FSCO A02–000654

BETWEEN:

FRANCESCO GIMONDO

Applicant

and

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Minor error (on page 19) corrected on June 21, 2004 in accordance with the *Dispute Resolution Practice Code* and section 21.1 of the *Statutory Powers Procedure Act.

Before: Beth Allen

Heard: March 8, 2004, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Mr. Gimondo was unrepresented
Kadey B.J. Schultz for Royal & SunAlliance Insurance Company of Canada

Issues:

The Applicant, Francesco Gimondo, was injured in a motor vehicle accident on October 30, 1999. He applied for and received statutory accident benefits from Royal & SunAlliance Insurance Company of Canada ("Royal"), payable under the *Schedule*.[1] Royal terminated weekly income replacement benefits on October 28, 2000. The parties were unable to resolve their disputes through mediation, and Mr. Gimondo 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 by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

Preliminary Issues:

The preliminary issues in this hearing are:

1. Is the Applicant entitled to an adjournment of the hearing pursuant to Rule 72 of the *Dispute Resolution Practice Code*[2] (the "*Code*")?

2. Is Royal entitled to a dismissal of the Applicant's claims on the basis that the Applicant failed to prove his case?

3. Is Royal entitled to rely on subsection 33(1), paragraph 1 of the *Schedule* to suspend the Applicant's income replacement benefits?

Substantive Issues:

The substantive issues in this hearing are:

1. Is the Applicant entitled to ongoing income replacement benefits pursuant to section 4 of the *Schedule* from October 29, 2000 and ongoing?

2. Is the Applicant entitled pursuant to section 6 of the *Schedule* to a greater weekly rate of income replacement benefit than that paid by Royal?

3. Is Royal entitled to a repayment of any benefits paid to the Applicant pursuant to section 47 of the *Schedule*?

[2]Updated 4th edition October 2003.

4. Is Royal entitled to its arbitration expenses pursuant to subsection 282(11) of the *Insurance Act*?

5. Can Royal rely on subsection 282(11.2) of the predecessor *Insurance Act* to seek an amount not exceeding its assessment fee?

6. Is the Applicant entitled to interest on any overdue benefit amounts pursuant to section 46 of the *Schedule*?

Results:

1. The Applicant's request for an adjournment is dismissed.

2. The Applicant's claim for income replacement benefits is dismissed on the basis that he failed to prove his case.

3. I need not decide the issue of whether Royal is entitled to rely on subsection 33(1), paragraph 1 of the *Schedule* to suspend the Applicant's benefit payments.

4. Royal's claim for a repayment of income replacement benefits paid to the Applicant is dismissed.

5. The Applicant shall pay Royal an expense award of $1,500.

6. Royal's claim for an award in the amount of its $3,000 assessment fee is dismissed.

7. There are no overdue benefit amounts and hence no interest owing by Royal.

EVIDENCE AND ANALYSIS:

Background:

The Applicant appeared at the hearing on March 8, 2004 unrepresented, accompanied by his father, Mr. Domenic Gimondo. The Applicant indicated that he was not prepared to proceed with the hearing and requested an adjournment to retain counsel. I refused the adjournment (for reasons I outline later in the decision), whereupon Mr. Domenic Gimondo rose to his feet, summoned his son, and stated that they were not staying for the hearing. An outline of the background to this case will provide a context to the denial of the Applicant's adjournment request.

The Applicant was involved in an accident on October 30, 1999. He filed an Application for Arbitration with the Commission on April 30, 2002. The Applicant was unrepresented at that time. The Applicant attended a mediation on January 31, 2002 and the Report of Mediator of the same date indicates that the Applicant was unrepresented at the mediation. On record are two authorizations dated July 23, 2002 which purportedly authorize Global Court Services ("Global") to act on the Applicant's behalf – one containing the purported signatures of the Applicant and his father, with no signature by an agent from Global; and the other containing only a purported signature of the Applicant, and an illegible signature purportedly by an agent for Global. A letter to Royal's counsel dated August 16, 2002 from Mr. Giuseppe Di Marco, an agent with Global, indicates that the Applicant had recently retained his services.

