Neutral Citation: 2004 ONFSCDRS 158

FSCO A04-000305, A04-000027 and A04-000014

FINANCIAL SERVICES COMMISSION OF ONTARIO

BETWEEN:

MS. ZIBA MIRI-LASHKAJANI,
MR. SAEED BARADAR-GOHARI, and
MS. AFSANEH AMIN-AKBARI

Applicants

and

RBC GENERAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY MATTER

Before: John Wilson

Heard: May 21, 2004, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Jeffrey D. Gray for Ms. Miri-Lashkajani

Neil Colville-Reeves for RBC General Insurance Company

Issues:

The Applicants, Ms. Miri-Lashkajani, Mr. Saeed Baradar-Gohari and Ms. Afsaneh Amin-Akbari, claimed to have been injured in a motor vehicle accident on July 1, 2003. They applied for statutory accident benefits from RBC General Insurance Company ("RBC"), payable under the *Schedule.*[1] The parties were unable to resolve their disputes through

[1] The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996,* Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

mediation, and Ms. Miri-Lashkajani applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act,* R.S.O. 1990, c.I.8, as amended. Ms. Miri-Lashkajani's application and Mr. Baradar-Gohari and Ms. Amin-Akbari's subsequent applications for arbitration indicated that Manoucher Baradaran, a non-lawyer, was to be their representative.

Following a second pre-hearing, I ordered that the following issues be decided, on notice to the parties:

1. Should Mr. Baradaran be barred, pursuant to section 23(3) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, from appearing as agent or adviser in these matters?
2. Should an order be made pursuant to section 282(11.2) of the *Insurance Act* requiring that Mr. Baradaran personally pay all or part of any expense award that may issue against the Insureds in this matter, relating to his period of representation as agent?

Result:

1. Mr. Baradaran shall be barred, pursuant to section 23(3) of the *Statutory Powers Procedure Act,* from appearing as agent or adviser in these matters.
2. Mr. Baradaran shall personally pay to the Insurer, its expenses thrown away at the two incomplete pre-hearings held before me on April 20 and May 14, 2004, which I fix at $400, payable forthwith, and in any event of the cause.

EVIDENCE AND ANALYSIS:

I held the first pre-hearing in this matter on April 20, 2004.[2] At that time, Mr. Baradaran indicated that, although he was on the record as representative, he would not be the representative taking this matter to hearing. He was also unable to supply either the name of the solicitor, or the dates when this matter could be heard.

He also indicated that there were two other claimants, all represented by him, whose pre-hearings were scheduled in the near future.

[2] This pre-hearing dealt only with Ms. Lashkajani's claim. The other Applicants had their first pre-hearing before Arbitrator Alves. At the subsequent pre-hearing on May 14, 2004, I ordered that all three claims be heard together.

Consequently, I directed that the pre-hearing be resumed, with the assistance of an interpreter, to deal with the scheduling and form of the arbitration hearing, and the question of whether the hearings for all three parties who were travelling in the same vehicle should be combined.

Prior to the resumption of the pre-hearing, Arbitrator Alves held a pre-hearing in the other two related matters. This took place on May 10, 2004. At this pre-hearing, Mr. Baradaran did not request a translator for his clients, and so none was supplied by the Commission. Instead, he attempted to speak for his clients.

In her May 19, 2004 pre-hearing letter, Arbitrator Alves wrote that:

> During the pre-hearing on May 10, 2004, Mr. Baradaran's conduct caused me to question his competence and his ability to act as an advocate on behalf of the Applicants. He did not appear to understand the issues or his obligations as an advocate to represent his clients' interests and to act with courtesy. Mr. Baradaran appeared to have difficulty with evidentiary issues, in particular relevance, materiality and the onus of proof.

Arbitrator Alves continued:

> The Insurer's allegations are extremely serious. An unfavourable outcome for the Applicants will have serious consequences. Mr. Baradaran does not appear to intend to arrange for counsel to represent the Applicants in these proceedings.

The Commission provided a Farsi interpreter for the resumption.

At the resumption of the pre-hearings, Mr. Baradaran still could not confirm the name of the legal representative who would have carriage of these matters.

