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Neutral Citation: 2007 ONFSCDRS 114

FSCO A05-001972

BETWEEN:

**PIRATHEEP PONNAMPALAM**

Applicant

and

**RBC GENERAL INSURANCE COMPANY**

Insurer

**DECISION ON A MOTION FOR LEAVE TO AMEND A RESPONSE TO  
AN APPLICATION FOR ARBITRATION**

**Before:** Susan Sapin

**Heard:** By telephone conference call on June 5, 2007.  
Written material filed by June 5, 2007.

**Appearances:** Steven Sieger for Mr. Ponnampalam  
Neil Colville-Reeves for RBC General Insurance Company

**Issues:**

The Applicant, Piratheep Ponnampalam, was injured in a motor vehicle accident on April 16, 2003. He applied for and received statutory accident benefits from RBC

General Insurance Company ("RBC"), payable under the *Schedule*.<sup>1</sup> RBC terminated weekly income replacement benefits on August 24, 2003. The parties were unable to resolve their disputes through mediation, and Mr. Ponnampalam applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The arbitration hearing scheduled to begin Monday, May 28, 2007 was rescheduled to Tuesday, July 10, 2007 and then again adjourned on consent to Monday, October 29, 2007.

In April 2007, RBC advised Mr. Ponnampalam that it wished to amend its Response by Insurer to an Application for Arbitration to include additional issues in the arbitration proceeding. Mr. Ponnampalam did not agree and RBC brought this motion requesting the following relief:

1. Leave to amend the Insurer's Response to include the following issues to be arbitrated:
  - a) whether Mr. Ponnampalam was involved in the accident of April 16, 2003;
  - b) whether Mr. Ponnampalam is required to repay all amounts paid to him to date by RBC under sections 47 and 48 of the *Schedule*;
  - c) what is the quantum of IRBs?

**Result:**

1. RBC may amend its Insurer's Response to include the above issues, as per its Amended Schedule A attached to this decision.

**Cases cited:**

*Thambimuthu and ING Insurance Company of Canada* (FSCO A04-000300, September 30, 2004)

*Carby and Co-operators General Insurance Company* (OIC A-950220, January 12, 1996)

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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.

*Graham and State Farm Mutual Automobile Insurance Company* (FSCO A04-002268, July 26, 2005)

### **EVIDENCE, SUBMISSIONS AND ANALYSIS:**

This motion came about after RBC was provided, for the first time, with unsolicited witness statements in late March 2007 suggesting that Mr. Ponnampalam had not been involved in the motor vehicle accident of April 16, 2003, as he claimed. The statements are from the driver and passengers of the other car that was involved in the accident. The statements are dated December 19, 2006.

On April 11, 2007, about six weeks before the hearing then scheduled to begin May 28, 2007, Mr. Colville-Reeves advised Mr. Sieger that RBC would be advancing the defence that the Applicant had not been involved in the accident, and on April 27<sup>th</sup>, 30 days before the hearing, advised him that RBC would call the witnesses. Mr. Colville-Reeves forwarded an amended Response to Mr. Sieger on May 9<sup>th</sup>, which included the above defence, a claim for repayment under sections 47 and 48 of the *Schedule* of all benefits paid, and an offset for all post-accident income earned. In its Response, the Insurer also disputed the IRB quantum of \$400 per week.

Mr. Sieger objected to RBC's motion on the grounds that it would be unfair to his client for me to allow RBC to change its defence to the arbitration at this late date, and that RBC's request does not meet the criteria set out in the jurisprudence to justify the addition of these new issues to the arbitration at this time.

The governing principles regarding late amendments to an arbitration proceeding are set out in the cases listed above. Briefly, subject to the overriding requirement for a full and fair hearing, an insurer may be permitted to add issues at any time prior to the hearing, provided they have been mediated. However, whether a proposed amendment will be permitted depends on the weighing of such matters as prejudice that cannot be compensated for by costs or an adjournment; delay occasioned by the amendment; laches (delay in pursuing the amendment); the nature of the amendment; and merit, i.e. whether there is any likelihood of the party proposing it succeeding on the issue, to

guard against the potential for using an amendment as a tactic to harass or delay.<sup>2</sup> Given the mandate of arbitration to be quick, cost-effective and (relatively) informal, amendments that would unnecessarily complicate or delay the arbitration process should be considered carefully.<sup>3</sup> Finally, a request to amend a Response on the eve of an arbitration proceeding requires a compelling reason.

