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Neutral Citation: 2006 ONFSCDRS 181

FSCO A06-000038

BETWEEN:

**GIANFRANCO MARAZITA**

Applicant

and

**RBC GENERAL INSURANCE COMPANY**

Insurer

### **DECISION ON A PRELIMINARY ISSUE**

**Before:** Joyce Miller

**Heard:** October 31, 2006, at the offices of the Financial Services  
Commission of Ontario in Toronto.

**Appearances:** Mr. Marazita did not appear.  
Neil Colville-Reeves for RBC General Insurance Company

**Issues:**

The Applicant, Gianfranco Marazita, was injured in a motor vehicle accident on November 4, 2003. He applied for and received statutory accident benefits from RBC General Insurance Company ("RBC"), payable under the *Schedule*.<sup>1</sup> RBC terminated

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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 Applicant's benefits, including income replacement benefits, on March 3, 2004. The parties were unable to resolve their disputes through mediation, and Mr. Marazita applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.l.8, as amended.

The preliminary issue is:

1. Should Mr. Marazita's arbitration be dismissed without a hearing on the grounds that it is frivolous, vexatious or has been commenced in bad faith, pursuant to Rules 68.1 and 68.2 of the *Dispute Resolution Practice Code*, (Fourth Edition - Updated October 2003).

### **Result:**

1. The arbitration is dismissed.
2. If needed, RBC may make submissions on the issue of expenses in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

### **THE LAW**

Rules 68.1 and 68.2 of the *Dispute Resolution Practice Code* provide:

68.1 Subject to **Rule 68.2**, an adjudicator may dismiss a proceeding without a hearing where the proceeding is frivolous, vexatious or is commenced in bad faith.

68.2 Before dismissing a proceeding under this Rule, an adjudicator shall deliver written notice to all parties of the intention to dismiss the proceeding on the grounds set out in **Rule 68.1**.

### **EVIDENCE AND ANALYSIS**

A pre-arbitration hearing was held on August 28, 2006. Mr. Marazita did not appear.

Mr. Marazita's counsel at that time, Mr. Brian Pickard, asked for an order permitting him to withdraw as representative to Mr. Marazita.

Arbitrator Renahan granted the order permitting Mr. Pickard to withdraw, concluding that "I find a serious loss of confidence between lawyer and client due to Mr. Marazita's failure to provide necessary instructions."

At the pre-hearing, counsel for RBC asked for a hearing date to determine whether Mr. Marazita's application for arbitration should be dismissed. Accordingly, Arbitrator Renahan provided notice to Mr. Marazita in his pre-hearing letter that his arbitration is being considered for dismissal. Specifically, Arbitrator Renahan stated:

An application to determine whether Mr. Marazita's application for arbitration should be dismissed on the grounds that it is frivolous, vexatious or commenced in bad faith, and whether either party should pay the arbitration expenses of the other party, shall be heard at the offices of the Financial Services Commission at 9:30 a.m. on Tuesday, October 31, 2006. The Commission will provide Mr. Marazita, RBC and Mr. Colville-Reeves with a formal notice of this hearing shortly. Of course, Mr. Pickard will not receive any further notices with respect to this matter.

Based on Arbitrator Renahan's letter of August 28, 2006, as well as the Notice of Hearing noted below, I find that Mr. Marazita had sufficient notice pursuant to Rule 68.2 that a hearing was set to determine whether Mr. Marazita's arbitration should be dismissed.

