



FSCO A09-000641

**BETWEEN:**

**DENNIS FERGUSON**

**Applicant**

**and**

**ING INSURANCE COMPANY OF CANADA**

**Insurer**

## **REASONS FOR DECISION**

**Before:** Jessica Kowalski

**Heard:** February 22 and 23, 2010, at the offices of the Financial Services  
Commission of Ontario in Toronto

**Appearances:** Michael Kealy for Mr. Ferguson  
Antonella Albano for ING Insurance Company of Canada

**Issues:**

The Applicant, Dennis Ferguson, was injured in a motor vehicle accident on August 23, 2007. He applied for and received statutory accident benefits from ING Insurance Company of Canada ("ING"), payable under the *Schedule*.<sup>1</sup> An issue arose concerning the amount of the income replacement benefits to which Mr. Ferguson was entitled and the parties were unable to resolve their dispute through mediation. Mr. Ferguson applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this hearing are:

1. Was Mr. Ferguson an employee or self-employed at the time of the accident?
2. What is the amount of the income replacement benefit to which Mr. Ferguson is entitled pursuant to section 6 of the *Schedule*, from August 30, 2007 onwards?
3. Is Mr. Ferguson entitled to interest for the overdue payment of income replacement benefits pursuant to section 46(2) of the *Schedule*?

**Result:**

1. Mr. Ferguson was employed as an employee at the time of the accident.
2. The amount of the income replacement benefit to which Mr. Ferguson is entitled is \$294.12 per week from August 30, 2007.
3. Mr. Ferguson is entitled to interest for the overdue payment of income replacement benefits, calculated in accordance with s. 46(2) of the *Schedule*.

**EVIDENCE AND ANALYSIS**

**The Accident**

Mr. Ferguson was injured in a motor vehicle accident on August 23, 2007 when the car he was driving was broadsided by another vehicle. The accident claimed the lives of Mr. Ferguson's two-month old daughter, his stepdaughter and his fiancée and left his six year-old stepson brain injured. Mr. Ferguson was seriously injured.<sup>2</sup>

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<sup>2</sup>ING did not dispute the injuries for the purpose of this arbitration hearing.

## **Income Replacement Benefits**

The issue in this arbitration is whether Mr. Ferguson was an employee or self-employed at the time of the accident. There is no dispute that he is entitled to income replacement benefits.

The parties disagree on the classification of Mr. Ferguson's employment at the time of the accident and therefore on the quantum of the income replacement benefits to which he is entitled. Mr. Ferguson argues that he was an employee, while ING argues that he was self-employed. The distinction is important in this instance because the *Schedule* permits individuals who earn employment income to designate the last four weeks before the accident as the relevant period from which their income replacement benefits are calculated.

If Mr. Ferguson was self-employed at the time of the accident, his income replacement benefit is \$27.70 per week. If employed, he is entitled to \$294.12 per week.

## **Mr. Ferguson's Employment Background**

Mr. Ferguson is an auto body mechanic by trade. After completing Grade 11, he worked for various businesses in the Brantford area as an employee. After working for others for some time, he and his uncle opened a business as partners. Their business lost money and Mr. Ferguson's uncle wanted out. In or about 2005, Mr. Ferguson opened his own business, DH Custom Auto. He operated DH Custom Auto until he started the work that is the subject of this arbitration.

## **Mr. Ferguson's Position**

For the two years before the accident, Mr. Ferguson was living with his fiancée. In June 2007, they had their first child together, daughter Hailey. After Hailey was born, Mr. Ferguson decided to shut down his business, DH Custom Auto, which had lost money each year since it started in 2005.<sup>3</sup> Concerned that his business was not sufficiently consistent to support his family, Mr. Ferguson testified that he decided it made more sense to work for someone else. He began to

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<sup>3</sup>The business, although inactive, is still incorporated.

look for employment. From the jobs offered to him, he took the one that sounded best: a job at a new auto body and repair shop on Park Road in Brantford operated by Ken Baker.

Notwithstanding that he was joining a new business, Mr. Ferguson argues that he had nothing to lose. As someone who enjoyed a good reputation in his trade, he says he could easily move if things did not work out. He was simply hired to work in exchange for a fixed steady wage. He argues that he had no financial or other interest in MS Welding, a business he says Mr. Baker told him was actually owned by Mark Smith.

Because he needed help with his first and last month's rent and the move to Brantford, Mr. Ferguson testified that he asked Mr. Baker for a cash advance of \$1800. He deposited the cash along with \$40 of his own money. They agreed that Mr. Ferguson would work off the advance at the rate of \$200 per week, deducted from his salary, until the full amount was paid.

