

BETWEEN:

CATHERINE MONCUR

Applicant

and

ING INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: William J. Renahan

Heard: May 21, 2003, in London, Ontario.

Appearances: Rodney D. Dale, Barrister and Solicitor, for Mrs. Moncur
Douglas A. Wallace, Barrister and Solicitor, for ING Insurance Company of
Canada

Issue:

The Applicant, Catherine Moncur, was injured in a motor vehicle accident on January 3, 1996. She applied for and received statutory accident benefits from ING Insurance Company of Canada (“ING”), payable under the *Schedule*.¹ The parties agree that Mrs. Moncur was entitled to a loss of earning capacity benefit but do not agree on the amount. They disagree as to the method to convert Mrs. Moncur’s part-time pre-accident income to full-time income for the purpose of determining her pre-accident earning capacity. They were unable to resolve their dispute through mediation, and

¹The *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.

Mrs. Moncur applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issue in this hearing is:

1. What is Mrs. Moncur's gross annual income under section 86 of the *Schedule*?

Result:

1. Mrs. Moncur's gross annual income under section 86 of the *Schedule* is \$36,714.

EVIDENCE AND ANALYSIS:

The matter proceeded by way of two Agreed Statement of Facts and oral submissions.

Background:

Mrs. Moncur is 49 years old. On January 3, 1996 she was jogging with her husband and a friend when she was struck by a vehicle which left the travelled portion of the road. Her most significant injury was a brain injury.

Prior to her injury, Mrs. Moncur was very athletic. She participated in a number of sports and was competitive in curling at the provincial level and track and field at the national level.

At the time of the accident, Mrs. Moncur was a teacher, qualified to teach Grades 5 through 10. Mrs. Moncur wanted to work full-time, however, due to the shortage of positions, she taught as a supply teacher about three days a week.

ING paid income replacement benefits of \$192.86 per week based on Mrs. Moncur's pre-accident gross weekly income of \$261.39.

Because Mrs. Moncur qualified for weekly income replacement benefits 104 weeks after the onset of her disability, she was entitled to weekly loss of earning capacity benefits. The loss of earning capacity benefit is defined in Part VI of the *Schedule* and, in general, is the amount by which the insured's pre-accident earning capacity ("PEC") exceeds her residual earning capacity. The parties agree that Mrs. Moncur's residual earning capacity is zero. They disagree as to what her PEC is.

Where an insured was employed before the accident, in most cases the PEC is based on the weekly income replacement benefit the insured received.

In the case of a person who was employed part-time before the accident and the person would have worked on a full-time basis at some time after the accident, section 86 provides a formula to convert the person's part-time income to full-time income for the purpose of determining the person's PEC.

ING's interpretation of section 86 led it to convert Mrs. Moncur's part-time income to a gross annual income of \$37,700 which resulted in the loss of earning capacity benefit of \$462.90 per week it has paid.

Mrs. Moncur argued that under section 86 her gross annual income is \$49,205, which results in a loss of earning capacity benefit of \$576.61 per week.

The Law:

I set out section 86 in full:

CONVERSION OF PART-TIME INCOME TO FULL-TIME INCOME

86.—(1) For the purpose of subsection 29(1), a person's net weekly income used in determining the person's pre-accident earning capacity shall be converted to a full-time net weekly income in accordance with this section if,

- (a) the person was employed on a part-time basis at some point during the period of time used under section 9 for the purpose of determining the amount of the person's weekly income replacement benefits;
- (b) the person would have worked on a full-time basis at some time after the accident; and
- (c) the gross income used under section 9 for the purpose of determining the amount of the person's weekly income replacement benefits includes income from employment other than self-employment.

(2) The full-time net weekly income shall be determined in accordance with section 81 or 82 using a gross annual income determined in accordance with the following formula:

$$A = B \times C \times 52$$

where,

- A = the gross annual income,
- B = the person's hourly rate of wages or salary in the employment designated under subsection (3),
- C = the number of hours in a regular work week for a person employed on a full-time basis in the employment designated under subsection (3), determined in accordance with subsection (4).

(3) For the purpose of subsection (2), the person shall designate one employment, other than self-employment, in which the person engaged on a part-time basis during the time period used under section 9 for the purpose of determining the amount of the person's weekly income replacement benefits.

(4) For the purpose of subsection (2), the number of hours in a regular work week for a person employed on a full-time basis in the employment designated under subsection (3) shall be determined in accordance with the following rules:

1. If the number of hours in a regular work week for a person employed on a full-time basis is fixed by a collective agreement or by law for a person employed in the position in which the person whose full-time net weekly income is to be determined was employed, that number of hours shall be used for the purpose of subsection (2).
2. If rule 1 does not apply but there is a standard number of hours in a regular work week for a person employed on a full-time basis in the position in which the person whose full-time net weekly income is to be determined was employed, that number of hours shall be used for the purpose of subsection (2).
3. If rules 1 and 2 do not apply but there is a standard number of hours in a regular work week for other persons employed on a full-time basis in the workplace in which the person whose full-time net weekly income is to be determined was employed, that number of hours shall be used for the purpose of subsection (2).
4. If rules 1 to 3 do not apply but there is a standard number of hours in a regular work week for persons employed on a full-time basis in the industry or profession in which the person whose full-time net weekly income is to be determined was employed, that number of hours shall be used for the purpose of subsection (2).
5. If rules 1 to 4 do not apply but there is a reasonable method for establishing the number of hours in a regular work week for a person employed on a full-time basis for the purpose of subsection (2), that method shall be used.
6. If rules 1 to 5 do not apply, the number of hours in a regular work week for a person employed on a full-time basis shall be deemed to be 36.5 hours for the purpose of subsection (2).