Mr. Sieger relied particularly on the decision of Arbitrator Wilson in *Thambimuthu* and submitted on behalf of Mr. Ponnampalam that none of these criteria have been met in this case. Specifically, on the question of whether his client was in the accident at all, he submitted that there is no evidence to support an allegation that his client was not in the vehicle at the time of the accident and that RBC had ample opportunity to investigate this; that Mr. Ponnampalam is severely prejudiced as he himself, as well as the witnesses, are or will be out of the country for a period of time and so there is insufficient opportunity to interview them in advance of the hearing; that there is no opportunity at this late date to canvass for independent witnesses, and that Mr. Ponnampalam will be exposed to the very serious consequence, and hardship, of a potential repayment of the approximately \$20,000 in benefits he received.

Mr. Sieger further submitted that a mere allegation of wilful misrepresentation on the part of Mr. Ponnampalam at this late date is not enough, and should be supported by real and cogent evidence. Furthermore, the mere existence of witness statements is not a sufficient basis upon which I should allow an amendment, and the statements should have been put before me in order for me to determine their merit.

Mr. Colville-Reeves could have put the witness statements before me, or Mr. Sieger could have required him to; neither chose to, no doubt for tactical reasons that seemed sensible at the time. It does not matter in any event as the absence of the statements does not affect my decision that the amendment should be allowed.

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<sup>2</sup> As per Arbitrator Wilson in *Thambimuthu*, citing also *Kennedy and Traders General Insurance Company* (FSCO A02-001715, February 3, 2004).

<sup>3</sup> *Graham*, p.6

There surely can be no doubt that the question of whether Mr. Ponnampalam was involved in the accident at all, and whether he misrepresented that fact to his insurance company, goes to the heart of his entitlement to benefits. RBC's position, that insurers must, and do, take their insureds at their word from the outset of a claim unless there is any evidence to the contrary, or "the whole system would break down," is a full answer to Mr. Ponnampalam's suggestion that RBC should have investigated sooner if they had any doubt that he was involved in the accident in the first place. I accept that the "doubt," in the form of the witness statements, does not appear to have surfaced until December 2006, over three and a half years after the accident, and I find that they were brought to the Applicant's attention in a timely manner.

I agree with Mr. Colville-Reeves, that the question of misrepresentation in this case is much simpler than in *Thambimuthu*<sup>4</sup> either Mr. Ponnampalam was in the accident, or he was not; if he was not, there is no basis for entitlement. The "success," or outcome, will turn on credibility. An arbitrator will either believe Mr. Ponnampalam and sister, who was driving the car, or the driver and occupants of the other car. The witness statements are what they are; I do not require the statements themselves in order to make the determination that if they were to be believed, the Insurer's case would succeed.

However, should it turn out that the witness statements on their face prove to be no more than a mere suggestion that Mr. Ponnampalam was not in the car and RBC is not successful before an arbitrator, it can expect that there will be cost consequences.

With respect to prejudice, as in "damage or detriment to one's legal rights or claims,"<sup>5</sup> if an arbitrator were to find that Mr. Ponnampalam had obtained benefits to which he knew he was not entitled, there cannot, by definition, be any prejudice to him in the legal sense.

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<sup>4</sup> In that case, Arbitrator Wilson rejected the insurer's request to add the issue of a wilful misrepresentation that had induced the company to enter into a contract of insurance it would not otherwise have, on the basis that insufficient particulars had been put before him to satisfy him that "the elements pleaded, if believed, could constitute material misrepresentation." p. 6

<sup>5</sup> *Black's Law Dictionary*, Eighth Edition

As to delay, the parties have already agreed to adjourn the arbitration hearing to October 29, 2007, which should provide ample opportunity for both parties to prepare.

Regarding the remaining issues, the claim for repayment of benefits has been mediated and as it flows naturally and consequentially from the issue of initial entitlement, there is no compelling reason RBC's response should not be amended to include it and, consequently, its reliance on section 48 of the *Schedule*.

RBC's claim for an offset and reliance on section 47 should also be included for the same reasons.

Finally, with regard to quantum of benefit, I note that RBC specifically reserved its right to dispute the \$400 weekly IRB amount if it received information contrary to the OCF 2s already received; on that basis and on condition that particulars were provided to the Applicant 30 days prior to the hearing scheduled to begin Monday, May 28, 2007, as set out in the pre-hearing letter dated September 5, 2006, RBC may amend its Response.

**EXPENSES:**

As the parties did not address the issue of expenses they are deferred to the hearing arbitrator.

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Susan Sapin  
Arbitrator

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June 8, 2007  
Date



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**PIRATHEEP PONNAMPALAM**

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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. RBC may amend its Response by Insurer to an Application for Arbitration Form E as per its Amended Schedule A attached.

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Susan Sapin  
Arbitrator

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June 8, 2007  
Date