Neutral Citation: 2008 ONFSCDRS 85

Appeal P08-00006

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ABDUL ZAHER WAHIDPUR

Appellant

and

UNIFUND ASSURANCE COMPANY

Respondent

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Mr. Henry Goldentuler for Mr. Wahidpur Mr. Mauro D'Agostino for Unifund
HEARING DATE:	Written submissions were received by May 22, 2008

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Notice of Appeal dated February 27, 2008 from the preliminary order dated January 30, 2008 and April 2, 2008 is not rejected, and may proceed to an appeal hearing.

2. The time limit for the Appellant serving and filing his written submissions is thirty days from the date the transcript from the preliminary issue hearing is received.

3. The Respondent shall serve and file its written submissions within twenty days of receiving the Appellant's written submissions.

May 28, 2008

Lawrence Blackman
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL AND BACKGROUND

Mr. Wahidpur (the "Appellant") was injured in a motor vehicle accident on December 15, 2005. He applied to Unifund Assurance Company (the "Respondent") for statutory accident benefits payable pursuant to the *Schedule*.[1]

A preliminary issue hearing was held before Arbitrator Kominar (the "Arbitrator") in November 2007. The Arbitrator's January 30, 2008 order was confirmed in decision format on April 2, 2008. The Arbitrator determined that the Appellant was precluded from receiving income replacement benefits ("IRBs") from February 27, 2006 to June 6, 2007 on the basis that notwithstanding being given explicit notice that the Respondent was relying on section 33 of the *Insurance Act*, R.S.O. 1990, c. I.8, there had been a "consistent pattern of denial of relevant information."

II. SUBMISSIONS OF THE PARTIES

The Appellant submits that the Arbitrator erred in law, including:

1. exceeding his jurisdiction in addressing an issue not set out at the pre-hearing;
2. failing to consider pertinent case law; and,
3. failing to acknowledge the Respondent's concession that the Appellant had not forfeited IRB entitlement as a result of non-compliance.

The Appellant acknowledges that the appeal is from a preliminary order.

Rule 50.2 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2003) (the "*Code*") provides that a party may not appeal a preliminary or interim order of an arbitrator until all of the issues in dispute in the arbitration have been finally decided, unless the Director

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

(or, by virtue of subsections 6(4) of the *Insurance Act*, the Director's Delegate) orders otherwise. Rule 51.2(c) of the *Code* provides that an appeal may be rejected if it is from a preliminary or interim order that does not finally decide the issues in dispute.

The Appellant cites *Allstate Insurance Company of Canada and Tesfay*, (FSCO P99-00023, June 21, 1999), to the effect that the decision to hear an appeal from a preliminary order is discretionary, and that the criteria whether to accept same includes:

(a) the strength of the appeal;
(b) the importance or novelty of the issue raised; and,
(c) whether the appeal would provide the quickest, most just and most expeditious way of disposing of the issues between the parties, in accordance with Rule 1.1 of the *Code*.

The Appellant submits that the Arbitrator's order:

(a) finally disposed of a significant and central issue in dispute and it would be seemingly moot to proceed on that issue in light of the order;
(b) addressed important and novel issues regarding notice requests under section 33 of the *Insurance Act* as well as procedural issues regarding defining the issues in dispute; and,
(c) contained significant and serious errors.

In its Response to Appeal, received by the Commission on March 25, 2008, the Respondent submitted that the Notice of Appeal should be rejected pursuant to Rules 50.2 and 51.2(c) of the *Code*. In further written submissions received by the Commission on May 22, 2008, the Respondent argued, in part, that:

(a) the Arbitrator's decision was not final and determinative of the issues to be addressed. Subsection 33(2) of the *Insurance Act* states that an insurer is not liable to pay a benefit in respect of any period during which an insured person failed to comply with the duties to provide information set out in subsections 33(1) and (1.1) of the *Insurance Act*. The Arbitrator found that the Appellant was not entitled to benefits for some 66 weeks. The

issues in dispute, however, are the Appellant's IRB entitlement for the initial 104-week period, a special award, pre-judgment interest and legal expenses;

(b) the appeal does not raise an issue of law;

(c) the issue is not novel, section 33 having been a component of the *Schedule* for more than ten years; and,

(d) the Appellant's argument that the Arbitrator's decision erred regarding existing arbitral decisions has no merit whatsoever.

