lunn an employee.

THE LAW

Applicant's counsel submits that in determining whether Mr. Lunn was **employed** for 180 days in the twelve months before the accident pursuant to section 12(3) of the *Schedule*, I should include the time period when Mr. Lunn was in receipt of benefits from the Workers' Compensation Board, the Unemployment Insurance Commission (sick leave benefits), and weekends during the relevant time periods.

Counsel for State Farm argues that during the time that Mr. Lunn received workers' compensation benefits, he should not be considered to be "employed".

⁸ during the final two weeks Mr. Lunn was on payroll

Section 12(3) of the *Schedule* sets out one of the qualifications for eligibility for weekly income benefits. It states as follows:

(3) A person who was unemployed and who was not self-employed at the time of the accident is qualified to receive a weekly benefit under subsection (1) if he or she was **employed** or self-employed **for any 180 days in the twelve-month period before the accident** [emphasis added], and if he or she as a result of and within two years of the accident has suffered a substantial inability to perform the essential tasks of the occupation or employment in which he or she spent the most time during the twelve-month period before the accident.

Under section 12(3) of the *Schedule*, I must consider the period of time from December 25, 1992 to December 25, 1993 (the date of the accident) in determining whether Mr. Lunn was "employed for 180 days in the twelve months preceding the accident".

What is the definition of employed?

In *Madore*⁹, Arbitrator Macintosh considered the meaning of the word "employed". At page 9 Arbitrator Macintosh stated:

I am not persuaded by the Insurer's argument that the state of being employed is limited to those periods when work is done and wages are received.

In my view, individuals may retain their status as employees during periods when they are neither performing work nor earning income due to such reasons as illness or an unpaid leave of absence. I consider that the state of being employed depends as much upon the intentions of the employer and the employee and the expectations between them, as upon the payment of salary in return for specified work.

⁹ *Richard J. Madore and Co-operators General Insurance Company*, August 24, 1994, OIC File No. A-004305

In *Madore*, Mr. Madore was considered to be an employee during the time period that he was in receipt of Short Term Disability Benefits, despite the fact that during that period he did no work for his employer, nor did he receive wages.

Likewise, Mr. Lunn must be considered an employee of Custom during the period December 25, 1992 to July 10, 1993 despite the fact that he was receiving workers' compensation benefits. Mr. Lunn retained his status with Custom, who continued to list him on their books, and corresponded with him as an employee.

Mr. Lunn had a continuing intention to go back to work, and Custom expected him to return. His employment status was continuous, despite the fact that he was neither performing work nor earning income.

Accordingly, I find that Mr. Lunn was employed on a continuous basis with Custom for 198 days from December 25, 1992 until July 10, 1993.

This period of employment, together with Mr. Lunn's employment at Family Passions Inc. qualifies Mr. Lunn as "employed for 180 days in the twelve months before the accident" and he is therefore entitled to receive weekly income benefits. The parties agree that Mr. Lunn was substantially disabled from performing his work until February 15, 1995. He is therefore eligible for benefits for the period October 1, 1994 to February 15, 1995.

B) Was Mr. Lunn on "Temporary Lay-off" at the time of the accident?

Mr. Lunn argued in the alternative, that he was on "temporary lay-off" from Custom at the time of the accident pursuant to section 12(2), and therefore qualifies for reinstatement of weekly income benefits.

Since I have found that Mr. Lunn qualifies for weekly income benefits under section 12(3), I would not ordinarily deal with this issue.

However, in view of the Insurer's position that Mr. Lunn misrepresented his situation to them, I will address it.

Section 12(2) *Schedule* sets out this qualification for eligibility for weekly income benefits:

(2) The following qualifications apply to an insured person who claims a weekly benefit under subsection (1):

1. He or she must have been at the time of the accident,
...
ii. on a **temporary lay-off** [emphasis added], or

In the decision of *Sharma*¹⁰, Arbitrator Palmer considered the intention of the parties as a factor in determining whether Mr. Sharma was unemployed or on a temporary lay-off at the time of the accident. At page six of the decision Arbitrator Palmer stated:

I agree that the intention in the minds of the parties at the time of the "temporary lay-off" and their good faith is important. A lay-off by an employer who has no intention of recalling the employee is tantamount to dismissal. Similarly, a laid-off employee who immediately seeks other permanent employment may have no intention of treating the separation as "temporary". The actions of the parties with respect to their employer/employee relationship up to the date of the accident are important. However, I do not believe that the intention of the parties should **govern** the question of temporality of the lay-off; an objective, reasoned interpretation of the individual circumstances is called for.

