



FSCO A06-001473

BETWEEN:

SUDHIR BHOLA

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Jeffrey Rogers

Heard: August 1 and 2, 2007, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Mr. David S. Wilson, solicitor for Mr. Bhola
Mr. Peter Yoo, solicitor for Personal Insurance Company of Canada

Issues:

The Applicant, Sudhir Bhola, was injured in a motor vehicle accident on January 10, 2004. He applied for and received statutory accident benefits from Personal Insurance Company of Canada (“Personal”), payable under the *Schedule*.¹ The parties disagree on his entitlement to weekly income replacement benefits and other benefits. They were unable to resolve their disputes through mediation, and Mr. Bhola applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The parties agreed that certain issues would be determined by way of a preliminary issues hearing.

At the beginning of the preliminary issues hearing counsel advised that they had narrowed the issues in dispute to the following:

1. Are the long term disability benefits paid to Mr. Bhola from and after April 2004 deductible from his income replacement benefit entitlement, pursuant to section 7(1)1.i of the *Schedule*?
2. Is Mr. Bhola to be treated as an employed person or self-employed for the purpose of calculating his income replacement benefit entitlement?

Result:

1. The long term disability benefits paid to Mr. Bhola from and after April 2004 are deductible from his income replacement benefit entitlement, pursuant to section 7(1)1.i of the *Schedule*.
2. Mr. Bhola is to be treated as self-employed for the purpose of calculating his income replacement benefits.

PRELIMINARY AND PROCEDURAL RULINGS

Agreement on Total Income

On the first day of the hearing, counsel for Mr. Bhola sought a ruling that the parties had agreed on Mr. Bhola's total income, exclusive of benefits, for the 52-week period prior to the accident, if found to be self-employed, and for the 4 week period prior to the accident, if found to be employed. The parties had anticipated that the hearing would involve a determination of this

question. However, witnesses summoned from Canada Post (Mr. Bhola's employer) had seemed reluctant to attend. They had therefore arranged a telephone conference between counsel for the parties, representatives of Canada Post, and counsel for Canada Post, in an attempt to resolve the issue. Counsel for Mr. Bhola indicated that an agreement had been arrived at following the telephone conference. He had confirmed the agreement by letter of July 27, 2007.² However, counsel for Personal had attempted to resile from the agreement by letter of July 30, 2007.³

I expressed reluctance to address the issue summarily, anticipating that evidence from counsel would be required. However, counsel for Personal confirmed that the parties had arrived at an "understanding" following the telephone conference. He indicated that he had later discussed the matter with an accountant and had concluded that the information Canada Post had supplied orally might not have been accurate. He therefore wanted an opportunity to review documents in the possession of Canada Post in order to confirm the information supplied. He did not indicate that the "understanding" was subject to receipt of written confirmation of the information.

I ruled that counsel had made an agreement which should be enforced. I ruled that there was no distinction between what Mr. Bhola described as an "agreement" and Personal termed an "understanding". I reasoned that efficient functioning of the dispute resolution process required the co-operation of parties in resolving disputes on their own and that enforcement of their agreements was necessary for the preservation of the integrity of the process.

Counsel's letter of July 27, 2007 also indicated that the parties had agreed that the benefits set out in a letter from Canada Post, dated December 22, 2005,⁴ should be included in the calculation of Mr. Bhola's pre-accident income, whether found to be employed or self-employed. After I made the above ruling, counsel for Mr. Bhola requested that I use the information in the agreement to calculate Mr. Bhola's income and make an order. I indicated that this was an unnecessary exercise, because it was a simple question of arithmetic.

² Exhibit 1

³ Exhibit 2

⁴ Exhibit 7

On the second day of the hearing, counsel for Mr. Bhola advised that a dispute had arisen as to the meaning of the agreement. The letter from Canada Post indicates that one of Mr. Bhola's benefits is 4.8% of gross earnings, paid towards a pension. Mr. Bhola submitted that the parties had agreed that "gross earnings" meant the figure that the parties had fixed for the purpose of calculating entitlement to income replacement benefits. Personal submitted that it meant "gross earnings" as defined in the pension plan.