Mr. Ferguson testified that after the accident he and Mr. Baker decided that the cash advance would cover Mr. Ferguson's salary for the days worked because Mr. Ferguson could not return to work. They considered the \$1800 his salary paid to date and he received no further income from his work for Mr. Baker.

Mr. Ferguson does not deny that he received no pay stubs or other documents from MS Welding, apart from the OCF-2 that he says Mr. Baker had Mark Smith sign.

### **ING's Position**

ING argues that Mr. Ferguson was self-employed at the time of the accident. ING takes the position that Mr. Ferguson had no employment contract with MS Welding, which did not remit or make any source deductions off Mr. Ferguson's payment, and Mr. Ferguson did not receive a paycheque. ING argues that Mr. Ferguson was not on the company's payroll and has no time cards or pay stubs to support or record his attendance at work as an employee. ING says the work Mr. Ferguson did do, which included helping to set up Ken Baker's new business, was more in line with that of a self-employed individual.

ING continues to pay Mr. Ferguson a weekly income replacement benefit of \$27.70, calculated on the assumption that he was self-employed.

## EVIDENCE AND ANALYSIS

Having suffered consistent business losses and faced with providing for a growing family, Mr. Ferguson had good reason to seek out steady employment. He testified that he received three employment offers. The first two offered a weekly salary of \$500 and \$800. The third, an offer from one Mr. Baker, offered \$1200 per week, and included assisting him in starting up a new auto body and repair shop on Park Road in Brantford. Mr. Ferguson had previously been employed by Ken Baker (at K & K Auto Body). He and Mr. Baker entered into an oral agreement, which Mr. Ferguson testified is common in his industry. He had always had oral employment agreements, even when he worked at larger companies. Mr. Ferguson would work for Mr. Baker in his new shop in exchange for a weekly salary of \$1200. His duties included preparing the shop before it opened to the public. He started work on August 10, 2007.

### Indicia of Employment

S. 2(5) of the *Schedule* defines “employee” as follows:

A person is employed if, for salary, wages, or other remuneration or profit, the person engaged in employment, including self-employment, or is the holder of an office, and “employment” has a corresponding meaning.

The Commission’s *Guideline for Identifying Self-Employed Individuals*<sup>4</sup> (the “*Guideline*”) defines an employee as:

An individual who is hired to perform pre-determined tasks/work in a business in exchange for remuneration.

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<sup>4</sup>Commissioner’s Guideline No. 4/96, Ontario Insurance Commission Effective October 19, 1996, issued pursuant to s.268.3 of the *Insurance Act*.

I find that Mr. Ferguson's situation falls within the definition of "employee". The facts of Mr. Ferguson's relationship with Mr. Baker and MS Welding as a whole serve to determine his employment status.

Jesse Hawley, a certified general accountant whom ING retained to calculate Mr. Ferguson's income replacement benefits, concluded that there was no employment relationship between Mr. Ferguson and MS Welding. ING adopted her conclusions. Ms. Hawley co-authored a report for PricewaterhouseCoopers dated June 6, 2008 in which she calculated Mr. Ferguson's weekly benefit to be \$27.20. Based on its understanding of the manner in which Mr. Ferguson was remunerated for his activities at MS Welding, PricewaterhouseCoopers recommended that Mr. Ferguson be treated as a self-employed individual for accident benefit purposes.

Ms. Hawley also quantified the amount of the benefit that would be owing to Mr. Ferguson - \$294.12 per week – if he were employed. Ms. Hawley testified that based on the documents that Mr. Ferguson provided to ING, his tasks were more representative of self-employment.

On cross-examination, Ms. Hawley testified that:

- MS Welding would have had until September 15, 2007 to open a payroll account and remit Mr. Ferguson's source deductions;
- if Mr. Ferguson had worked more than a couple of weeks, he could have gone to MS Welding and asked that the source deductions be taken from his pay;
- as Mr. Ferguson was no longer working on August 23, 2007, it would not be unusual for MS Welding not to add him as an employee knowing that he was not coming back to work;
- she spoke to Ken Baker but did not get any records from him or from MS Welding;

- she is not a payroll or remittance expert;
- although Mr. Ferguson reclassified the \$1800 on his 2007 income tax return (from “other income” to “employment income”) it made no difference in that his net loss for that year remained the same; and
- she has seen situations where accountants have put income on a line other than employment income on an employed person’s income tax return where the employer did not issue a T4.

Ms. Hawley relied on several factors to make her decision: that Mr. Ferguson was not formally on a payroll, received \$1800 in cash, never received a T4 from MS Welding and did not have a (written) employment contract.