He later identified Mr. Jeffrey D. Gray of the Jeffrey D. Gray Law Office[3] as the solicitor who would take this matter to arbitration, and stated that he would be available for a hearing in March of 2005.

[3] Mr. Gray wrote on August 25, 2004 to confirm that he had been retained by the above parties.

This caused some consternation among all three clients, who appeared not to have been informed either of Mr. Gray's participation, or of the potential delay in hearing their claim. They requested a brief recess to discuss this matter themselves, which I granted. Through an interpreter they then indicated that they wished a further two weeks to explore retaining alternative counsel. They also stated that they wished this matter to be heard promptly, not in March of 2005. The Applicants appeared to be angry and concerned about this turn of events. They were also eager to have a chance to clear their names, in the face of the Insurer's allegations of fraud.

Although Mr. Baradaran still attempted to deal with outstanding production matters in these files, it was clear that he was completely out of his depth, and totally unable to understand what is involved in documentary discovery. Consequently, I ordered that any production matters be put over until a point at least two weeks hence to allow the Applicants to make a decision about representation.

Arbitrator Alves identified over eighteen concerns about Mr. Baradaran's conduct in this and other matters. In the two pre-hearings before me, I noted that he unnecessarily delayed matters through his failure to obtain the name and the available dates of the proposed lawyer, as directed. He also has necessitated yet another pre-hearing to deal with outstanding production issues, due to a fundamental inability to deal with such matters.

As Arbitrator Alves had noted, the Insurer's defence raised serious issues for the Applicants, since what is alleged is a criminal conspiracy to stage an accident and defraud the Insurer.

At the pre-hearings, Mr. Baradaran seemed unable to appreciate either the seriousness of the matter, or the issues involved. His continued involvement in this matter raised questions under section 23 of the *Statutory Powers Procedure Act* which states:

> **23.** (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

While it is not common for an adjudicator to take action under section 23, an arbitration under the *Insurance Act* forms part of a process that has as one of its objectives, consumer protection.[4] Under the circumstances, to allow Mr. Baradaran to proceed to represent parties, in the face of evidence of misconduct and incompetence, would be to countenance an abuse of the process of this tribunal. It could also have serious consequences for the parties he purported to represent.

Consequently, following Arbitrator Alves' comments in her pre-hearing letter of May 19, 2004,[5] and my own experience in these two pre-hearings, I formally put the parties and Mr. Baradaran on notice that I intended to proceed to have him excluded from these proceedings pursuant to section 23(3) of the *Statutory Powers Procedure Act.* This provision permits a tribunal to exclude an agent or an adviser who is "not competent properly to represent or to advise... or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser."

My pre-hearing letter of May 25, 2004 put Mr. Baradaran on notice concerning the issue of exclusion and a possible order of expenses against him personally pursuant to section 282(11.2) of the *Insurance Act.* He was also given time to make submissions and tender evidence on these issues, should he so wish.

The Commission has now set minimum standards for the conduct of representatives during the arbitration process. *The Code of Conduct for Statutory Accident Benefit Representatives* issued by the Superintendent of Financial Services (November 1, 2003) sets out obligations of honesty, competency, and courtesy, among others. Rule 2.3 recognizes that a representative must have a "reasonable understanding" of the law and procedural requirements involved in a claim. It goes without saying that an understanding of the production process and questions of privilege would be encompassed by this requirement.

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[4] See the comments of Gonthier J. in *Smith v. Co-operators* (2002 S.C.C. 30) "There is no dispute that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance."

[5] Arbitrator Alves stated: "In my view, based on the above, a hearing to determine whether Mr. Baradaran should be excluded from further steps in this proceeding under subsection 23(3) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S-22 as amended is warranted."

Likewise, Rule 2.4 sets out a requirement for "adequate skills, attributes and abilities appropriate to each matter." This rule speaks for itself.

In light of Mr. Baradaran's inability to effectively put forward his clients' interest and his conduct at the pre-hearings in question, and at those presided over by Arbitrator Alves, I find that he fell beneath the minimal performance standards set by the Commission.