I ruled that, because Canada Post prepared the letter long before the parties made their agreement, and because the agreement does not define gross earnings for the purpose of pension contributions, "gross earnings" must take its definition from the pension plan. I suggested to counsel that they resolve the issue without expending the resources necessary to arrive at the precise figure, because their dispute involved a miniscule 4.8% of the difference between gross earnings as defined in the pension plan, and the gross earnings figures they had agreed to, reduced by the formula for calculating weekly entitlement to income replacement benefits.

Structure of Hearing

The facts regarding deductibility of long term disability benefits are not in dispute. No oral evidence was presented on that issue. Some facts regarding Mr. Bhola's employment status are in dispute. Mr. Bhola testified on that issue. The parties agreed that Personal bore the onus of proving deductibility of disability benefits. They disagreed on who bore the onus on the issue of employment. Personal submitted that Mr. Bhola bore the onus. Mr. Bhola argued that, because the result of a finding that he was self-employed would be prejudicial to him, the consumer protection nature of the legislation required that the onus be placed on Personal to prove that he was self-employed.

Mr. Bhola therefore submitted that I should hear the evidence and then hear submissions from Personal on both issues, followed by his submissions and then reply from Personal. Personal submitted that I hear the issue of deductibility on the first day, and then hear the evidence on the employment issue on the second day, followed by submissions by Mr. Bhola and then Personal.

I ruled that Mr. Bhola's employment status was an essential element of entitlement with regard to which he bore the onus. Mr. Bhola's suggested approach would lead to the absurd result that the onus would shift, as dictated by the facts on a case by case basis. A technical application of my ruling would have required that the order of submissions should be reversed on the two issues. However, I ruled that in view of the fact that Personal had filed a detailed factum setting out its position on each issue, the most efficient way to conduct the hearing would be to hear the evidence first, then hear submissions from Personal on both issues, followed by Mr. Bhola's submissions, and then reply from Personal.

Documents

Personal sought to file a Document Brief on each issue. Mr. Bhola objected to the admissibility of one of the documents on the grounds that it was irrelevant. I accepted the briefs, ruling that they would be marked for identification purposes only⁵, that the record would consist of only those documents referred to in evidence or submissions and marked as individual exhibits, and that I would deal with objections to admissibility as the documents were referred to.

In its reply submissions, Personal sought to introduce documents it claimed to be relevant to the question of whether Mr. Bhola was engaged in the alleged self-employment activities in the four weeks preceding the accident. That issue was identified to be in dispute during Mr. Bhola's testimony and Personal had not put the documents to him. I ruled the documents could not fairly be introduced in reply submissions.

EVIDENCE AND ANALYSIS:

Long Term Disability Benefits

Section 7(1)1.i of the *Schedule* provides for a reduction of an insured person's weekly entitlement to income replacement benefits by the "net weekly payments for loss of income that

⁵ Exhibits A and B.

are being received by the person as a result of the accident...under any income continuation benefit plan...”.

Section 2(9) of the *Schedule* sets out a specific deduction. It provides that “payments for loss of income under an income continuation benefit plan shall be deemed to include...periodic payments of insurance, if the insurance (i) is offered by the insurer only to persons who are employed at the time the contract for the insurance is entered into, and (ii) is offered by the insurer only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person’s income from employment.”

Mr. Bhola has been employed by Canada Post since 1985. Immediately prior to the accident he was working as a postal clerk, averaging 40 hours per week. He had coverage under a group insurance policy issued to Canada Post by Sunlife Assurance Company of Canada.⁶ Because Mr. Bhola did not return to work as a result of the January 10, 2004 accident, he began receiving long term disability benefits from Sunlife on April 27, 2004. The question is whether those payments are “net weekly payments for loss of income...under any income continuation benefit plan...”.

Personal submits that the Sunlife policy meets the specific criteria of section 2(9) and, in the alternative, the general criteria of section 7(1)1.i. Mr. Bhola’s position is that the Sunlife policy was not “offered by the insurer only to persons who are employed at the time the contract for the insurance is entered into”, that his benefits were not calculated with reference to his income from employment, that the payments he received were not for “loss of income”, were not “weekly” and were not made under an “income continuation benefit plan”. He therefore met neither the specific criteria of section 2(9) nor the general criteria of section 7(1)1.i.