Mr. Ferguson worked for less than two weeks at a small business that did not have a formal payroll. Mr. Ferguson needed cash before he started work to help him move. That MS Welding or Ken Baker did not issue a T4 is outside Mr. Ferguson’s control. Mr. Ferguson’s evidence on all these points was not successfully challenged and only Mr. Ferguson testified to the nature of his contractual relationship between himself and Ken Baker on behalf of MS Welding.

Mr. Ferguson testified that he went to work during the day and did the work assigned to him by Mr. Baker, for whom he had previously worked as an employee at K & K Auto Body.

Mr. Ferguson’s work at MS Welding was very different from his work as a self-employed person. Unlike when he entered into business with his uncle or on his own, Mr. Ferguson did no investigation. Before accepting the job, he conducted no credit checks on Mr. Baker, did not inspect financial records or a lease. He did not set up utilities like he testified he had with his uncle or on his own. He had no ownership interest, invested no money of his own, and had no expectation to share in any potential profits of the business. His responsibilities were to do the work assigned to him. He had a set salary and a fixed work week. His pay did not change based on hours worked. It was Mr. Baker who assigned Mr. Ferguson’s work, and I heard no evidence that Mr. Ferguson was free to work when and for whom he chose, that he could provide his

services to others at the same time, or that he could refuse the work that Ken Baker assigned. There was no evidence before me that Mr. Ferguson had any opportunity to exercise control over his daily activities.

Nor did I hear evidence that Mr. Ferguson had opportunity for profit in his relationship with Ken Baker. Whether Mr. Baker's business lost or gained money, the amount of Mr. Ferguson's weekly pay was to remain the same. He made no financial investment in the business, like he did when he partnered with his uncle or on his own. It was exactly that stability that he says drew him to leave unprofitable self-employment for an employment situation.

Mr. Ferguson also testified that he bore no financial risk: if Mr. Baker could not pay him his wages, Mr. Ferguson could (and would) leave to find alternate employment. He had a good reputation and at least two other offers before he accepted Mr. Baker's.

I do not find the fact that Mr. Ferguson used his own tools as determinative of a business relationship. He testified that he has been amassing tools using a government grant when he started his apprenticeship. He also testified that in his industry it is standard for auto body mechanics to move with their own tools. Mr. Baker supplied the heavy equipment at the shop, such as the hoists and air compressors. ING gave no evidence that auto body mechanics do not bring their own tools to their place of employment, whether they are employees or contractors and Mr. Ferguson's testimony in this regard was uncontroverted. In her testimony, Ms. Hawley referred to indicators of employment status provided by the Canada Revenue Agency ("CRA"). In a bulletin distinguishing between employment and self-employment situations, the CRA specifically identifies auto mechanics as skilled tradespeople that are often required to supply their own tools, even if they are full-time employees.<sup>5</sup>

ING argues that \$1200 per week was too good to be true and should have set off alarm bells for Mr. Ferguson. But Mr. Ferguson testified that there was simply no risk to him, for the reasons already noted. It is not only conceivable but entirely reasonable that given Mr. Ferguson's growing family and history of two unsuccessful businesses left him willing to take a chance on

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<sup>5</sup>Canada Revenue Agency bulletin RC4110(E) Rev.08 ("Employee or Self-Employed?")



the best opportunity that presented itself. Having worked for K & K Auto Body and Mr. Baker before, Mr. Ferguson had little apparent reason to question the terms of his new employment.

I also find that Mr. Ferguson's working arrangement does not fit the criteria of a self-employed worker under the *Schedule*, demonstrated by the questions listed in the *Guideline* under the heading "Traditional Self-Employment Situations". When applied to the evidence before me, these questions confirm Mr. Ferguson's status as an employee. The questions ask whether he:

- i. is an owner of an unincorporated sole proprietorship or a partner in a partnership (other than a limited partner):  
Mr. Ferguson had no ownership interest in MS Welding or Ken Baker's shop. He made no investment and was not identified as an owner or shareholder or otherwise in any business registration documents;
- ii. has an established location where business transactions take place:  
Mr. Ferguson did not have a location for his "business". He performed his duties at Ken Baker's Park Road shop;
- iii. participates in the everyday operations of the business (not just an investor or receiving remuneration for purposes of income splitting):  
There is no evidence that Mr. Ferguson participated in the business (Ken Baker's and/or MS Welding) beyond performing the duties assigned to him, including preparing the shop before it opened to the public;
- iv. determines own method and schedule for accomplishing tasks:  
There was no evidence that Mr. Ferguson had the discretion to refuse to do the work assigned to him;
- v. determines own hours and may not necessarily work a set number of hours per period (i.e. 40 hours week):  
Ken Baker set Mr. Ferguson's hours and agreed to pay him a fixed wage;