A Notice of Pre-hearing Discussion dated June 10, 2002 was sent to the Applicant's residential address. An initial pre-hearing discussion took place on October 22, 2002. According to the pre-hearing report by Arbitrator Sampliner dated October 24, 2002, neither the Applicant nor his agent, Mr. Di Marco, attended. The Applicant's father did attend. The pre-hearing arbitrator, Arbitrator Sampliner, telephoned the Applicant who informed him that his agent, Mr. Di Marco,

told him (the Applicant) that he need not attend the pre-hearing discussion. Royal's counsel presented Arbitrator Sampliner with an authorization by Global purporting to authorize it to represent the Applicant at the arbitration hearing. Mr. Domenic Gimondo advised Arbitrator Sampliner that the signature on the authorization purporting to be his, was in fact his signature, but the signature purporting to be that of his son, was not his son's signature. Arbitrator Sampliner then ordered that Mr. Di Marco and Global be struck from the Commission's records as the Applicant's representatives.

The pre-hearing report indicates that Arbitrator Sampliner explained the arbitration process to the Applicant's father and pointed out that if the Applicant wished to retain a representative, he should hire a lawyer or other representative sufficiently before the date set for the resumption of the pre-hearing discussion, November 8, 2002, in order for the representative to be able to constructively participate in the pre-hearing discussion. Document production was deferred until the pre-hearing resumption. The pre-hearing report was sent to the Applicant's residential address. The dates for the arbitration hearing were set for January 20, 21, 22 and 23, 2003.

A Notice of Resumption of Pre-hearing Discussion dated November 4, 2002 had been sent to the Applicant's residential address. The pre-hearing discussion was resumed before Arbitrator Sampliner on November 8, 2002. Neither the Applicant, his father, nor a lawyer or agent attended on his behalf. No one answered the Applicant's telephone when Arbitrator Sampliner called him during the pre-hearing discussion.

Productions were dealt with on November 8, 2002. Arbitrator Sampliner ordered the Applicant to produce all 12 items listed by Royal on Schedule C to its Response to the Application for Arbitration. He ordered the Applicant's medical records for two years pre-accident, instead of the three years pre-accident requested by Royal. In his pre-hearing resumption report dated November 12, 2002, Arbitrator Sampliner suggested that the Applicant and his lawyer or representative review the October 24, 2002 pre-hearing report, the provisions in the *Code* pertaining to applicants' and their

representatives' rights and obligations and Practice Note 4 which deals with the exchange of documents.

The Applicant, accompanied by his father, attended the arbitration hearing on January 20, 2003 before Arbitrator Bayefsky. No representative or agent attended on behalf of the Applicant.
Mr. Ross Baker attended on behalf of Royal, represented by Ms. Schultz. At the outset of the hearing, the Applicant requested an adjournment in order obtain legal representation for the hearing. He indicated that Mr. Joseph Falconeri, a lawyer, had his file and had undertaken to represent him. Counsel for Royal objected to the adjournment request on the bases that the Applicant did not properly arrange in advance for legal representation and that the Applicant had failed to satisfy Royal's production requests.

Arbitrator Bayefsky granted the adjournment on the following conditions: that the Applicant provide a letter to Royal's counsel and to the Commission within 14 days confirming Mr. Falconeri's representation; that within three weeks the parties should agree on new hearing dates, no later than the week of August 25, 2003; that the adjournment is peremptory to the Applicant, with no further adjournments being allowed to the Applicant except in extreme, unforeseeable circumstances; that the Applicant pay fixed costs of $1,500 plus GST, regardless of the final outcome of the hearing; that within 30 days, the Applicant provide, or show in writing his best efforts to obtain, the productions requested by Royal, as set out in Arbitrator Sampliner's November 12, 2002 pre-hearing resumption report. Arbitrator Bayefsky also confirmed the issues in dispute, adding the issue of repayment at Royal's request, as well as Royal's arbitration expenses and the return of its filing fee.