⁶ Exhibit 6

Legislative Purpose

In *Wilcox and Economical Mutual Insurance Co.*⁷, in deciding whether Ms. Wilcox's payments under the disability insurance policy she had purchased were deductible from her income replacement benefits, Director's Delegate Makepeace conducted an extensive review of the history of deductibility of collateral benefits and arrived at the following conclusions which must be applied in interpreting section 2(9) and section 7(1)1.i:

1. The purpose of the deductibility provisions is to prevent double recovery. While injured persons should not be penalized by having access to other benefits, they should not be compensated twice for the same loss.
2. Where non-deductibility of a type of benefit has been established, it would take the clearest legislative language to displace it.

Application of Section 2(9)

Section 2(9) provides for a deduction of benefits paid under a specific type of insurance policy. There is no dispute that the payments Mr. Bhola received from Sunlife were "payments of insurance" within the meaning of section 2(9). However, for the section to apply, the insurance must be "offered by the insurer only to persons who are employed at the time the contract for insurance is entered into". Mr. Bhola was employed by Canada Post on January 1, 1994, the effective date of the Sunlife contract. However, the contract does not limit coverage to persons employed on that date.

Section 5 of the contract provides for coverage for "employees employed...after the inception date". I therefore find that the Sunlife contract does not meet the requirements of section 2(9). I agree with Mr. Bhola's suggestion that the section is probably intended to capture instances where an individual buys disability insurance, and not the typical employee group plan, which allows for coverage of new employees, without a new contract.

⁷ FSCO P-99-00015, March 2, 2000

Section 7(1)1.i
Net weekly payments

Section 7(1)1.i provides for the deduction of “net weekly payments”. The benefits Mr. Bhola received from Sunlife were paid each month. Relying on the decision in *Lee and Certas Direct Insurance Company*⁸, Mr. Bhola argued that benefits paid monthly are not deductible. In that case, Arbitrator Alves ruled as follows:

Further, the *Schedule* contemplates the deduction of net *weekly* payments for loss of income. In this case, the IOF policy provided for the payment of monthly benefits, at the end of the month, and, in the event that benefits were payable during less than a month, the amount payable will be paid at the daily rate of 1/30th of the monthly amount. As the IOF benefits were paid monthly, not weekly, they would not be caught by the wording of section 7(1)1.i of the *Schedule*.⁹

Although deduction of benefits paid monthly has been allowed in other cases, the issue of the period of payment of the benefits has not been addressed, except in *Lee*.

I do not accept Mr. Bhola’s submission. I note first that *Lee* was decided without the necessity of reconciling the specific deduction of “periodic payments” provided in section 2(9), which applies only to accidents that occurred on or after January 1, 2002. Section 2(9) must be considered here.

If only benefits paid weekly are deductible, the only deductible, periodic payments under section 2(9) would be those paid weekly. Therefore, with two identical qualifying policies, one paid weekly and the other monthly, one would be deducted and the other would not. That result is absurd and should be avoided, unless the language of the legislation can be given no other reasonable interpretation.

I find that “weekly payments” signifies the period of calculation of the deduction, rather than the period of receipt of the benefit. That approach is consistent with the scheme of the *Schedule* and does not frustrate the legislative intent to preclude double recovery. The calculation period of the

⁸ FSCO A03-000041, June 15, 2006

⁹ At paragraph 18

deduction is harmonious with section 6 of the *Schedule* which provides for income replacement benefits, based on “net weekly income from employment determined in accordance with section 61”. This calculation is required, regardless of the period of payment. I reject Mr. Bhola’s submission that the above approach is untenable, because the *Schedule* contains a formula in section 61 for calculating “net weekly income from employment”, but no formula for calculating “net weekly payments for loss of income”. I note that the section 61 formula requires a calculation of gross annual income from employment, without that term being defined. It is unreasonable to suggest that had the legislature not provided a formula for net weekly income, it would have been impossible to calculate. The formula would have been established by jurisprudence. Similarly, the phrase “net weekly payments for loss of income” is not too vague to preclude an approach that might require interpretation. The only interpretation required is the meaning of “net”. The rest is simple arithmetic. The need for interpretation does not preclude giving section 7(1)1.i a meaning that furthers the legislative intent.