- vi. negotiates the price(s) or fee(s) for service(s) with the customer or client with the exception of regulated fields (i.e. physicians):

I heard no evidence that Mr. Ferguson did or was required to enter into negotiations for the price or fees for services with customers;

- vii. determines the annual income as his or her profit from the business according to the *Income Tax Act* (Canada) and *Income Tax Act* (Ontario):

Mr. Ferguson did not determine his annual income as profit from the business. He was to earn a fixed wage. In his 2007 income tax return, Mr. Ferguson declared the \$1800 he received in August 2007 as “other income”. He reclassified the \$1800 as “employment income” in an amended return after he applied for arbitration.

I do not find the reclassification material or determinative of Mr. Ferguson’s employment status. As Ms. Hawley testified, the reclassification had no bearing on Mr. Ferguson’s net loss for that year. It was a single payment that shed little light on the nature or pattern of his work with Mr. Baker, which he only began ten days before he was injured. That sole payment did not demonstrate a pattern and I do not find it persuasive evidence, especially when considered in the totality of the evidence, that Mr. Ferguson was self-employed.

- viii. is ineligible for regular Employment Insurance benefits;

- ix. contributes the employer and employee contributions to Canada Pension Plan (CPP) for his or her own pension plan;

- x. 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)).

With respect to questions viii through x, I find that Mr. Ferguson was not responsible for his source deductions or for remitting taxes. In my view Mr. Ferguson should not be penalized for Mr. Baker's failure to issue a T4, deduct tax or make other source deductions from Mr. Ferguson's single payment.

## **The Business Location and the OCF-2**

Mr. Smith suggested that Mr. Baker was not at Park Road in August 2007, having been evicted some time earlier. Mr. Smith testified that he helped Mr. Baker leave Park Road, but he could not say with any certainty when that occurred. Mr. Smith testified variously that: he visited Ken Baker at the Park Road location in June or July 2007; he could not recall the month or which part of summer 2007 he helped Mr. Baker move; and that he definitely helped Mr. Baker move before September 2007, it could have been June 2007, but was not as early as May 2007.

Mr. Smith also testified that, while he could have helped Mr. Baker move from Park Road to the Copernicus location in June 2007, he was "pretty sure" it was July because his birthday is in July and the move coincided with a party that Mr. Smith's wife was planning. By his re-examination, Mr. Smith had decided that he had helped Mr. Baker move the weekend of July 7, 2007 because the move conflicted with the party but was necessary because the landlord was going to seize Mr. Baker's things.

On cross-examination, however, Mr. Smith testified that he had had a conversation with Mr. Baker at Park Road North a day or two after Mr. Ferguson's accident. Specifically, Mr. Smith indicated that a day or two after Mr. Ferguson's car accident (that is, in August 2007) he had dropped by Park Road and had a conversation with Mr. Baker who told him about his friend, an "employee" in his language, that had been in a car accident. Mr. Smith also conceded on cross-examination that Mr. Baker may have been holding himself out to third parties as working for MS Welding and/or using MS Welding's name.

Mr. Smith also recalled that Mr. Ferguson came to 100 Copernicus in November 2007, which coincides with the signing of the OCF-2. On cross-examination, Mr. Smith testified that Mr. Baker introduced Mr. Ferguson to him, told him that Mr. Ferguson had been in a car accident, and that before the accident, Mr. Ferguson was working for Mr. Baker on Park Road North.

Mr. Ferguson's evidence was by contrast straightforward:

- he worked at Ken Baker's shop on Park Road in Brantford;
- when he started on August 13, 2007, Ken Baker was still at Park Road;
- Mr. Ferguson helped with setting up the shop in preparation for a September 2007 opening;
- he did a lot of work at Park Road and did not know that Ken Baker was planning a move to the Copernicus location; and,
- he learned that Mr. Baker had moved the shop to the Copernicus location when Mr. Baker called to see how Mr. Ferguson was doing after the accident.

I find that Mr. Ferguson began working for Mr. Baker at the Park Road location and that the business was still on Park Road by the time Mr. Ferguson had his accident. By November 2007 (when Mr. Ferguson asked Mr. Baker to sign the OCF-2), Mr. Baker had been evicted from Park Road and moved his business premise to 100 Copernicus, where the sign read "MS Welding". Mr. Smith also denies that he signed the OCF-2 in November 2007. In challenging the signature on the OCF-2, it rested with ING to prove that it was not Mr. Smith's signature, which it did not do. ING failed to adduce expert evidence to challenge the signature, and I found Mr. Smith's denial unpersuasive.

