

**BETWEEN:**

**JOE FALCO**

**Applicant**

and

**THE CONTINENTAL INSURANCE COMPANY**

**Insurer**

and

**PAFCO INSURANCE COMPANY LIMITED**

**Insurer**

**DECISION ON A PRELIMINARY ISSUE**

**Before:** Beth Allen

**Heard:** June 21, 1999, in Hamilton, Ontario

**Appearances:** Paul Barrafato for Mr. Falco  
Albert Conforzi for The Continental Insurance Company  
Derek E. Wilson for Pafco Insurance Company Limited

**Issues:**

The Applicant, Joe Falco, was injured in two motor vehicle accidents, the first on January 26, 1994 and the second on December 4, 1995. He was insured for the first accident by The Continental Insurance Company ("the Continental") and for the second by Pafco Insurance Company Limited ("Pafco"). The preliminary issues in this matter pertain only to Mr. Falco's

claims against the Continental. The Continental paid weekly income replacement benefits (IRBs) under section 7 of the *Schedule*<sup>1</sup> at the rate of \$1,000 per week from February 2, 1994 until October 13, 1994 and at \$185 per week until January 25, 1996 when benefits were terminated. Mr. Falco disputes the termination of the benefit and the benefit amount, claiming ongoing IRBs at the higher rate. He also claims a special award under subsection 282(10) of the *Insurance Act*, R.S.O. 1990, c.I-8 as amended (the “*Act*”) on the basis that the Continental failed to comply with the benefit stoppage provisions under section 64 of the *Schedule*. The Continental seeks, under section 70 of the *Schedule*, a repayment of benefits paid to Mr. Falco for post-accident income he earned.

Mr. Falco requests the following: that the Continental arrange a disability DAC (Designated Assessment Centre) assessment pursuant to the section 64 stoppage provisions; an adjournment of the proceeding until after the DAC delivers its report; interim benefits pursuant to subsection 279(4.1) of the *Act* pending the outcome of the DAC assessment; and certain orders as to production. Mr. Falco submitted that in view of the fact that quantum and his post-accident earnings are at issue, the interim benefit rate should be established only after the DAC has assessed his post-accident income. My understanding is that it is not within the purview of a disability DAC to assess income.

The preliminary issues are:

1. If I find the Continental did not comply with the stoppage provisions under the *Schedule* by failing to arrange a DAC assessment pursuant to section 64, is the Continental required to arrange a DAC assessment before the hearing into the merits?

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96, and 304/98. O.R. 776/93 was extensively modified by O.R. 781/94; accordingly, where necessary, “*1994 Schedule*” refers to the original O.R. 776/93, and “*1995 Schedule*” refers to O.R. 776/93 as amended.

2. Is Mr. Falco entitled to interim benefits under subsection 279 (4.1) of the *Act* from the IRB benefit termination date until the DAC delivers its assessment?

**Result:**

1. The Continental is not required to arrange a disability DAC assessment.
2. Mr. Falco is not entitled to interim benefits.

**Procedural Matter:**

On June 18, 1999, this office received a letter (with further correspondence attached) from Mr. Falco's counsel which was copied to counsel for the Continental and Pafco. In this letter, Mr. Falco seeks the orders as outlined above. In bringing his preliminary motion, Mr. Falco's counsel did not comply with the production requirements or the filing and service time limits set out in Rule 65 of the *Dispute Resolution Practice Code*<sup>2</sup> (the "*Code*"). During the hearing, counsel filed documentary evidence and case law in support of their submissions.

In spite of Mr. Falco's non-compliance with the *Code*, I exercised my discretion under Rule 65 to hear the parties' oral submissions on the preliminary issues. In light of the many prior delays in this matter, I decided to deliver oral rulings on the benefit stoppage, interim benefits and production issues so that the hearing on the merits might proceed. I indicated that I would issue a written decision with full reasons on the benefit stoppage and interim benefit issues.

After I delivered my rulings, Mr. Falco's counsel advised that a potential conflict had arisen between he and Mr. Falco as a result of my rulings and that Mr. Falco would require independent

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<sup>2</sup> (Third Edition, April 15, 1997).

legal advice. He requested an adjournment of the matter for this purpose. I granted the adjournment strictly on this basis and requested that a resumption date be scheduled as soon as reasonably possible. The previous adjournments (two of them at Mr. Falco's counsel's request) were granted mainly because of Mr. Falco's failure to produce critical documentation. I find that the previous adjournments have allowed ample opportunity for the parties to produce the documentary evidence needed for the hearing. Therefore, the hearing resumption will proceed with the evidence that was available at this sitting.