Payments for loss of income

At the heart of the question of whether disability payments are for loss of income is the issue of whether the payments are intended to indemnify the claimant for lost income or are paid upon the happening of an adverse event. As Arbitrator Alves stated in *Lee*:

The two main hallmarks of an indemnity policy are a stated intent to pay income security for loss of wages, and provisions designed to continue paying an amount of income that closely follows the claimant’s pay at the time of her disability.¹⁰

Other factors found to be relevant are:

- Whether benefits are linked to being actively and regularly working at the onset of disability;
- Whether the disability test is inability to perform pre-disability employment duties;

¹⁰ At paragraph 11

- Whether post-disability earnings are deductible;
- Whether the disability insurer has subrogation rights directly tied to the claimant's income;
- Whether the employer is involved in arranging for and paying for the disability policy, and;
- Whether the benefits cease when the claimant is no longer disabled from working or at an age reflecting retirement.

I find that the Sunlife policy provides payments for loss of income. The relevant elements of the policy are as follows:

- Section 5 of the policy requires an employee to be actively at work for coverage to commence and section 9 of the policy links the amount of the benefit to the insured's earnings at the time of disability;
- Section 6 of the policy provides for termination of coverage upon the termination of employment;
- Section 4 of the policy links entitlement to inability to perform employment duties;
- Section 9 provides for deductibility of post-disability income;
- Section 8 gives Sunlife subrogation rights of claims for recovery of loss of income;
- Section 9 of the policy provides for benefits ceasing on the employee's 65th birthday, and;
- The policy was arranged by Mr. Bhola's employer.

I do not accept Mr. Bhola's submission that the policy provides for entitlement upon former employees becoming disabled, because the definition of "employee" in section 4 includes "a former employee, where the context of the policy requires, who is eligible for benefits under this policy". Although former employees might continue to receive benefits, having attained eligibility as employees, both the coverage and initial entitlement provisions of the policy require employment.

I also do not accept Mr. Bhola's submission that, because post-disability income is deducted from the amount of the benefit, the benefit is not tied to pre-disability income. In fact, the deductibility of post-disability income tends to show that the policy was intended to indemnify Mr. Bhola for his loss of income and is not a cushion against the general adverse effects of disability.

Income Continuation

Section 9 of the Sunlife policy provides for a 13-week "elimination period" before benefits are payable. Mr. Bhola submits that, because he had to wait 13 weeks to receive the benefits, the Sunlife plan does not provide "income continuation".

In *Lee*, Arbitrator Alves considered the four month waiting period in deciding the question of whether the relevant policy provided payments for loss of income. She concluded that the length of the waiting period suggested that the policy was a financial cushion in the event of disability, rather than a link to earnings.¹¹ In *Codling-Mokena and CAA Insurance Co.*¹², Arbitrator Leitch went further. He found that a 60-day waiting period removed the payments under the policy from the ordinary meaning of "continuation" and the benefits were therefore not deductible. He stated that "a claimant who receives no benefits under the policy for 60 days has plainly not had his/her income continued during that period and may suffer serious financial consequences as a result."¹³

Arbitrator Leitch imposes the requirement of an unbroken stream of income, but continuation includes the idea of stopping and starting again. For example: I started building the wall on Monday and continued on Tuesday. That use of the term is still appropriate when there is a significant interval between stopping and starting. For example: I started building the wall on January 10, 2004, but I was unable to continue until 13 weeks later, when I had recovered from my broken foot caused by dropping a brick on it.