## **Mr. Smith**

MS Welding was the registered business name for Mr. Smith's part time welding business. Mr. Smith had a full-time job welding fences and playground equipment. He operated a welding business from his home until Mr. Baker, whom he had met playing pool, suggested he move MS Welding to Ken Baker's shop to increase visibility and business. By the time of this arbitration, Mr. Smith and Mr. Baker had had a falling out. Mr. Smith testified that:

- Mr. Baker owed Mr. Smith money;
- Mr. Baker may have been telling third parties that he was working for MS Welding – Mr. Smith simply does not know. Nor does he know whether Ken Baker held himself out to be a principal of MS Welding;
- Ken Baker had set up a telephone line in MS Welding's business name for which Mr. Smith ended up paying;
- When Ken Baker was evicted from the Copernicus location for non-payment of rent, Mr. Smith paid the commercial landlord money to remove MS Welding's property;
- Ken Baker identified Mr. Ferguson as his "employee" and the "guy who worked for me who was involved in "this tragic car accident".

Whether with or without Mr. Smith's knowledge, Mr. Baker had at the very least set up his business telephone in MS Welding's name and had an "MS Welding" sign at the Copernicus location, where Mr. Ferguson attended to have the OCF-2 signed. Whatever the relationship between Messrs. Smith and Baker, or whether Mr. Baker duped Mr. Smith as well as Mr. Ferguson, I am not convinced Mr. Ferguson should be penalized. On the whole, Mr. Ferguson's

evidence was forthright and consistent and I prefer his account of his employment relationship with Mr. Baker to Mr. Smith's.

Because he testified that he did not hire Mr. Ferguson, Mr. Smith also had no knowledge of the nature of Mr. Ferguson's job tasks. What Mr. Smith did offer was that Ken Baker identified Mr. Ferguson as an "employee" and as the "guy who worked for me" when he told Mr. Smith about Mr. Ferguson's accident. Mr. Smith was not at the shop during the day, which by then had moved to the Copernicus location, and had no direct insight into Mr. Ferguson's day-to-day work or the tasks assigned to him by Mr. Baker.

### **Ken Baker**

Mr. Baker did not appear as a witness at the hearing. According to both parties, he is nowhere to be found. Mr. Smith had no direct knowledge of the relationship between Mr. Ferguson and Mr. Baker. ING argues that Mr. Baker was not at the hearing to confirm that Mr. Ferguson worked for him. Neither was he there to confirm that Mr. Ferguson did not.

### **Conclusion:**

I find that Mr. Ferguson meets the definition of "employee" in the *Schedule and Guideline*. He was hired by Mr. Baker to work as an auto body mechanic and to generally assist in his workshop. Mr. Ferguson worked for Mr. Baker from August 13 to August 23, 2007, disrupted by the accident. I accept Mr. Ferguson's evidence that it is not uncommon in his trade to accept work based on an oral agreement, and that, even when he worked for larger outfits like Brant County Ford, he did not have a written employment contract. Mr. Ferguson's oral contract with Mr. Baker established the terms of their working relationship: that Mr. Ferguson would work for Mr. Baker in his new shop, that he would assist in preparing that shop before it opened to the public, that he was to work during the week and be paid a salary of \$1200 per week.

The evidence is limited to a short period of time: Mr. Ferguson simply did not work long enough to establish a demonstrated history of payments, and/or payroll deductions.

That his employer had not yet set up a payroll account, or that that it did not take deductions off Mr. Ferguson's sole payment are outside Mr. Ferguson's control, as was the relationship between Mr. Smith and Mr. Baker. Whatever that relationship was, or whether Mr. Baker was acting as a rogue, Mr. Ferguson should not bear the consequence of having entered into what he believed was an employment arrangement in good faith.

**EXPENSES:**

The parties made no submissions with respect to expenses. I recommend that the parties resolve the issue of expenses between themselves. In the event that they are unable to do so, they may bring the matter before me in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

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Jessica Kowalski  
Arbitrator

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August 6, 2010  
Date



FSCO A09-000641

**BETWEEN:**

**DENNIS FERGUSON**

**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. Mr. Ferguson is entitled to a weekly income replacement benefit of \$294.12 per week from August 30, 2007, in accordance with sections 4, 5 and 6 of the *Schedule*.
2. Mr. Ferguson is entitled interest for the overdue payment of the income replacement benefit, calculated in accordance with s. 46(2) of the *Schedule*.

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Jessica Kowalski  
Arbitrator

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August 6, 2010  
Date