III. ANALYSIS

Delegate Makepeace in *Allstate Insurance Company of Canada and Torok*, (FSCO P01-00021, May 29, 2001), following a similar recitation in *Tesfay*, set out the criteria to be considered in determining whether to accept an appeal on a preliminary or interim order:

> The purpose … is to facilitate the most cost-effective resolution of disputes by minimizing the time and money spent on procedural or collateral matters. The decision whether to hear an appeal of a preliminary order is discretionary … As Delegate Naylor stated in *General Accident and Glynn*, the over-arching principle guiding the exercise of the discretion is that the rule "should be broadly interpreted to produce the quickest, most just and least expensive resolution of the dispute." …The criteria to be considered include the apparent strength of the appeal, the importance or novelty of the issue raised, and whether rejecting the appeal or hearing it will prejudice either party …

In this case, I am persuaded that the appeal should be accepted for the following reasons:

(a) The Arbitrator's order finally determines the Appellant's IRB entitlement for 66 of the 104 weeks in dispute. IRB entitlement is the paramount issue in dispute in this arbitration proceeding, from which the other issues flow;

(b) The appeal raises, in part, an issue of law as to the meaning and effect of subsections 33(2) and (4) of the *Insurance Act*. The appeal also raises an issue as to whether there was an admission or concession by a party, and the effect of same. The Respondent does not contradict the submission that it was not suggesting that the Appellant had

forfeited IRB entitlement as a result of non-compliance and that payment of such potential benefits was only delayed;

(c) I am not persuaded that the Appeal has no merit whatsoever; rather, there is apparent strength to the appeal. Delegate Makepeace, in *Iankilevitch and CGU Insurance Company of Canada*, (FSCO P03-00013, August 31, 2004), held that subsection 33(2) "authorizes forfeiture of benefits otherwise payable to Ms. Iankilevitch until she complies. The remedy given by s. 33(2) is delay, not forfeiture." Accordingly, the Delegate revoked the arbitrator's orders disentitling the insured person to benefits.

The Arbitrator does not mention this or any other decision in his reasons. The Arbitrator would seemingly be obliged to directly address *Iankilevitch* and whether it was distinguishable on a factual basis, there was a new interpretive argument being advanced or whether there had been a change in the environment in which the legislation operated, as set out by Director Sachs in *Vo and Maplex General Insurance Company et al.*, (OIC P-002777, December 12, 1997), or whether the decision was incorrect and should not be followed.

(d) Whether or not the issue in appeal is novel, I am persuaded that the issue is of fundamental importance to this case and is of significant importance generally to the operation of the *Schedule*; and,

(e) I am persuaded that the most efficient and just means of proceeding is to determine the appeal as expeditiously as possible, and then allow arbitration to determine IRB entitlement for the appropriate period, as well as determine the other issues in dispute. I am not persuaded that this approach is prejudicial to either party. Rather, it makes little sense to have arbitration first address IRB entitlement for the final 38 weeks in issue, and then hear the appeal. If the appeal is successful, IRB entitlement will then need to be determined for the first 66 weeks in issue, which will presumably mean hearing much of the same evidence a second time, resulting in an unnecessary expenditure of time and money.

Accordingly, the appeal is accepted. The Appellant indicates in his Notice of Appeal that he ordered the transcript of the hearing on February 11, 2008. I have not been advised that the transcripts are presently available. Therefore, in accordance with Rule 54 of the *Code*,

1. The time limit for the Appellant serving and filing his written submissions is thirty days from the day the transcript from the preliminary issue hearing is received; and,

2. The Respondent shall serve and file its written submissions within twenty days of receiving the Appellant's written submissions.

If there is some difficulty regarding the transcripts, I ask that the parties contact the Appeals Administrator to arrange a telephone conference with me forthwith to discuss same. If, however, the transcripts have been received and the above-noted time lines need to be amended, a telephone conference call should also be arranged.

IV. EXPENSES

The legal expenses of this preliminary issue decision are deferred to the appeals adjudicator hearing the main appeal in this case.

Lawrence Blackman Director's Delegate	May 28, 2008 Date