¹¹ At paragraph 13

¹² FSCO A04-000017, October 17, 2006

¹³ At paragraph 28

I find that the legislature intended “continuation” to include the concept of stopping and starting for several reasons. First, like the *Schedule*, which imposes a waiting period of one week for income replacement benefits, almost all income replacement policies include a waiting period. There will therefore rarely be an unbroken stream of income. Second, if some short waiting period is acceptable as Arbitrator Leitch suggests, an arbitrary line must be drawn. Continuation and deductibility will be on one side, and double recovery on the other. Third, the results for persons entitled to income replacement benefits who are also entitled to other payments for loss of income would be more or less the same. The longest waiting period would be one week, after which entitlement to income replacement benefits commences. Deductions for other payments for loss of income would then commence after any longer waiting period in another plan. This approach achieves the legislative purpose of preventing double recovery. It does not penalize persons with access to other benefits. The principle that accident victims should not be compensated twice for the same loss is achieved.

I find it inappropriate to make financial hardship that might be caused by waiting for payment under the collateral plan a determining factor in ascertaining the nature of its benefits. The waiting period under the *Schedule* is one week. That is when a person entitled to income replacement benefits would normally start receiving them. Financial hardship only arises when income replacement benefits are not paid promptly. The penalties in the *Schedule* for improper delay or denial of benefits do not include non-deductibility of collateral benefits.

Conclusion on deductibility

For the above reasons, I find that the payments Mr. Bhola received from Sunlife are weekly payments for loss of income, received as a result of the accident under an income continuation plan. They are therefore deductible pursuant to section 7(1)1.i of the *Schedule*.

Employed or Self-Employed?

Section 8 of the *Schedule* provides rules for calculating the gross income for persons entitled to income replacement benefits. A person who was not self-employed at any time during the four

weeks before the accident may designate either the four week period before the accident, or 52 weeks before the accident, for calculation of gross income. The choices for a person who was self-employed at any time in the four weeks before the accident are limited to 52 weeks before the accident, or their last fiscal year before the accident. This restriction applies even if the self-employed person has another job in which he or she is an employee.

In addition to his job at Canada Post, Mr. Bhola worked as a mortgage agent. In 2003 he successfully completed a mortgage underwriting course at Seneca College and registered with the Financial Services Commission as an authorized mortgage agent. Mortgage agents cannot operate on their own. They must be associated with a mortgage broker. After completing the course, Mr. Bhola contacted a few brokers and, on June 30, 2003, he signed a “Mortgage Consultant Agreement” with Metrocap Financial Services.¹⁴

The agreement is drafted for the participation of three parties. The first is Metrocap. The second is a company retained by Metrocap as an independent contractor to procure and arrange mortgages. The third is Mr. Bhola, who was to be retained by the company to act exclusively on its behalf in procuring or arranging mortgages. There was never a company. Metrocap never told Mr. Bhola to incorporate a company and he did not do so. Mr. Bhola testified that he understood the agreement to mean that he was tied exclusively to Metrocap. He worked for no other broker in 2003. It was never his understanding that he would be working for the company. He also did not register a sole proprietorship and was never asked to do so.

The agreement provides that Mr. Bhola would be an employee of the company, while the company would be retained as an independent contractor. Mr. Bhola appeared unfamiliar with all of the details of the contract. He agreed that he viewed some of the obligations imposed on the company by the contract to be his responsibility. In fact, according to the agreement, Metrocap would pay commissions to the company, not Mr. Bhola.

Mr. Bhola testified that his function was to bring borrowers and lenders together. His job was to find clients and it was completely up to him how he did so. He was retained by borrowers

¹⁴ Exhibit 3

attempting to secure a loan on either property they owned, or intended to purchase. He established a home office. He would meet clients either at his home, their home, at Metrocap or in a public place, like a coffee shop. His home was primarily his office for this enterprise. He had a computer linked to Metrocap at home. He had no designated office at Metrocap. There was no requirement that he ever attend at Metrocap's office. From time to time, Metrocap did put on courses on how to grow the business, but attendance was not compulsory. For the most part, he was left on his own. He decided his own hours of work and conducted his work as he wanted. He could hire employees if he chose, and they would be exclusively under his control.

In addition to meeting clients at Metrocap, Mr. Bhola used its office to make copies and send faxes. He could get the girl at the front desk to do this. Although there were no specific restrictions on this use and although he was never told not to, he knew that the broker did not like it. The broker did not like it because it cost money. He had once heard a complaint about someone using the staff too often. He did not pay for the use of Metrocap's office.