In a letter to the Commission and Royal's counsel dated February 6, 2003, among other things, the Applicant indicates that Mr. Falconeri suggested he contact another lawyer, Mr. Aaron Lang, who, the Applicant stated would need some time to prepare his case. Neither Royal's counsel nor the Commission heard from Mr. Lang.

In a letter to the Commission, copied to the Applicant, dated February 11, 2003, Royal's counsel, among other things, indicates that she had not received correspondence from Mr. Falconeri confirming he was representing the Applicant. She indicated her concern about the Applicant's February 6, 2003 letter where, contrary to his representation at the hearing on January 20, 2003, he indicates that Mr. Falconeri is not representing him.

By letter dated February 13, 2003 to the Applicant and to Royal's counsel, Arbitrator Bayefsky addresses the concerns raised by the Applicant and Royal's counsel in their respective correspondences of February 6 and 11, 2003. Arbitrator Bayefsky reminds the Applicant: that no other adjournments will be granted to him except in extreme, unforeseeable circumstances; that while he is free to retain new counsel, the new hearing will be scheduled within the time frame set out in his January 20, 2003 correspondence; and that the Applicant must provide Royal's production requests within 30 days of Arbitrator Bayefsky's January 20, 2003 correspondence.

By a letter dated June 26, 2003, Royal's counsel again wrote to the Applicant to remind him of Arbitrator Bayefsky's orders with regard to production. She pointed out to the Applicant that as of the date of her letter, (30 days after the time limit set by Arbitrator Bayefsky), the Applicant has neither produced any documentation nor shown in writing his best efforts to do so.

The hearing was scheduled to resume the week of August 18, 2003, but due to the power failure in Ontario at that time, the hearing was cancelled and set to resume during the week of March 8, 2004.

By a further letter dated June 26, 2003, addressed to the Applicant and copied to the Commission, Royal's counsel again raises concerns about the Applicant's continued failure to comply with Arbitrators Sampliner's and Bayefsky's production orders and directions with respect to retaining counsel. She also reminds the Applicant about Arbitrator Bayefsky's restriction on a grant of

adjournment to only extreme or unforseen circumstances. Royal's counsel also reminds the Applicant about the cost award against him of $1,500 ordered by Arbitrator Bayefsky on January 20, 2003.

By letter dated February 9, 2004, addressed to the Applicant and copied to the Commission, Royal's counsel again reminds the Applicant that he has not complied with the arbitrators' production orders and indicates that Royal will be seeking its costs at the arbitration hearing set to start on March 8, 2004.

Adjournment:

Without prior notice to the Commission or Royal, at the commencement of the hearing on March 8, 2004, the Applicant requested an adjournment of the hearing. Royal opposed this request.

The Applicant submitted that he did not attend prepared to go ahead with the hearing. He stated that when he received the call from a case administrator the previous week to set up a settlement discussion with Royal, he indicated that he wanted to have a face-to-face settlement discussion. As is often the practice at the Commission, the case administrator offered him the opportunity to have a face-to-face discussion with Royal, with the assistance of an arbitrator, on the morning of March 8, 2004, before the commencement of the hearing. That discussion took place over approximately an hour, but it did not result in a settlement. The hearing was therefore set to proceed before me.

The Applicant submitted that he thought when the case administrator offered him a face-to-face settlement discussion on March 8, 2004, this was to take place instead of the hearing. He stated that he therefore did not want to go ahead with the hearing. Despite the previous delays, in the event that the Applicant misunderstood that the hearing was to proceed if the matter did not settle that morning, I offered him the opportunity to start the hearing the next morning, March 9, 2004. The Applicant declined that offer, stating that he wanted other dates to be set for the hearing.

The Applicant further argued that he needed time to retain counsel to represent him at the hearing. He indicated that he had spoken to a lawyer about representing him. I asked him the lawyer's name and neither the Applicant nor his father could recall this.