The difficulty with applying this formula is that it deals primarily with a part-time worker in terms of wages per hour and hours worked in a regular work week. As a supply teacher, Mrs. Moncur was paid on a daily basis without regard to the hours she worked. And, as a teacher, she did not work more than 194 days per year.

In *Bapoo v. Co-Operators General Insurance Company*, (1977) 36.O.R. (3d) 616 (C.A.), Laskin, J.A. cited *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 131:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the court must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with legislative text, (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

Analysis:

For Mrs. Moncur, Mr. Dale argued that since section 267.1 of the *Insurance Act* replaced Mrs. Moncur's right to sue for economic loss with the accident benefits available under the *Schedule*, I should take into account Mrs. Moncur's vocational and personal characteristics to interpret section 86 in a way that would result in an award similar to what Mrs. Moncur might have received if she could have sued for economic loss.

I disagree with this approach for a number of reasons. The accident benefits are not akin to loss available in tort because they are paid without regard to fault. Further, section 86 provides a formula which does not take into account personal and vocational characteristics. Lastly, although Mrs. Moncur may have earned more than the average teacher because of her personal and vocational characteristics, she might have earned less if she stopped working for any other reason.

In the year before the accident, Mrs. Moncur worked for the Windsor Roman Catholic Board of Education (“Catholic Board”) and the Essex County Board of Education (“Public Board”). She received three separate rates of pay. The Catholic Board paid her \$145 per day. The Public Board paid her \$129.75 per day for less than 15 continuous days of work and \$189.25 per day for each of more than 15 continuous days of work.

The parties argued that I might average the daily rates of pay. I disagree. I find no provision in the formula which allows me to average rates of pay. Such a provision would have to allow for weighing the rates of pay depending on the number of days worked.

Subsection 86(3) requires the insured to designate one employment for the purpose of determining the converted gross annual income. Mr. Dale did not designate an employment, because, without knowing what my interpretation was, he could not know which employment would yield the highest gross annual income. Subsection 86(3) allows the insured to choose the most favourable hourly rate. Accordingly, I will use the rate which is most favourable to Mrs. Moncur and I will not take into account how many days she worked at any particular job in order to find a weighted average daily rate of pay.

The formula in subsection (2) requires me to multiply the person’s hourly rate of wages (“B”) by the number of hours in a regular work week for the designated employment (“C”) and multiply the result by 52.

Subsection (4) provides six alternate rules for determining the amount of hours to use in C. It directs me to consider the rules in order and use the first rule which applies to the fact situation. Paragraph 1 does not apply because the number of hours Mrs. Moncur would have worked if she worked full-time was not fixed by a collective agreement. Paragraphs 2, 3 and 4 do not apply because there is not a standard number of hours in a regular work week for teachers.

In my view, paragraph 5 applies because “there is a reasonable method for establishing the number of hours in a regular work week for a person employed on a full-time basis *for the purpose of subsection (2)*” (emphasis added). In this case, the purpose of subsection (2) is not to determine how many hours a week a full-time teacher works. In this case, the purpose of subsection (2) is to convert a part-time teacher’s income to that of a full-time teacher.

The parties agreed that under Regulations to the *Education Act*, R.S.O. 1990, c.E.2, a teacher works 194 to 198 school days a year. Accordingly, the maximum Mrs. Moncur could earn at the designated daily rate of \$189.25 per day for 194 days is \$36,714.50. This salary of \$36,714 is the same amount specified in the Public Board collective agreement salary grid for a first year full-time teacher.

In my view then, the “reasonable method for establishing the number of hours in a regular work week” for a full-time teacher must take into account that a teacher works 194 days in a year and earns \$36,714. Since the number of days and annual salary for a full-time teacher are fixed, the hours a full-time teacher works in a regular work week is irrelevant to her or his annual income. If I selected any reasonable number of hours in a regular work week for a full-time teacher, the resultant hourly rate of pay would be inversely proportionate to the hours worked.

Accordingly, I find that Mrs. Moncur’s gross annual income within the meaning of subsection 86(2) of the *Schedule* is \$36,714.

I believe this interpretation complies with the legislative text and promotes the legislative purpose of converting part-time income to full-time income.

Mrs. Moncur's loss of earning capacity benefit does not increase at the same rate as the salary schedule in the collective agreement, even when adjusted to the percentage change in the Consumer Price Index for Canada as provided by section 79 of the *Schedule*. Mr. Dale argued that this was unfair. However, the loss of earning capacity benefit is not reduced to reflect negative contingencies such as Mrs. Moncur not continuing to work full-time as a teacher. In my opinion, the outcome is reasonable and just.

EXPENSES:

If the parties cannot resolve the issue of entitlement to or amount of expenses of the arbitration proceeding, they may make written submissions to me on the issues of entitlement and amount in accordance with Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, May 31, 2001).

William J. Renahan
Arbitrator

June 16, 2003

Date

FSCO A02-001183

BETWEEN:

CATHERINE MONCUR

Applicant

and

ING 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. Catherine Moncur's gross annual income for the purpose of section 86 of the *Schedule* is \$36,714.
2. The issue of entitlement to and amount of expenses of the arbitration proceeding is deferred.

William J. Renahan
Arbitrator

June 16, 2003

Date