## **EVIDENCE AND ANALYSIS:**

### **Background:**

On January 26, 1994, Mr. Falco was involved in the accident material to these preliminary issues. The Continental paid Mr. Falco IRBs at \$1,000 per week from February 2, 1994 until October 13, 1994 and at \$185 per week from October 13, 1994 until January 25, 1996. As I understand it, the Continental notified Mr. Falco of its intention to terminate his IRBs a number of times, but reinstated benefits on these occasions. It appears that the October 16, 1995 Explanation of Assessment by Insurance Company notice started the chain of events that underlies the stoppage issue in this case. In response to the October 16, 1995 notice, Mr. Falco's counsel, by letter dated November 2, 1995, communicated Mr. Falco's objection to the termination and requested a DAC assessment. A DAC assessment was scheduled for December 8, 1995. The Continental reinstated benefits pending the DAC results.

Mr. Falco was involved in the second accident on December 4, 1995, four days before the scheduled DAC assessment. In the end, the DAC assessment was not conducted. However, the evidence is unclear as to why the assessment did not take place.

Communications and correspondence passed among Mr. Falco's and the Continental's counsel, the rehabilitation facility retained by the Continental, and representatives from the Continental and the DAC facility. It appears from one correspondence that the rehabilitation facility indicated that the Continental required Mr. Falco to attend regardless of his involvement in the second accident. Mr. Falco's counsel suggested in correspondence that the Continental obtain clearance from his family doctor before requiring him to attend. The Continental's counsel indicated in correspondence that his understanding was that the DAC refused to assess Mr. Falco because of his injuries from the second accident. Correspondence generated days before the hearing from the Continental's representative and a representative of the DAC facility, suggests that Mr. Falco attended the DAC appointment at the scheduled time but he refused to participate in the assessment. The DAC facility gave no reason in its correspondence for Mr. Falco's non-participation.

Enclosed with a letter dated January 10, 1996, the Continental sent Mr. Falco a further Explanation of Assessment by Insurance Company dated January 5, 1996 wherein it advised Mr. Falco of its intention to cease IRB payments effective January 25, 1996 because he was no longer disabled from the January 26, 1994 accident. Also enclosed was a photocopy of an excerpt from the *Schedule* (Regulation 776/93), including a reproduction of section 64. In response, in a letter dated January 12, 1996, Mr. Falco's counsel requested the Continental arrange a further DAC assessment. However, the Continental neither arranged a further assessment nor reinstated IRBs.

As I understand the circumstances leading up to this hearing, Mr. Falco had not previously requested a preliminary determination of the benefit stoppage and interim benefit issues. In the Application for Mediation, filed about four months after his January 12, 1996 request for a DAC assessment, Mr. Falco raised only the quantum issue. As reflected in the Reports of Mediator, the preliminary issues were not raised at either of the two mediations (held on January 16, 1995 and July 19, 1996). Nor were they advanced in either the Application or the Amended Application for

Arbitration (dated October 5, 1995 and February 28, 1996, respectively), nor at either of the two pre-hearings in this matter (held on April 25, 1996 and November 21, 1996).

In Mr. Falco's counsel's letter dated September 26, 1996, he raised the issue of the Continental's obligation to pay IRBs after benefit termination on January 25 1996 on the basis that Mr. Falco disputed the termination. However, he did not raise the stoppage or interim benefits issues at the pre-hearing two months later or thereafter. He did this nearly three years afterward in his June 18, 1999 letter which he filed and served one business day before this hearing.

Mr. Falco's arbitration with the Continental has been adjourned on three occasions. It was previously scheduled to be heard in September 1996, March 1997 and April 1998. Mr. Falco's counsel did not take the opportunity in the interim between scheduled dates to formally advance the preliminary issues.