Royal's counsel objected to any further delays in this matter. She pointed to the many opportunities the Applicant had to retain a representative from the time of the initial pre-hearing on October 22, 2002 to the pre-hearing resumption on November 8, 2002. Royal's counsel stated that the Applicant had been given guidance by Arbitrator Sampliner at the November 8, 2002 pre-hearing resumption, and on January 20, 2003 by Arbitrator Bayefsky about retaining a legal representative. Royal's Counsel also stated that he has been furnished with many reminders through correspondence from Royal's counsel and the arbitrators who have handled the matter. As further support for her position that the Applicant ought not to be given another opportunity to obtain legal representation, Royal's counsel pointed out that the Applicant has never explained, and has presented misleading and confusing information about his relationship, if any, with Mr. Di Marco.

I declined the request for an adjournment for the following reasons:

The Applicant had from the period leading up to the October 22, 2002 pre-hearing discussion, through the intervening periods leading up to the second pre-hearing discussion, the January 2003 hearing dates and the current hearing dates, to retain a representative. He failed to do so despite several written directions from Arbitrator Sampliner and Arbitrator Bayefsky, and many written reminders from Royal's counsel. The Applicant also failed to explain what happened with Mr. Di Marco, Mr. Falconeri and Mr. Lang, in spite of Royal's counsel asking for an explanation. I do not accept the Applicant's argument that he deserves another opportunity to retain representation.

I find the Applicant failed to make reasonable efforts to comply with Arbitrator Sampliner's and Arbitrator Bayefsky's production orders. In fact, the Applicant failed to produce any of the documents

he was ordered to produce. Based on the history of this case, I also conclude that granting an adjournment would not have been helpful in these circumstances.

I also considered the fact that, without notice or explanation, the Applicant failed to attend the two pre-hearing discussions. I find this demonstrates a disrespect and disregard for the arbitration process which should not be rewarded with another opportunity to delay the proceedings. He showed the ultimate disrespect and disregard for the process when he and his father fled the hearing room when I denied the adjournment and ordered the matter to proceed.

Commission appeal decision, *Peterson and Royal Insurance Company of Canada*[3] discusses arbitrators' discretion to control their own processes, holding that:

> An adjournment is a matter of discretion, not of right. Arbitrators have the authority to control their own processes within the Commission's rules of procedure, including the right to determine whether an adjournment should be granted.

For these reasons, I deny the Applicant's request for an adjournment

Dismissal of the Applicant's Application for Arbitration:

The hearing proceeded in the absence of the Applicant.

On his Application for Arbitration dated April 30, 2002, which he seems to have completed without the assistance of a representative, the Applicant claims weekly income replacement benefits, caregiver benefits, medical benefits, other expenses and other disputes. Only the income replacement benefit issue was mediated. Therefore, only his claim for income replacement benefit is in dispute in this arbitration.

[3](OIC P-006241, February 6, 1996)

Royal paid the Applicant an income replacement benefit of $280 per week under section 4 of the *Schedule* on a "without prejudice" basis from November 6, 1999 to October 28, 2000. The Applicant claims an income replacement benefit beyond the termination date, at a greater weekly rate than that paid by Royal pursuant to sections 4 and 6 of the *Schedule*.

At the hearing, Royal produced the income and medical documents on which it based its income replacement benefit payments. The Applicant provided Royal with a Disability Certificate dated November 11, 1999, prepared by Dr. David Hill, which states that the Applicant sustained cervical, shoulder and lumbar strains and multiple contusions in the accident and he restricts the Applicant from engaging in certain physical activities for the present. The Applicant also provided an Employer's Confirmation of Income dated November 9, 1999 which states that the Applicant was self-employed with a company called Tiger Trax Inc., earned $8,000 in the 52 weeks before the accident and earned from $475 to $525 per week in the four weeks pre-accident. A handwritten letter dated November 18, 1999 from Mr. De Laurier, president of Tiger Trax Inc., states that the Applicant was a self-employed merchandise salesman who earned $450 to $500 per week. The Applicant also provided Royal with a consignment invoice dated October 27, 1999 from Tiger Trax Inc., containing the Applicant's name as the distributor, which notes consignment sales of $269.82. No information was provided as to business expenses.

