**Financial Services Commission of Ontario**

**Commission des services financiers de l'Ontario**

Ontario

**Neutral Citation: 2012 ONFSCDRS 106**

**FSCO A11-001854**



**BETWEEN:**

**GINA PALOZZI**

**Applicant**

**and**

**ECONOMICAL MUTUAL INSURANCE COMPANY**

**Insurer**

# PRE-HEARING DECISION

**Before:** Fred Sampliner

**Heard:** Written submissions

**Appearances:** Alexander Voudouris for Ms. Palozzi
Ryan Kirshenblatt for Economical Mutual Insurance Company

**Issues:**

The Applicant, Gina Palozzi, was injured in a motor vehicle accident on September 27, 2009, and a pre-hearing conference respecting her claims for statutory accident benefits from Economical Mutual Insurance Company ("Economical") under the *Schedule*[1] came before me at a March 13, 2012 arbitration pre-hearing at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. Economical Mutual Insurance Company ("Economical") refused Ms. Palozzi's request for production of six categories of documents. I asked the parties to make written submissions and set the hearing dates for her statutory accident benefits claims against Economical for March 19 to 21, 2013.

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

The question is:

1. Is Ms. Palozzi entitled to an order that Economical produce the re-insurer's adjusting file, its communications with re-insurer(s), minutes of committee discussions, supervisors' or managers' notes, adjusters' performance data/reviews, and the file(s) of the broker(s) who set up the medical examination(s)?

The result is:

1. Ms. Palozzi is not entitled to an order for her requested productions.

## My reasons are as follows:

The overall distinction between the arbitration process and the court system is that the former is intended to be more expedient and efficient, and its disclosure process more restricted in scope than the court system.[2] Delegate Blackman highlights the distinction in his recent *Rakosi* decision, rejecting the a "semblance of relevance" test applies in the arbitration context to determine whether a production request is reasonable.[3] The distilled logic of the decision balances the proportional[4] relevance of the information to the disputed issues, along with the burden/expense, timing and sensitivity/intrusiveness of an individual's privacy concerns.[5] These are the criteria to evaluate whether Ms. Palozzi has established a reasonable basis for my issuing an order on the six items.[6]

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[2]Rule 1.1 of the *Dispute Resolution Practice Code*, *Practice Note 4*

[3]*Rakosi and State Farm Mutual Insurance Company* (FSCO P11-00027, May 11, 2012) Appeal

[4]*Access To Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HSMO, 1995)

[5]*Allstate Insurance Company of Canada and Al-Obaidi* (FSCO P99-00009, May 2, 1999), Appeal

[6]See *Rakosi* supra

My view is consistent with Delegate Blackman that adjudicators must seek to reduce the enormous avalanche of productions that serves as a major contributor to the cost of the arbitration system. Failing that, we will encourage criticism, the public's disillusion with legal systems in general, and eventually bury ourselves in the paper process. I encourage counsel to limit their production requests and submit joint document briefs for hearings as a matter of course.

Pre-hearing conferences generally focus on the applicant's health/functional information and financial data because these areas are directly relevant to most categories of statutory accident benefits.[7] Document requests concerning claims adjustment, while peripheral to the main entitlement issues, go to whether an insurer has unreasonably withheld or denied claims in order to determine if an insured is entitled to a special award under section 282(10) of the *Insurance Act*.

While Ms. Palozzi's request for the re-insurer's records falls within the claims adjusting process, she does not claim a special award. Her Application for Arbitration lacks any mention of a special award. She has not alleged any facts to indicate Economical unreasonably withheld or denied her claims at any stage of this proceeding, and her submissions in support of her six production requests does not set out a claim or factual basis for a special award.

I therefore make the reasonable inference that Ms. Palozzi is inquiring into her Insurer's file adjustment process. Here Economical concedes it will provide Ms. Palozzi with those records to the date of her Application for Mediation in order for her to review the claims process, but not her requested re-insurance records.

First, it is necessary to understand the nature of re-insurance. By definition, it is the acceptance of all or a part of an insurer's risk by a second insurer, usually involving the transfer of larger

[7]Practice Note 4

individual risks or groups of smaller ones.[8] The consequence of bulk risk transfer reduces the likelihood that a re-insurer would be directly involved in adjusting comparatively small individual claims such as Ms. Palozzi's. In my view of the arbitration system's more limited discovery process and efficiency goal, re-insurer records are generally irrelevant to the issues without information of involvement in the adjustment process.

Here, there is no information that Economical transferred adjustment of Ms. Palozzi's claim to any third party or that a re-insurer was involved in the handling of her accident benefits. However, Ms. Palozzi will have an opportunity to determine if a third party was involved in the adjusting process once she obtains Economical's records, but it is premature and unsupported now. Based on the nature of re-insurance, the lack of any information that a re-insurer was directly involved in the adjustment of her benefits and the fact Ms. Palozzi does not claim a special award, I find that her request is not reasonable.

Ms. Palozzi contends that, on their face, Economical's notes of its committee meetings, the adjuster's performance reviews and the supervisor's files are relevant. She cites no case law or facts to support her request.

An adjuster's general performance data clearly does not relate to the adjustment of a claim. Management's files and committee meeting records likewise do not appear to deal with the adjustment process, and Ms. Palozzi poses no facts to support her requests. Without any basis in law or fact, I reject Ms. Palozzi's argument and find that her requests for these items are not reasonable.

Ms. Palozzi argues that the file of Economical's medical broker who arranged insurer examinations is relevant because she maintains all brokers routinely edit health examination reports. There is not a scintilla of evidence to suggest anyone edited the reports of Economical's examiners, and I do not accept her allegation is common knowledge.

[8] *Black's Law Dictionary* (8th Ed. 2004) p. 1312

The broker's information also appears to duplicate records Ms. Palozzi either already has or will directly receive from the examiners. Normally, parties obtain the examiner's underlying notes, test results, communications and reports, from which they can determine the value of their opinions. These original records would similarly reveal editing. Duplication of original records from alternate sources, such as brokers, is contrary to the efficiency goal of the arbitration process and not reasonable.

## EXPENSES:

The expense issue is deferred.

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|---|---|
| | July 9, 2012 |
| Fred Sampliner<br>Arbitrator | Date |

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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. Ms. Palozzi's requests for Economical's re-insurer adjusting file, communications with re-insurer(s), minutes of committee discussions, supervisors' or managers' notes, adjusters' performance data/reviews, the file(s) of the broker(s) who set up the medical examination(s) are dismissed.

Fred Sampliner
Arbitrator

July 9, 2012
Date