Ontario Insurance Commission

Commission des assurances de l'Ontario

Neutral Citation: 2006 ONFSCDRS 10

FSCO A05–000898

BETWEEN:

ANNABEL ANTONY

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

Before: David Muir

Heard: December 16, 2005 by teleconference

Appearances: David S. Wilson for Mrs. Antony
Neil Colville-Reeves for RBC General Insurance Company

Issues:

The Applicant, Annabel Antony, was injured in a motor vehicle accident on March 6, 2001. She applied for and received statutory accident benefits from RBC General Insurance Company ("RBC"), payable under the *Schedule.*[1] The parties were unable to resolve their disputes through mediation, and Mrs. Antony applied for arbitration at the

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

Financial Services Commission of Ontario under the *Insurance Act,* R.S.O. 1990, c.I.8, as amended.

At the pre-hearing discussion of this case held on August 9, 2005, RBC requested the production to two defence medical reports commissioned for purposes of related tort proceedings. I was advised that the request was first made prior to the pre-hearing. At the instance of Mrs. Antony, and with the ready agreement of RBC, the parties requested that the issue be dealt with by way of written submissions. I agreed to receive the parties' submissions and provide a written response.

In a letter decision dated October 24, 2005 I denied RBC's request for the production of the defence medical reports.

The essence of my reasoning is captured in the following passage:

> RBC relies upon the determination of the Court of Appeal in *Tanner v. Clark*[2] for the proposition that an important principle underlying any production dispute was the need for the trier of fact to have before them all of the evidence bearing upon an issue in dispute.
>
> Strictly speaking, the ruling in *Tanner v. Clark* is not applicable at all to these circumstances, however I am also not persuaded that the Court's general statements of the importance of full disclosure in the context of a tort proceeding ought to govern the exercise of my discretion here.
>
> To my mind, while fulsome disclosure is of course an important principle of any fair adjudicative process, it is not the only value. Expedition, efficiency and economy are also values which play an important role in adjudicative systems design and operation. Indeed, in many quasi-judicial adjudicative contexts, the Dispute Resolution Process included, expedition, efficiency and economy are, for want of a better characterization, first amongst equals in balancing these competing values.
>
> The rule which has been adopted by arbitrators at the Commission flows from the appeal decision of Director's Delegate McMahon in *CAA and Sandhu*[3] In short, requests for the production of defence medicals will not be granted in the absence of a compelling argument that the medical evidence obtained pursuant to the *Schedule* are insufficient.

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[2] *Tanner et. al. v. Clark et. al.* (2003) 63 O.R. (3d) 508. [footnote in original]
[3] *CAA Insurance Company (Ontario) and Sandhu,* (FSCO P01-00044, January 18, 2002) appeal. [footnote in original]

> I am not persuaded that the grounds advanced by RBC are sufficiently compelling to justify departure from what I see as the general rule governing these sorts of requests. I take no issue with RBC that these reports may be relevant to the issues in dispute in the arbitration and for purposes of these reasons have assumed without deciding that they may be relevant. However, as Mrs. Antony points out, relevance is not a significant point in the cases, indeed it is generally assumed without much comment that these materials may be relevant to the issues in the arbitration.
>
> RBC does submit that it ought to be entitled to production of these materials because it has been unable to obtain its own evidence pursuant to the powers to assess claims provided in the *Schedule.*
>
> I am not satisfied that this is the case based on the material before. RBC has conducted several assessments of Mrs. Antony, including psychiatric and physiatric assessments, not long before the defence medicals in issue. There is nothing more disclosed in the parties' submissions that suggests prejudice to RBC in not having access to the tort materials. The absence of prejudice to RBC would in itself end the matter, however I also agree, as pointed out by Director's Delegate McMahon, that the production of these kinds of materials will inevitably tend to lengthen and complicate the arbitration proceeding.

Mrs. Antony now seeks her expenses for what is now characterized as a motion. RBC resists the timing of the request, arguing that the question of whether or not Mrs. Antony is entitled to her expenses should be determined by the hearing arbitrator at the conclusion of the dispute resolution process. In support of its position RBC relies upon a recent decision of mine in which I held that interim expenses ought to be awarded only in exceptional circumstances. These are not exceptional circumstances submitted by RBC. In response, Mrs. Antony submitted that the expenses are routinely ordered in these kinds of circumstances, where, it was submitted, one party or the other raises an issue which must be defended giving rise to costs.

The issues are:

1. Is Mrs. Antony entitled to an award of expenses at this point in the proceeding?

Result:

1. Mrs. Antony is not entitled to an award of expenses at this point in the proceeding.

I agree with RBC, that these are not exceptional circumstances, which would support an award of expenses at the pre-hearing stage of the proceeding.

Although much of the debate between the parties centred on whether or not the production dispute was a "motion" or merely an aspect of the pre-hearing, I find that nothing much turns on this distinction. To my mind there is no magic in how an event in a proceeding is characterized – calling an event, a motion, does not transform it from one which will attract an expense award into one that will not. Indeed many pre-hearings including the one held in this case, will include one or more motions. In most circumstances those motions should be (and typically are) dealt with in the pre-hearing. The discretion to make an award of expenses should not be exercised in a way that could encourage the fragmentation of the pre-hearing into one or more motion hearings.