As noted above, Royal has made numerous requests for medical and employment documentation from the Applicant to support his income replacement benefit claim. In particular, Royal has requested: clinical notes and records, hospital and OHIP records; a collision report; employment records; information from his previous employer and his "employer" at the time of the accident; pre-accident self-employment income records; and a declaration of post-accident income. The Applicant has satisfied none of these requests.

I find the Applicant failed to provide evidence to support his entitlement to income replacement benefits beyond the termination date. He did not testify or call any witnesses on his behalf to assist him in proving his claims. This being the case, I find I need not consider Royal's evidence on this issue. I therefore dismiss the Applicant's income replacement benefit claim.

Royal's Claims:

Section 33

Royal raises an alternative defence, that it is entitled to suspend the Applicant's income replacement benefits due to his failure to provide sufficient medical, employment and income information. I have already decided on the merits that the Applicant is not entitled to further income replacement benefits at a higher rate on the basis that he failed to present sufficient evidence to prove his claims. I find therefore that I need not decide the section 33 issue which permits an insurer to suspend an applicant's accident benefits for any period during which he has failed to provide information reasonably required for the insurer to establish entitlement to benefits.

Repayment

Royal claims a repayment pursuant to section 47 of the *Schedule* based on income replacement benefits paid to the Applicant from November 6, 1999 to October 28, 2000. Royal paid income replacement benefits totalling $14,561.87.

Subsection 47 provides:

47.- (1) A person shall repay to the insurer,

(a) any benefit under this Regulation that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud:

(b) any income replacement or non-earner benefit that is paid to the person if he or she, or a person in respect of whom the payment was made, was disqualified from payment under Part IX; or

(c) any income replacement, non-earner or caregiver benefit or any benefit under Part VI, to the extent of any payments received by the person that are deductible from those benefits under this Regulation.

...

(2) If a person is required to repay an amount to an insurer under this section,

(a) the insurer shall give the person notice of the amount that is required to be repaid; and

(b) if the person is receiving an income replacement or caregiver benefit, the insurer may give the person notice that the insurer intends to collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit;

(3) The obligation to repay a benefit does not apply unless the notice under subsection (2) is given within 12 months after the payment was made.

(4) Subsection (3) does not apply if the benefit was paid as a result of wilful misrepresentation or fraud.

(5) An insurer that has given the notice referred to in clause (2)(b) may collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit.

(6) The insurer may charge interest on an amount repayable under this section from the fifteenth day after the notice is given under subsection (2) at the bank rate in effect on that day.

(7) In subsection (6),

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short term advances to the banks listed in Schedule I to the *Bank Act* (Canada).

Royal does not allege that fraud or misrepresentation on the part of the Applicant led it to pay income replacement benefits to the Applicant. It submits that the Applicant failed to produce the documentation to substantiate his claim which resulted in Royal not being able to pay the correct income replacement benefit rate. On an Explanation of Benefits Payable by Insurance Company dated November 25, 1999, Royal indicates that the $280 per week income replacement payments are being made on a "without prejudice basis." Royal argues that it should not have to bear the financial burden of the payments made to the Applicant because, as a gesture of good faith, it paid the income replacement benefits without the documentary evidence to support these payments, despite its many requests of the Applicant for the documentation.

Royal did not provide a notice of the repayment amount as required by the *Schedule*. Royal first raised the possibility of a repayment claim in its Response to the Application for Arbitration dated June 2, 2002 and later at the pre-hearing discussion on October 22, 2002. Royal's counsel submits that it has not been able to comply with the notice requirements in subsection 47(2)(a) and (3) which require the insurer to provide notice of the amount of the repayment within 12 months after the benefit payment was made. Royal's counsel submits that since the Applicant failed to provide sufficient documentation to calculate the Applicant's proper income, and hence the amount of his income replacement benefit, Royal was not able to notify the Applicant as to the amount of the repayment within the required 12 months.