¹⁰ *Rajinder Sharma and Co-operators General Insurance Company*, February 7, 1994, OIC File No. A-003840

Mr. Lunn was employed by Family Passions Inc. during the weeks ending October 10, 17, and 24, 1993¹¹, building movie sets. The company wanted him to join the union, but he was unable to do so as he was a member of another union local at the time. He stated he then decided to return to his former trade, as a pipe insulator, where "the money was better and the hours were longer".

I find that Mr. Lunn formed the intention to leave his former trade and find work in another area, and then later decided to return to his trade as a pipe insulation mechanic.

Sometime in either late October or November 1993¹², Mr. Lunn had telephoned Custom and advised Mr. Pileggi, the Superintendent that he was ready to come back to work. He was later told by Mr. Pileggi that he would not be able to return to work at Custom.

I find it difficult to understand why Mr. Lunn would have waited until October or November 1993 to contact Custom if he truly thought he was employed by them but on "temporary lay-off".

Mr. Lunn's attempt to contact Custom at this late date was in the nature of trying to secure new employment there. The question was not **when** could he return to work, but rather, **whether** he could come back to work.

Even if he was not aware that he was permanently laid off from Custom in July 1993, he himself did not treat the separation from Custom as temporary. His actions of seeking alternative work, placing himself on the Union hiring list, and accepting unemployment insurance sick leave benefits all suggest that Mr. Lunn did not believe he was on "temporary lay-off" from Custom.

¹¹ Exhibits 1, 2 and 3

¹² this date is unclear

In addition, it is clear that Custom did not consider Mr. Lunn to be an employee after July 10, 1993.

For these reasons, I find that Mr. Lunn was not on "temporary lay-off" pursuant to section 12(2) of the *Schedule* at the time of the accident.

C) Repayment to Insurer

State Farm submits it is entitled to a repayment for benefits paid during the period January 2, 1994 to September 30, 1994 pursuant to section 27(1) of the *Schedule*, on the basis that Mr. Lunn misrepresented his situation on the Application for Accident Benefits¹³ indicating that he was on "temporary lay-off" at the time of the accident.

State Farm submits that it relied upon this statement in calculating Mr. Lunn's benefits. State Farm indicated that if it had understood that Mr. Lunn was in fact unemployed at the time of the accident, or "employed for 180 days in the previous twelve months before the accident" the benefits would have been calculated differently.

Section 27(1) of the *Schedule* sets out the qualifications for repayment of benefits paid by the Insurer:

27.-(1) A person must repay to the insurer any benefit received under this Regulation that is paid to the person through error or fraud.

The onus of proving that benefits were paid through "error" or "fraud" rests with State Farm. In this case, there is no allegation of fraud on Mr. Lunn's part.

¹³ Exhibit 10

Mr. Kwong, a claim representative for State Farm, testified that he received the Application for Accident Benefits¹⁴, on which Mr. Lunn had noted that he was on "temporary lay-off" on January 19, 1994 together with the Employer Confirmation of Income Form¹⁵ from Mr. Lunn, and that between January 19, 1994 and January 31, 1994 he calculated the benefits after fully reviewing the documents.

He stated that if Mr. Lunn had not noted on his form that he was on "temporary lay-off" at the time of the accident, he would have calculated the benefits differently.

In reviewing the form, it is clear to me that Mr. Lunn made his claim without entirely understanding his entitlement to various categories. He filled out the section at paragraph 6 stating he was on "temporary lay-off". In addition, he filled out the section which states "if unemployed, have you worked 180 days out of the last 12 months. If yes, complete the employment section". Mr. Lunn completed the "most recent employer" section as well. I do not understand Mr. Kwong's evidence that he would have calculated the quantum of benefits differently depending on what category Mr. Lunn completed on the Form.

Calculation of the quantum of benefit is not dependent upon the income benefit category that an individual may fall under in section 12(2).