Because Mr. Bhola was inexperienced when he started at Metrocap, he needed assistance to complete his transactions. This situation continued until after the accident. Although not part of the written agreement with Metrocap, arrangements were made for a mortgage underwriter in the office to assist him. She would answer questions he could not and she completed the deals for the clients he brought in. Mr. Bhola's evidence was that, because of this arrangement, the split of commissions between himself and Metrocap was changed from 85/15 as the agreement provides, to 50/50. Mr. Bhola's evidence was that the underwriter also got a share of the commission, out of Metrocap's 50%.

Commissions were always paid directly to Metrocap. Metrocap then paid Mr. Bhola his share of the commission, without deductions. Metrocap provided no benefits. Mr. Bhola's 2003 tax return¹⁵ contains a Statement of Business Activities, showing his home address as his business address. It indicates that he is a 100% partner in the business. It shows a business loss of \$7,617.67. It also shows a claim of \$1,135.06 as expenses for Mr. Bhola's home office.

¹⁵ Exhibit 4

Mr. Bhola testified that it was his idea to claim the business expenses in the return. An accountant gave him advice, but the advice in this regard was simply to be accurate.

Mr. Bhola testified that he was unaware of any rules he had to follow in his dealings at Metrocap, except the rules of ethics he was taught at Seneca. He was unaware of any rules specific to Metrocap. When prompted in reply to review clauses 3.03, 3.03 and 3.05 of the agreement, he agreed that he was bound by those terms, which the agreement states to be obligations of the company. He was unaware of other obligations imposed on the company by clauses 3.04 and 3.06.

When asked whether he expected to make money from his mortgage consulting enterprise, Mr. Bhola responded that of course he wanted to make money. Why else, he asked, would he have done it?

Mr. Bhola was not asked specifically whether he engaged in any business for Metrocap in the four weeks preceding the accident. He did agree that he has never terminated his relationship with Metrocap. His 2003 tax return states that 2003 was not his last year of business.

The term “self-employed” is not defined in the *Schedule*. The Superintendent has issued a Guideline¹⁶ on this subject, pursuant to section 268.3 of the *Insurance Act*. The Guideline indicates that a person carrying on business as a sole proprietor will be considered to be self-employed and identifies many of the indicia of independence, consistent with being self-employed. The relevant sections are as follows:

For the purposes of the *SABS*, an individual is considered to be self-employed if the business he or she derives his or her remuneration from in not incorporated under any law. For example, sole proprietorships and partnerships are considered to be self-employment situations...

¹⁶ Guideline for identifying self-employed individuals

DEFINITIONS

Business: An activity that is carried on for profit or with a reasonable expectation of profit, including a profession, a calling, a trade, a manufacture or undertaking of any kind, an adventure or concern in the nature of trade, or a service.

The following sets out indicators of self-employment in two situations:

TRADITIONAL SELF-EMPLOYMENT SITUATION

THE INDIVIDUAL:

- is an owner of an unincorporated sole proprietorship or a partner in a partnership (other than a limited partner).
- has an established location where business transactions take place.
- participates in the everyday operations of the business (not just an investor or receiving remuneration for purposes of income splitting).
- determines own method and schedule for accomplishing tasks.
- determines own hours and may not necessarily work a set number of hours per period (i.e. 40 hour week).
- negotiates the price(s) of product(s) or fee(s) for service(s) with the customer or client with the exception of regulated fields (i.e. physicians).
- determines the annual income as his or her profit from the business according to the Income Tax Act (Canada) and Income Tax Act (Ontario).
- is ineligible for regular Employment Insurance benefits.
- contributes the employer and employee contributions to Canada Pension Plan (CPP) for his or her own pension plan.
- collects and remits all taxes to different levels of government according to each respective tax legislation (i.e. GST, PST, source deductions from employee(s)).

IN THE CASE OF A SOLE PROPRIETORSHIP:

has control over:

- (1) the hiring and dismissal of employee(s),
- (2) the wage level and hours of work of employee(s),
- (3) the method by which employee(s) accomplish work, and
- (4) executive decisions surrounding the business.