**Reasons for Decision:**

***Benefit Stoppage and Interim Benefits:***

I do not have sufficient evidence upon which to make a finding on whether the Continental complied with the benefit stoppage provisions. However, even if I were to come to the conclusion that the Continental was non-compliant, this is not a case where it would be reasonable to adjourn the hearing until a DAC assessment is conducted. I also decline to order interim benefits under the circumstances. I arrive at my decision based on the following procedural and evidentiary considerations.

As pointed out in the *Coutu*<sup>3</sup> decision, “the stoppage provisions provide a detailed code as to the manner in which income replacement benefits may be terminated by an insurer.” Section 64 provides that an insurer may not stop benefit payments except in accordance with this section. If an insurer intends to stop benefits, it must notify the insured person in writing, giving 14 days’ notice of termination. If the insured person acquiesces, the insurer may stop benefit payments. But if the insured person disputes termination and requests a DAC assessment, the insurer is required to continue to pay benefits pending the delivery of the DAC’s report to the applicant. If the DAC report states that the insured person is no longer disabled as a result of the accident, the insurer may stop paying benefits.

It is mandatory that the insurer arrange a DAC assessment if the insured person disputes termination and requests a DAC. Mr. Falco contended that the Continental was in breach of the benefit stoppage provisions when it terminated his benefits effective January 25, 1996 and failed to arrange a DAC assessment when he requested one on January 12, 1996. He argued that the Continental is obligated to arrange an assessment and should be required to pay interim benefits from the benefit termination date until the DAC delivers its report.

Mr. Falco cited the *Francis*<sup>4</sup> arbitration and appeal decisions in support of his position that the arbitration proceeding should not proceed until the DAC has released its report. He particularly relies on the arbitrator’s reference to section 71.1 of the *Schedule* which restricts the insured’s right to proceed to mediation (and hence according to Mr. Falco, arbitration) until he has been assessed by a DAC.

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<sup>3</sup>*Coutu and Wawanesa Mutual Insurance Company* (OIC A97-001916, June 5, 1998)

<sup>4</sup>*Francis and Allstate Insurance Company of Canada* (FSCO A97-001109, January 26, 1999), confirmed by appeal decision *Allstate Insurance Company of Canada and Francis* (P99-00014, June 11, 1999)

The Continental submitted, on the other hand, that it met its obligations when it arranged the DAC assessment on December 8, 1995. According to the Continental, Mr. Falco attended the DAC facility on the appointed date and refused to undergo the assessment and for this reason, it was justified in terminating benefits on January 25, 1996 and should not be required to pay interim benefits. The Continental further pointed out that prejudice would result if it was ordered to pay interim benefits for a period in excess of three years.

The Continental pointed out that Mr. Falco's accident occurred when the *Statutory Accident Benefits Schedule* (Regulation 776/93 under the *Act*) had recently come into force. Regulation 776/93 came into force on December 31, 1993 and its successor amendment, Regulation 781/94, on December 31, 1994. The Continental submitted that with the newness of the legislation and the system-users' unfamiliarity and lack of practical experience with the new scheme, it is reasonably expected that in the beginning errors would be made in implementing some of its provisions. The Continental argued that this reality resulted in it providing the Explanation of Assessment by Insurance Company dated January 5, 1996 when this was not required. From the Continental's view, it had properly notified Mr. Falco of termination by the previous October 16, 1995 Explanation of Assessment by Insurance Company and scheduled a DAC assessment at Mr. Falco's request, which he refused to undergo. Therefore in the Continental's view, it was not obligated to provide a further termination notice or DAC assessment.

As stated earlier, I find I am not prepared to make a finding as to whether the Continental complied with the section 64 provisions. From the documentary evidence before me, there appears to be divergent views as to the circumstances around the DAC assessment. I need to hear oral evidence from witnesses who have direct knowledge of what occurred around the time of benefit termination and the scheduling and cancellation of the DAC assessment. Mr. Falco's oral evidence and that of representatives from the DAC facility, the Continental and the rehabilitation

facility retained by the Continental might be helpful in this regard. This evidence will be relevant to Mr. Falco's claim for a special award.