Mr. Kwong also testified that he noticed inconsistencies in the weekly income figures shown on the Employer Confirmation of Income Form¹⁶ and Application as early as January 1994.

¹⁴ Exhibit 10

¹⁵ Exhibit 15

¹⁶ Exhibit 15

Mr. Kwong acknowledged that he did not make any attempt to clarify the inconsistencies, despite the fact that it might have been a good idea to have done so.

The *Schedule* requires that State Farm pay benefits in an expeditious manner. State Farm is not required as a matter of course to confirm all information provided by an Applicant. They noted a clear inconsistency on the face of the material as early as January 1994, and yet they did not check the discrepancies.

In the case of *Theuma*¹⁷ arbitrator Makepeace stated:

"I am not persuaded that these benefits were paid to Mr. Theuma as a result of any misconduct on his part. I accept that he made the claim without entirely understanding his entitlement to various categories of benefits."

Although I have found Mr. Lunn was not on "temporary lay-off" at the time of the accident, I do not believe that Mr. Lunn knowingly misrepresented this fact on his Application for Accident Benefits.

Mr. Lunn was an unsophisticated client. There is no definition of "temporary lay-off" on the Application form. The letter from Union #95 dated June 20, 1995¹⁸ states as follows:

"lay offs in our business are normal and **temporary**. Laid off is not a permanent classification and the members employment status will vary depending on the length of the job project."

¹⁷ *Theuma and Halifax Insurance Company*, April 28, 1994, OIC File No. A-006496

¹⁸ Exhibit 4

It is clear from this letter that the Union considers time between jobs as "lay-offs". Mr. Lunn's only business experience, outside the work with Family Passions Inc., appears to be that of a pipe insulation mechanic regulated by Union #95.

I believe that the term "lay-off" on the Application for Accident Benefits meant to Mr. Lunn what it meant in the Union letter - that in between jobs he believed himself to be on "temporary lay-off".

Accordingly, I find that the Insurer has not satisfied the requirements of section 27(1) of the *Schedule* and is therefore not entitled to repayment of any weekly income benefits paid to Mr. Lunn.

Quantum of Benefit:

At the hearing, I ruled that quantum was not in issue in this proceeding, unless it were necessary for me to determine the amount of a repayment that was owed.

Since I have found that State Farm is not entitled to a repayment, it is not necessary for me to consider further the issue of quantum.

Expenses:

Mr. Lunn claims his expenses incurred in the arbitration. An award for expenses may be made under section 282(11) of the *Insurance Act*, which provides as follows:

The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

In *Ralph McCormick*¹⁹, Arbitrator Susan Naylor made the following comments about expenses, with which I agree:

The discretion to award expenses should be exercised, having regard to the intent and purpose of the legislative scheme. The arbitration process has been established under the *Insurance Act*, as amended, in order to facilitate applicants' access to relatively inexpensive, speedy and informal adjudication of disputes regarding no-fault benefits. The discretion to award expenses should be exercised in accordance with this objective, having regard to the individual circumstances of each case.

Accordingly, it is appropriate to award an applicant his or her expenses, unless, in the circumstances of the particular case, it is determined that the application for appointment of an arbitrator was manifestly frivolous or vexatious, or that the applicant's conduct unreasonably prolonged the proceedings.

The Director of Arbitrations approved this statement of the principles guiding an award of expenses in the appeal decision in *Vito Luigi Calogero*²⁰.

The Applicant is entitled to his expenses as set out in Schedule 1 of the Dispute Resolution Practice Code. I remain seized of the issue of the amount of expenses, in the event that the parties are unable to agree on the amount owing.

¹⁹ *Ralph McCormick and Economical Mutual Insurance Company*, October 2, 1991, OIC File No. A-000139

²⁰ *Vito Luigi Calogero and The Co-Operators General Insurance Company*, February 13, 1992, OIC File No. P-000251

Order:

1. Mr. Lunn was unemployed at the time of the accident but was employed for a period of 180 days in the twelve months preceding the accident and therefore qualifies for reinstatement of weekly income benefits.
2. Mr. Lunn was not on "temporary lay-off" at the time of the accident.
3. State Farm is not entitled to a repayment on the basis of error or fraud.
4. Interest is payable on benefits owing as provided under section 24 of the *Schedule*.