At the hearing, Royal estimated the amount of the repayment. Royal's counsel referred to the income information on the documentation the Applicant provided – the Employer's Confirmation of Income, the letter from Mr. De Laurier and the Consignment Notice. She pointed out that based on the gross income of $8,000, the net weekly income would be approximately $145.77 and the weekly income replacement benefit would be about $116.62 (80 per cent of $145.77, as required by subsection 6(1)(a) of the *Schedule*). According to Royal, the total amount of income replacement benefits that would have been paid based on this figure, would be about $6,064.24 ($116.62 X 52 weeks).

Royal's counsel argues, based on these figures, that the repayment should be based on $8,495.76 ($14,561.87 – $6,064.24), or the difference between what Royal paid and what it would have paid based on the available documentation. Royal's counsel also noted that the Applicant provided no evidence as to business expenses, which would have lowered even further his income amount and hence his income replacement benefit amount.

I must deny Royal's claim for an overpayment for the following reasons.

The provision requiring the Insurer to give the Applicant notice of the repayment amount within 12 months after the benefits were paid is mandatory. Royal did not provide notice of the repayment to the Applicant within the prescribed notice period. Royal first raised the repayment issue in its Response to an Application for Arbitration dated June 2, 2002, in excess of 12 months after income replacement benefits were paid.

The information Royal relied on at the hearing to calculate the income replacement benefit – the Employer's Confirmation of Employment, the letter from the employer and the consignment invoice – were in Royal's possession in November 1999. In other words, Royal was in no better position at the hearing than it was in November 1999 to notify the Applicant of the amount, or approximate amount, of the overpayment. Royal paid benefits until October 28, 2000 and I find Royal could have notified the Applicant of the overpayment by October or November 2001.

I considered as well that section 33 of the *Schedule* permits insurers to refuse to pay a benefit for any period before the insured person provides the information reasonably required to assist the insurer in determining entitlement to a benefit. Royal might have relied on this provision early in the process to communicate to the Applicant the importance of providing the necessary information at an early stage.

Expenses:

Subsection 282(11) of the Insurance Act:

Subsection 282(11) of the *Insurance Act* gives arbitrators the discretion to award expenses to parties to an arbitration hearing. Royal brings its claim for expenses under Regulation 664[4] of the *Insurance Act* as it was amended by Regulation 275/03 effective July 19, 2003. Since the amendment to the Regulation in this case does not affect the result, I will not consider the issue of the temporal effect of the legislative change.

Rules 75 and 76 of the *Dispute Resolution Practice Code*[5] repeat the criteria provided in section 12 of Regulation 275/03 to be considered by arbitrators in making an expense award.

Rule 75 provides as follows:

> 75.1 An adjudicator may award expenses to a party if the adjudicator is satisfied that the award is justified having regard to the criteria set out in **Rule 75.2.** The items and amounts which may be awarded are found in Rule 78 and the **Schedule** to the **Expense Regulation** found in **Section F** of the **Code**.
>
> 75.2 The adjudicator will consider only the criteria referred to in the **Expense Regulation** found in **Section F** of the **Code.** These criteria are:
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> (a) each party's degree of success in the outcome of the proceeding;
> (b) any written offers to settle made in accordance with **Rule 76**;
> (c) whether novel issues are raised in the proceeding;
> (d) the conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders;
> (e) whether any aspect of the proceeding was improper, vexatious or unnecessary.

[4] R.R.O. 1990 as amended.

[5] Updated fourth edition October 2003.

Rule 76 provides:

> 76.1 An adjudicator will consider an **Offer to Settle** in connection with an award of expenses provided that:
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> (a) it was made in writing, was served on the other parties and contains:
> (i) the full terms of the **Offer** to Settle;
> (ii) the date when the **Offer** was served and the time period during which it remained open for acceptance;
> AND
>
> (b) the **Offer** was made after the conclusion of mediation and before the conclusion of the hearing, with particular consideration given to any **Offer** served after the conclusion of the pre-hearing discussion or preliminary conference as the case may be, up to 5 days before the commencement of the hearing.