In this case there were two production issues that arose in the pre-hearing – the first, a request for pre- and post-accident medical records was dealt with at the pre-hearing; the other was not, leading ultimately to this expense dispute.

My authority to award expenses is found in the *Insurance Act.*

The scheme of the *Act* is a simple one. Section 282(11) provides that an arbitrator may make an award of expenses to one party or the other, according to the prescribed criteria. Section 282(11.1) empowers an arbitrator to make an interim award of expenses at any time during an arbitration proceeding, subject to such terms and conditions as may be established by the arbitrator.

Expense awards are primarily intended to partially compensate a party for the costs incurred over the course of the dispute resolution process. An expense award does not completely compensate a party and what is, and what is not compensable is narrowly prescribed by regulation. Expense awards, if required (as the parties most often agree on the appropriate disposition of the question following the release of the hearing

arbitrator's decision), are normally made after the conclusion of the hearing as contemplated by section 282(11), *supra.* Until the proceeding concludes, the parties are normally expected to bear the cost of the proceeding, except where there is an award of interim expenses pursuant to section 282(11.1), *supra.*[4] Accordingly, expenses will not normally be awarded at a pre-hearing.

Another recognized purpose of an expense award, is as an aid in controlling the dispute resolution process. An award of expenses can, by compensating one party at the expense of the other, exact a price for misconduct. This purpose is explicit in the criteria which the arbitrator is required to consider when dealing with an expenses dispute at the conclusion of a proceeding. It has also come to be used increasingly at earlier stages in the arbitration process, where arbitrators have presumably taken their authority from the explicit power to make an interim award of expenses contained in section 282(11.1), combined with the common law duty to control the adjudicative process. Accordingly it has become commonplace to see awards of expenses in the context of interlocutory steps in an arbitration proceeding. However, being an interim award, I am of the view that such awards should not be made except in exceptional circumstances.[5] Moreover, to the extent that the purpose of such an award is to control the process, there must be some conduct by the party against whom the award is sought which merits such discipline.

In *Singh*[6]*,* relied upon by RBC, I did order expenses for time thrown away at the pre-hearing stage of the proceeding. However, the circumstances in that case were exceptional. The manner in which the Applicant and his representatives had conducted themselves was egregious, resulting in significant delay and wasted expense in moving the matter to a hearing. The purpose of an award of expenses in such circumstances is, at a minimum, to provide some compensation to the innocent party, and hopefully, to send a message to the offending party that their conduct is inappropriate. In short, the

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[4] See *Champaigne and Co-operators General Insurance Company,* (FSCO A03-001344, September 3, 2004) and the cases cited therein, in particular *Bernicky and Guardian Insurance Company of Canada,* (OIC A-006268, July 6, 1994).
[5] Mrs. Antony did not frame the issue as a request for an award of interim expenses, accordingly none of the criteria set out in the cases cited in note 4 supra, were addressed.
[6] *Singh and Aviva Canada Inc.* (FSCO A04-001564, October 19, 2005)

authority to make that award flowed in part, from the common law obligation to control the dispute resolution process.

None of those circumstances exist here. The production issue raised by RBC was not an unusual one and although not successful, was not frivolous or inappropriate. There is no aspect of the conduct of RBC in the process to date that requires a disciplinary intervention in the form of an expense award.

The routine awarding of expenses following an interlocutory step in the proceeding only tends to engender further disputes and delays in the proceeding. Although it did not result in delay in this case, the fact that the parties did not agree about Mrs. Antony's entitlement to expenses at this stage required the scheduling of a hearing to deal with this issue. Furthermore, although I make no determination of the issue, it became apparent during the course of argument on entitlement that there would be a dispute about the quantum of expenses being claimed by Mrs Antony. When RBC indicated that it was not prepared to deal with that issue there having been no compliance with the advance disclosure requirements of Rule 79 respecting the assessment of expenses, it was Mrs. Antony who complained about the possibility of having to come back to deal with the quantum issue.

There will be circumstances where an award of expenses is appropriate after an interlocutory event in a proceeding. For example it may be appropriate that there be an expense award after the determination of a preliminary issue where the parties have expended significant resources in presenting their positions on the issue. In each case the exercise of the discretion to make such awards will be determined on the particular facts at play.

For the reasons set out here this is not a circumstance where it would be appropriate to exercise the discretion to make an expense award. The issue of Mrs. Antony's entitlement to her expenses will be considered by the hearing arbitrator at the conclusion of this proceeding or by the parties themselves in the event that they are able to resolve all of their disputes.

January 23, 2006

David Muir
Arbitrator

Date

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BETWEEN:

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ARBITRATION ORDER

Under section 282 of the *Insurance Act,* R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mrs. Antony is not entitled to an award of expenses at this time. She may raise the issue before the hearing arbitrator at the appropriate time.

January 23, 2006

David Muir
Arbitrator

Date