Mr. Lunn is entitled to his expenses incurred in respect to the arbitration.

Fern Kirsch
Arbitrator

August 18, 1995
Date

Appendix 1

Exhibits:

- Exhibit 1: Family Passions Inc. October 10, 1993 payroll record
- Exhibit 2: Family Passions Inc. October 17, 1993 payroll record
- Exhibit 3: Family Passions Inc. October 24, 1993 payroll record
- Exhibit 4: Letter from International Association of Heat and Frost Insulators and Asbestos Workers Local 95, dated June 20, 1995
- Exhibit 5: Sickness or Maternity Form, dated July 20, 1993
- Exhibit 6: Claim Type Change from Sickness to Regular Benefits, dated October 25, 1993
- Exhibit 7: Document page 18 Certification
- Exhibit 8: Request for Payroll Information, dated February 18, 1994
- Exhibit 9: Letter from Employment and Immigration Canada, dated June 29, 1994 (2 pages)
- Exhibit 10: Application for Accident Benefits (undated)
- Exhibit 11: Payroll Sheets 1992 and 1993 (three pages)
- Exhibit 12: Letter from Custom Insulation Systems, dated January 28, 1993
- Exhibit 13: Letter from Custom Insulation Systems, dated February 5, 1993
- Exhibit 14: Letter from Custom Insulation Systems, dated July 5, 1993
- Exhibit 15: Employer Confirmation of Income, dated January 12, 1994
- Exhibit 16: Record of Employment, dated July 13, 1993 (2 pages)
- Exhibit 17: Assessment of Claim by Insurer, dated January 31, 1994
- Exhibit 18: Assessment of Claim by Insurer, dated January 11, 1995

Exhibit 19: Page of Transcript, page 13

Exhibit 20: Supplementary Record of Claim, dated August 18, 1993

Other Material before the Arbitrator

Application for Arbitration dated December 21, 1994

Response of Insurer, dated January 19, 1994 (should be 1995)

Report of Mediator, dated December 15, 1994

Arbitration pre-hearing letter, dated March 2, 1995

Appendix 2

Ahmed and Royal Insurance Company of Canada, October 13, 1994, OIC File No. A-004411

Anand Boodhai and Allstate Insurance Company of Canada, November 21, 1994, OIC File No. A-004002

Bush and Pilot Insurance Company, April 25, 1994, OIC File No. A-004687

Ferrari and Royal Insurance Company of Canada, September 8, 1994, OIC File No. A-007313 (under appeal)

Gibson v. York Fire & Casualty Insurance Company, January 4, 1995, OIC File No. A-006150 (as corrected)

Jolin and Jevco Insurance Company, October 27, 1993, OIC File No. A-002187 (supplemental decision, March 31, 1994)

Levenson and The General Accident Assurance Company of Canada, February 18, 1992, OIC File No. A-000260 (upheld on appeal on another issue, September 29, 1992, OIC File No. P-000260)

Madore and Co-operators General Insurance Company, August 24, 1994, OIC File No. A-004305 (under appeal)

Main and Canadian General Insurance Company, May 6, 1994, OIC File No. A-006208

McCormick and Economical Mutual Insurance Company, October 2, 1991, OIC File No. A-000139

Mouawad and Alpina Insurance Company, Ltd., June 30, 1994, OIC File No. A-003226 (under appeal)

Raickovic and Gore Mutual Insurance Company, May 26, 1993, OIC File No. A-002533

Scavuzzo and Canadian Home Assurance Company, May 18, 1992, OIC File No. A-000626 (upheld on appeal, June 19, 1992, OIC File No. P-000626)

Sharma and Co-operators General Insurance Company, February 7, 1994, OIC File No.

A-003840 (under appeal)

Singh and Wellington Insurance Company, June 24, 1994, OIC File No. A-004139

Theuma and Halifax Insurance Company, April 28, 1995, OIC File No. A-006496

Upper and Canadian General Insurance Company, June 3, 1994, OIC File No. A-002855

Vo and Maplex General Insurance Company, October 4, 1993, OIC File No. A-002777, (appeal decision, March 11, 1994, OIC File No. P-002777)