Even assuming I were to decide the stoppage issue in Mr. Falco's favour, I do not think, under the circumstances of this case, that section 71.1 of the *Schedule* assists Mr. Falco in his view that the arbitration hearing should be adjourned. Mr. Falco has already proceeded to mediation on two occasions (January 16, 1995 and July 19, 1996), applied for arbitration (October 5, 1995) and attended two pre-hearings (April 25, 1996 and November 21, 1996). Even accepting the fact that Mr. Falco through error (caused by the newness of the scheme) proceeded through the dispute resolution process, on none of these occasions did he raise the benefit stoppage issue. Nor in the interim between adjournments did he take the opportunity to raise the issue. Like the Continental, Mr. Falco submitted that his unfamiliarity with the new accident benefits scheme explains the errors he made proceeding through the dispute resolution process. For this reason, according to Mr. Falco, his errors should not affect his right to a DAC assessment before the arbitration hearing.

In my view, the novelty of the scheme can only explain the errors in the early period after the accident. The newness of the system cannot account for Mr. Falco's three-year delay in raising the issue. In any event, adjourning the arbitration hearing once again will not rectify past errors made because of the novelty of the scheme. This would only add to the already mounting expense and inconvenience occasioned by past delays. In any case, while newness might explain some errors by insureds and insurers in dealing with the scheme, it cannot excuse errors which can result in parties' rights being compromised.

From another perspective, it is questionable how useful a DAC assessment would be at this time. Mr. Falco's accident occurred over five years ago and his benefits were terminated over three years ago. I do not think a DAC assessment performed at this time, years after benefit

termination, would be able to satisfy an important objective of a DAC assessment — to assess the state of an insured’s disability at the time of benefit stoppage. It is reasonable to expect that a person’s state of health would not have remained the same over time. In Mr. Falco’s case, he was involved in at least one accident since the Continental terminated his benefits. The usefulness of a DAC assessment under these circumstances would be compromised by the passage of time. Both sides have generated a great deal of other medical evidence which I believe will better assist in determining Mr. Falco’s disability. As noted earlier, Mr. Falco could have available the special award remedy if I determine at the arbitration that the Continental did not comply.

Because I am not determining the issue of the Continental’s compliance with section 64, I need not determine Mr. Falco’s entitlement to interim benefits, since Mr. Falco’s claim for interim benefits is predicated on a finding that the Continental is obligated to schedule a further DAC assessment. However, I must point out that Mr. Falco presented little, if any, evidence or argument which I might have considered in deciding this issue, if I were required to do so. Arbitration cases have held that interim benefits should not be awarded on a routine basis and that if they are awarded they should cover a short period.<sup>5</sup> Some cases have held that the applicant must establish evidence of at least a minimal level of disability and some urgency in order to succeed in an interim benefits claim.<sup>6</sup> Mr. Falco failed to address these matters.

***Delay and Expenses:***

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<sup>5</sup>*Malabanan and Canadian General Insurance Company* (OIC A96000084, July 26, 1998)

<sup>6</sup> See for instance: *Harkness and Economical Mutual Insurance Company* (OIC A96-001420, December 10, 1996); *Malabanan, supra*; *Lucas and Dominion of Canada General Insurance Company* (OIC A-009670, March 23, 1995); *Osbourne and Allstate Insurance Company and York Fire & Casualty Company* (OIC A-009110 and A-009111, November 18, 1994)

As noted earlier, I allowed an adjournment of the hearing on the merits to allow Mr. Falco the opportunity to seek independent legal advice. Apart from the substantive and practical reasons, there are also procedural reasons why I would not otherwise have adjourned this matter.

There has been a history of three previous adjournments because of production delays on Mr. Falco's part. Two of these were at Mr. Falco's request. This, coupled with the fact that Mr. Falco raised the preliminary issues at the last minute, when he had ample opportunity to raise them earlier, and the fact that he failed to comply with the *Code's* procedures for bringing preliminary motions, has also made me unsympathetic to his original adjournment request.

The parties made no submissions as to expenses. However, when considering the expense issue at the arbitration hearing, I will take into account Mr. Falco's contribution to the delay in this matter.

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Beth Allen  
Arbitrator

June 29, 1999

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Date

FSCO A95-000485 & A97-000207

**BETWEEN:**

**JOE FALCO**

**Applicant**

**and**

**THE CONTINENTAL INSURANCE COMPANY**

**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 Continental is not required to arrange a disability DAC assessment.
2. Mr. Falco is not entitled to interim benefits.

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Beth Allen  
Arbitrator

June 29, 1999

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Date