Determining the nature of Mr. Bhola's relationship with Metrocap, requires an examination of the substance of his dealings with Metrocap, rather than the form established by the contract he signed. It is clear that the parties treated the contract only as a rough framework for their relationship. I find, in substance, Mr. Bhola established a sole proprietorship in which he engaged in the business of being a mortgage agent. In substance, he fulfilled many of the obligations the contract imposed on the company, which the contract describes as an independent contractor. The establishment of a sole proprietorship does not require registration. A sole proprietorship is simply a business in which one individual owns all of the assets, owes all of the liabilities and operates in his or her personal capacity. This is precisely what Mr. Bhola intended to describe when he indicated in his tax return that he was a 100% partner in his business.

I find that Mr. Bhola entered into the enterprise of being a mortgage agent because he wanted to make a profit, as he testified. There is no evidence that his expectation was unreasonable. In the circumstances, I find that his enterprise meets the guideline definition of "business". He was engaged in "an activity that is carried on...with a reasonable expectation of profit".

I find that the following are indicia of self-employment:

- Mr. Bhola had no fixed office at Metrocap;
- He was not required to attend at its offices;
- His principal place of business was his home, not Metrocap;
- Metrocap exercised no control over how Mr. Bhola recruited clients;
- Mr. Bhola was free to decide how much time he spent recruiting clients;

- Mr. Bhola retained an accountant and treated his enterprise as a business for tax purposes;
- Mr. Bhola knew of no rules of conduct, specific to Metrocap.

I find no indicia of control by Metrocap, consistent with employment. I do not accept Mr. Bhola's submission that his relationship with the underwriter is evidence of control by Metrocap or his lack of independence. The evidence is that the underwriter assisted him in completing his deals. There is no evidence that she exercised any control over Mr. Bhola. I do not accept Mr. Bhola's characterization of the payments of commission to the underwriter as payments out of Metrocap's share. The agreement contemplated payment of 85% of the commission to Mr. Bhola. His share was reduced to 50% because of the involvement of the underwriter. Therefore, the payment to the underwriter could be viewed as coming from his share.

Although Mr. Bhola was not specifically asked whether he engaged in activities as a mortgage agent in the four weeks preceding the accident, I find that the only evidence supports that conclusion. Mr. Bhola's evidence was that since he started being a mortgage agent, has never stopped. If his position was that he ceased during the four weeks preceding the accident, I would have expected him to say that specifically.

In *Allstate Insurance Company of Canada and Mohammad Malik*¹⁷, the Director's Delegate made the following statement:

...The interpretation of employment status should be aimed at ensuring that the insured person's income is measured fairly. While the starting point is the arrangement adopted by the parties, I agree that their characterization can be reevaluated if it provides a distorted picture of the person's income. However, that is not the case here. Mr. Malik's income is fairly represented by deducting his expenses from his income... While his earnings may not have fluctuated as much as other self-employed individuals, his revenues and expenses varied from week

¹⁷ FSCO P00-00007, July 17 2000, at page 11

to week-the underlying reason for not giving self-employed persons the four week option.

I do not accept Mr. Bhola's submission that this statement allows Arbitrators to choose the employment status that provides the greater benefit to the insured. The Director's Delegate simply reiterated the established approach of giving effect to the substance, rather than the form of transactions, in determining employment status. The fact that Mr. Bhola's income replacement benefit will be less, if self-employed, does not mean that his benefit is based on a distorted picture of his income.

For the above reasons, I conclude that Mr. Bhola is to be treated as self-employed for the purpose of calculating his income replacement benefit entitlement.

EXPENSES:

The parties made no submissions on expenses. There was nothing unusual about the hearing that would assist in determining the issue. I therefore reserve the issue to the hearing Arbitrator. However, should the parties resolve the matter without a hearing but are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

September 17, 2007

Date



FSCO A06-001473

BETWEEN:

SUDHIR BHOLA

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 long term disability benefits paid to Mr. Bhola from and after April 2004 are deductible from his income replacement benefit entitlement, pursuant to section 7(1)1.i of the *Schedule*?
2. Mr. Bhola is to be treated as self-employed for the purpose of calculating his income replacement benefits.

Jeffrey Rogers
Arbitrator

September 17, 2007

Date