Royal claims payment of the $1,500 expense award ordered by Arbitrator Bayefsky in his letter of January 20, 2003, ordered to be paid irrespective of the outcome of the hearing. To date, this amount has not been paid by the Applicant. Arbitrator Bayefsky's order stands and the Applicant is required to comply with it.

Royal also argues that criteria (a), (b), (d) and (e) of Rule 75 should be applied to award expenses in its favour. I agree.

Regarding criterion (a), the Applicant was clearly unsuccessful in the arbitration.

I find that criterion (b) should be decided in Royal's favour. In accordance with criterion (b) and Rule 76 of the *Code*, Royal filed an offer to settle the Applicant's claim which the Applicant refused. I find if the Applicant had accepted this offer, he would have avoided the added expense award imposed by me at this hearing, the added cost of the January 20, 2003 sitting and the current hearing.

Clearly, criterion (d) should be applied in Royal's favour. The Applicant was granted an adjournment in January 2003 because he stated that he needed more time to retain a legal representative, although he

had been given several previous opportunities to retain a representative. He misled the tribunal and Royal by indicating that he had retained counsel and as it turns out no information was forthcoming from the Applicant about this. After numerous reminders from the Commission and Royal between January 2003 and the current hearing, about identifying his representative and providing documentary productions, the Applicant appeared at the current hearing, without representation and without the productions he was ordered to provide, and requested a further adjournment so that he might retain a representative. Again, he attempted to mislead the tribunal by indicating that he had spoken to a lawyer about taking his case, but when asked, he could not give the lawyer's name. I find this criterion favours Royal because the Applicant failed to comply with production orders and engaged in conduct that unnecessarily prolonged the proceedings.

I find that criterion (e) should also be applied against the Applicant. I find that the Applicant improperly misled or attempted to mislead the tribunal about obtaining legal representation. I find this conduct was dishonest and should not be encouraged. I also find that the delay and cost that resulted from the Applicant's less than candid approach to obtaining legal representation, and his continued failures to satisfy production orders, were unnecessary. This conduct should also attract an award of expenses against the Applicant.

Royal filed with the Commission a docket of its legal fees and disbursements incurred in respect of the arbitration hearing – fees of $8,476, plus $613.34 GST; and disbursements of $286.02, totalling $9,375.36. Taking into account that the Applicant is subjected to a previous award of expenses of $1,500, I order him to pay a further fixed amount of $1,500.

An Award of the Insurer's Assessment Fee

Royal claims the total amount of its filing fee of $3,000 pursuant to a provision under the *Insurance Act* that has been revoked. Subsection 282(11.2) was revoked effective October 1, 2003 and replaced by a provision that does not authorize an arbitrator to consider such an award. The predecessor

subsection 282 (11.2) of the *Insurance Act*[6] allowed an arbitrator the discretion to order an insured person to pay an amount no higher than the amount of the insurer's $3,000 assessment fee (arbitration filing fee) if the arbitrator finds that the Applicant "commenced an arbitration that was frivolous, vexatious or an abuse of process." Royal paid a $3,000 fee with its Response to an Application for Arbitration dated June 2, 2002 under the predecessor Regulation.

Section 25 of the *Financial Services Commission of Ontario Act, 1997*[7] (the *"FSCO Act"*) authorizes the Commission to impose assessment fees on parties to the Commission's dispute resolution process. The amount of the fees is established by a regulation under the *FSCO Act* which governs the assessment of expenses and expenditures. Regulation 11/01 under the *FSCO Act*, which came into effect on January 25, 2001, imposed the $3,000 assessment fee on insurers. Regulation 11/01 has been amended but the requirement for insurers to pay a $3,000 fee has not been affected.