The hearing in this case commenced as scheduled on October 31, 2006 at 9:30 a.m. Mr. Marazita did not attend the hearing, nor did a representative appear on his behalf. There was no indication in the file that Mr. Marazita made any effort to inform the Commission that he would not appear. In addition, the Commission's file reveals the following:

- Mr. Marazita has not at any time advised the Commission of any change in his address.
- The file shows that, as a follow-up to Arbitrator Renahan's letter of August 28, 2006, a formal notice of the hearing was sent to Mr. Marazita on August 28, 2006 advising him of the hearing on October 31, 2006.
- The Notice of Hearing sent to Mr. Marazita stated: "This hearing of a preliminary issue will determine whether the Application for Arbitration should be dismissed on the grounds that it is frivolous, vexatious or commenced in bad faith." In addition, the Notice of Hearing stated:

You may attend this hearing of a preliminary issue in person and/or be represented. If you or your representative do not attend, **the Arbitrator may dispose of the case in your absence and**

**you will not be entitled to any further notice of arbitration proceedings.**<sup>2</sup> [emphasis added]

- A FSCO Form F, Statement of Service, on file shows that Mr. Marazita was personally served on October 20, 2006 with RBC's "Motion Record" to dismiss Mr. Marazita's arbitration.

For all of these reasons, I find that Mr. Marazita had proper, if not abundant, notice of the hearing to dismiss his arbitration. Mr. Marazita did not appear for this hearing. Accordingly, pursuant to section 7 of the *Statutory Powers Procedure Act*, as articulated in the Notice of Hearing, I proceeded to dispose of the case in Mr. Marazita's absence.

The purpose of this hearing was to determine whether Mr. Marazita's arbitration should be dismissed. The fact that an applicant does not appear at a scheduled hearing does not mean that an arbitrator can dismiss the arbitration solely on the applicant's failure to attend the hearing. While I have authority pursuant to section 7 of the *SPPA* to proceed with the hearing, the burden of proof rests with RBC to show on a balance of probabilities that Mr. Marazita's claim should be dismissed.

For the following reasons I find that RBC has fulfilled its burden.

RBC presented an affidavit by Mauro D'Agostino, a lawyer at the law firm Samis & Company, with supporting documentation, to show that since the application for arbitration was filed, there has been a complete failure on the part of Mr. Marazita to fulfill any of his obligations in support of his claim. These failed obligations include:

- not responding to relevant production requests;
- not communicating or providing any instructions to his counsel on how to proceed in his arbitration claim; and
- not attending at the pre-hearing.

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<sup>2</sup> It should be noted that the notice to proceed with a hearing in the case of non attendance is based on section 7 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. 22 ("SPPA"). Section 7 gives an arbitrator the jurisdiction to dispense with a hearing in the absence of a party who was properly notified of the hearing.

Section 7 provides:

Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, **the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.** [emphasis added]

In addition, RBC submits that Mr. Marazita has been provided with ample opportunity to advise either the Commission or RBC's counsel of his intention to proceed with his arbitration, but has failed to do so. RBC further submits that despite clear notice of the October 31, 2006 hearing to dismiss his arbitration, including being personally served on October 20, 2006 with RBC's Motion Record, Mr. Marazita did not appear for the hearing. Accordingly, RBC submits that the appropriate inference for Mr. Marazita's total lack of participation in the arbitration process is that his application for arbitration is frivolous and vexatious.

## **FINDINGS**

I find that Mr. Marazita had clear notice from Arbitrator Renahan's letter of August 28, 2006 and the Notice of Hearing of the same date that the dismissal of his application for arbitration was being considered on October 31, 2006. I find that when he was personally served with RBC's Motion Record on October 20, 2006, he had more than adequate notice of the application for dismissal. I find that despite ample notice of the hearing to dismiss his arbitration Mr. Marazita chose not to appear. I agree with RBC's submissions that Mr. Marazita's application for arbitration is frivolous and vexatious. I find that Mr. Marazita completely failed in his obligations to support his arbitration claim. Accordingly, I find that Mr. Marazita's application for arbitration is dismissed on the basis of it being frivolous and vexatious.

## **EXPENSES:**

If needed, RBC may make submissions on the issue of expenses in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

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Joyce Miller  
Arbitrator

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November 15, 2006  
Date



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BETWEEN:

**GIANFRANCO MARAZITA**

Applicant

and

**RBC GENERAL 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. Mr. Marazita arbitration is dismissed.
2. If needed, RBC may make submissions on the issue of expenses in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

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Joyce Miller  
Arbitrator

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November 15, 2006  
Date