



Neutral Citation: 2013 ONFSCDRS 93

FSCO A11-002192

BETWEEN:

TROY BRUNELLE

Applicant

and

JEVCO INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Alan Mervin

Heard: May 27, 2013, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Jwan Desai for Mr. Brunelle
Ryan Kirshenblatt for Jevco Insurance Company

Issues:

The Applicant, Troy Brunelle, was injured in a motor vehicle accident on September 18, 2008. He applied for and received statutory accident benefits from Jevco Insurance Company (“Jevco”), payable under the *Schedule*.¹ Jevco terminated weekly income replacement benefits. The parties were unable to resolve their disputes through mediation, and Mr. Brunelle applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The hearing in this matter began on May 27, 2013. At the start of the hearing, Jevco brought a motion to introduce new evidence it had unexpectedly just received.

The documents in dispute which constitute the new evidence consist of the following:

1. A statement of claim in a family law action commenced by Mr. Brunelle in family court. According to this statement of claim, allegedly prepared by Mr. Brunelle's family law counsel, Mr. Brunelle claims he did construction work on a residence owned by his ex-spouse.
2. A list of improvements to the residence allegedly prepared by Mr. Brunelle. The improvements to the property were allegedly performed by Mr. Brunelle; and
3. Photographs purporting to be of Mr. Brunelle in various situations in and around the residence.

Jevco served these documents on Mr. Brunelle just prior to the start of the arbitration hearing, after receiving them unexpectedly from Mr. Brunelle's sister, outside the 30-day time period required for service of documents specified in Rule 39.1 of the *Dispute Resolution Practice Code* (the "Code").

Mr. Brunelle objected to the admission of the new evidence, and, in the event that it should be found to be admissible, requested an adjournment of the arbitration hearing.

The issues in this motion therefore are:

1. Should the documents be admitted as evidence in the arbitration hearing?
2. If the documents are found to be admissible, is Mr. Brunelle entitled to an adjournment of the arbitration hearing?

Result:

1. The new evidence submitted by Jevco is admissible in the arbitration hearing.
2. The arbitration hearing is adjourned to April 14, 2014.

EVIDENCE AND ANALYSIS:

Mr. Kirby submitted that he received the new evidence from Mr. Brunelle's sister on Thursday, May 23, 2013, unsolicited, and unexpectedly, without any prior notice of its existence to him or to Jevco. After examining the evidence, he served it on Mr. Brunelle's counsel on Friday, May 24, 2013.

Mr. Brunelle's counsel confirmed that they received a copy of this evidence on Friday, May 24, 2013.

There is no dispute that the new evidence was not served in compliance with Rule 39.1 of the *Code*, which states that, "Subject to **Rule 39.2**, all documents, reports (including expert's reports) and assessments to be introduced at a hearing by either party must be served on the other party at least 30 days before the first day of the hearing."

Rule 39.2 of the *Code* allows for an exception. It states that evidence that was not served on the opposing party within the time requirements set out in Rule 39.1 may be admitted where extraordinary circumstances exist.

Mr. Brunelle objected to the admission of the evidence, but ultimately agreed, after submissions from the parties, that I examine the materials before determining their admissibility. I reviewed the documents before admitting them and marked them as Exhibit 1 to the motion.

Jevco further submits that there should be no surprise to Mr. Brunelle with respect to the existence of the documents or the photographs because they were prepared by Mr. Brunelle or

his solicitor in the family law proceeding, and the photographs were taken with Mr. Brunelle's knowledge. Although Mr. Kirby conceded that their disclosure to Mr. Kirby and Jevco might well have been a surprise to Mr. Brunelle's current counsel, Mr. Brunelle knew of their existence.

The Documents

Jevco submits that the documents are extremely relevant and crucial to its defence because they coincide with the period of time during which Mr. Brunelle has claimed a disability, go to the heart of the issues in dispute in this arbitration, and are more probative than prejudicial.

Jevco submitted that the circumstances in which they received the documents and in which they were subsequently served on Mr. Brunelle, constituted extraordinary circumstances as contemplated by the *Code*, and therefore ought to be admissible under the exception provided in Rule 39.2. Jevco had no prior notice of this evidence before receiving it on May 23, 2013 from Mr. Brunelle's sister, and, after Mr. Kirby had an opportunity to examine it the next day, served it without delay on Mr. Brunelle.

I find the circumstances of the receipt of the new evidence to be extraordinary within the meaning of Rule 39.2.

I accept Jevco's submission that they had no warning that the documents were in existence until they were delivered by a family member on May 23, 2013, and served May 24, 2013, the Friday afternoon, before the start of the arbitration.

I find that Jevco served the documents on Mr. Brunelle at the earliest opportunity and without delay.

I further find that the documents are relevant to the matters in dispute as they go directly to the issue of Mr. Brunelle's disability, and find that the documents are of more probative value than prejudicial.

The Adjournment

Mr. Brunelle then requested that the hearing be adjourned, in order to provide Mr. Brunelle an opportunity to examine and prepare a response to the documents. Jevco did not object. I granted the adjournment request, and the hearing was adjourned to August 14, 2014.

Alan Mervin
Arbitrator

July 19, 2013

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. The new evidence tendered by Jevco at the commencement of the arbitration hearing is admissible at this hearing.
2. The Arbitration hearing is adjourned to April 14, 2014.

Alan Mervin
Arbitrator

July 19, 2013

Date