Based on the predecessor version of subsection 282(11.2) of the *Insurance Act*, Royal asks that I order the Applicant to pay an award of the total $3,000 assessment fee because, according to Royal, he commenced an arbitration that is frivolous, vexatious and an abuse of process.

Whether Royal is entitled to an award of its assessment fee raises the issue of the temporal effect of legislative change. I look to the analysis in *Driedger on the Construction of Statutes*[8] as it relates to the effects of the amendment to subsection 282(11.2) of the *Insurance Act*.

Driedger states that it is presumed that legislation is not meant to have retroactive application and that this presumption applies to all legislation, including procedural provisions, beneficial provisions and

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[6] As enacted by the Statutes of Ontario, 1993, chapter 10, section 33.

[7] O. Reg. 11/01under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997 c. 28, repealed and replaced with O. Reg. 105/03

[8] Ruth Sullivan, *Driedger on the Construction of Statutes*, (Third Edition), (Toronto: Butterworths 1994), ("*Driedger*") at p. 552.

provisions designed to protect the public's interest. According to *Driedger's* analysis, legislation is meant to apply immediately and generally to continuing facts or events, unless its application would interfere with vested rights; and where the impact of legislation on a protected interest or expectation would be arbitrary or unfair, the legislation is presumed not to apply; and by definition, provisions that are purely procedural or beneficial do not interfere with vested rights.

Driedger's analysis was adopted by the Director's Delegate in the *Lehman*[9] appeal decision. Director's Delegate Draper (as he then was) held that an amendment to the *Statutory Accident Benefits Schedule for Accidents on or after January 1, 1994* (Regulation 776) which revoked one provision and replaced it with a new version, applied to the insured person's ongoing benefit claims.

To apply the predecessor version of subsection 282(11.2) to award Royal its assessment fee would require a finding that the new version of the provision, which came into effect October 1, 2003, should not be applied immediately in this case to continuing facts and events after that date. According to *Driedger*, to rebut the presumption that legislation is presumed to apply prospectively, it would have to be established that prospective application would unfairly or arbitrarily interfere with vested rights, protected interests or expectations.

Although Royal paid the $3,000 assessment fee in June 2002, before the legislative change, I find the mere payment of the filing fee under the predecessor provision does not entitle Royal to rely on that provision to make a claim for an award after that provision has been repealed. According to *Driedger's* analysis, Royal would be required to have a right to such an award that arose under the predecessor provision. I find this would mean the right or interest would have had to have vested, accrued or been accruing before the new legislation came into effect. Royal was not in that position on October 1, 2003 when the legislation changed. I therefore do not see that any unfairness or prejudice results from my determination. I find that the payment of an assessment fee allows an insurer a limited

[9] *GAN Insurance Company and Lehman*, (FSCO P97-00064, August 10, 1998) upheld on judicial review by *Lehman and GAN Insurance Company*, Court File No. 559/98-Toronto, October 12, 2000, Divisional Court Ontario.

right or expectation to participate in the arbitration process and, absent a determination or order by an arbitrator, no right or expectation of obtaining an award based on this fee would exist at that time.

I find that subsection 14(1)(a) of the *Interpretation Act*[10] supports my view. It sets out some limits on the effect of a revocation or repeal of legislation:

> **14.-** (1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided,
>
> ...
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked;

For these reasons, I find that I have no jurisdiction to consider an award against the Applicant in relation to the $3,000 assessment fee paid by Royal.

April 16, 2004

Beth Allen
Arbitrator

Date

[10] R.S.O. 1990, Chapter I.11

FSCO A02–000654

BETWEEN:

FRANCESCO GIMONDO

Applicant

and

ROYAL & SUNALLIANCE 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 Applicant's request for an adjournment is dismissed.

2. The Applicant claim for income replacement benefits is dismissed.

3. Royal's claim for a repayment of income replacement benefits paid to the Applicant is dismissed.

4. The Applicant shall pay Royal an expense award of $1,500.

5. Royal's claim for an award in the amount of its $3,000 assessment fee is dismissed.

April 16, 2004

Beth Allen
Arbitrator

Date