The revised section 282(11.2) of the *Insurance Act,* which now specifically gives an arbitrator the right to hold a representative liable for costs, reads as follows:

> An arbitrator may make an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that;
>
> (a) in respect of a representative of an insured person, the representative commenced or conducted the proceeding without authority from the insured person or did not advise the insured person that he or she could be liable to pay all or part of the expenses of the proceeding;
>
> (b) in respect of a representative of an insured person, the representative caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person; or
>
> (c) the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default.

Although the new provisions do not specify the type of conduct that constitutes "reasonable cause", the courts have long considered the issues raised by cost orders against representatives, especially lawyers.

McLachlin J. stated in *Young v. Young* [1993] 4 S.C.R. 3 (S.C.C.):

> The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make

> such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

Returning to section 282(11.2) of the *Insurance Act,* it is apparent that the application of this provision is contingent upon some serious default by the representative of an insurer or an insured. It is not meant to be a routine sanction for counsel or representatives whose practices offend an adjudicator. It is meant to apply to egregious cases where the conduct of a representative, if unchecked, would tend to bring the arbitration system and the administration of justice into disrepute, as enunciated in *Young* and *Marchand*[6] cases.

The more recent decision of Pockele J. in *Children's Aid Society of Huron County v. T.V.*[7] makes it clear that lengthy and ill prepared argument, prolixity, the lack of serious preparation, and a lack of acquaintance with the applicable law can, together, form the pre-condition for an order of costs against a lawyer.

In Mr. Baradaran's case, I find that his failure to disclose the name of the person to have carriage of the matter, his failure to obtain instructions concerning representation from his clients, and his inability to deal with routine hearing matters at the May 14 pre-hearing, have seriously delayed the progress of this arbitration.

I also have concerns about the failure to notify the Commission of the need for an interpreter at the pre-hearings, in light of the very different responses made by his

[6] *Marchand [litigation guardian of] v. Public General Hospital of Chatham* [1999] O.J. No. 670
[7] [2002] O.J. No. 3297

clients concerning his retainer and the proposed retainer of Mr. Gray at the pre-hearing of May 14, once an interpreter was available.[8]

Given the limited fluency in English of the Applicants, an inference could be drawn that Mr. Baradaran preferred to act as the sole filter of information being exchanged at the pre-hearing stage, and to some degree keep his own clients in the dark. Such a suspicion is given some credence by his own clients' reaction at the May 14 pre-hearing, as well as the absence of interpretation at the pre-hearing on May 10 before Arbitrator Alves. This pattern of conduct, if intentional, could bring the arbitration process into disrepute.

Rule 2.13 of the *Code of Conduct* provides that a representative must comply with "any orders or directions given by a mediator or adjudicator." Mr. Baradaran's failure to obtain the name of the counsel for the hearing prior to the resumption on May 14, reflects a failure to follow such an order or direction.

Both section 282(11.2) of the *Insurance Act* and the expense regulation impose sanctions for conduct which "caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default."

In this matter, two pre-hearings were substantially wasted because Mr. Baradaran did not see fit to find out who was to represent the Applicants in this matter, nor, it seems, to explain his choice to the Applicants before the resumption of the pre-hearing date. I find, as well, that Mr. Baradaran's patent inability to understand the process of production, or to speak to issues arising at the pre-hearing, contributed to the need for a further resumption, now scheduled for November 2004.

As noted earlier, McLachlin J. in *Young v. Young* (supra) supported cost awards against counsel where "repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay."

[8] The availability of an interpreter has been brought to Mr. Baradaran's attention at other pre-hearings. Interpreters are provided for and paid for by the Commission at all stages in an arbitration proceeding, where requested.

I note that Mr. Baradaran's handling of cases at the Commission has been the subject of concern in other arbitration decisions.[9] It is reasonable to assume that neither the conduct nor the level of appreciation of the process displayed in this arbitration is an isolated matter. Rather, they are consistent with Mr. Baradaran's performance in arbitrations in general.

Given Mr. Baradaran's repeated conduct, as outlined in Arbitrator Alves' findings excerpted earlier, and my observations at the pre-hearings where I presided, I find that Mr. Baradaran not only "caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default," as provided for in section 282(11.2) of the *Insurance Act,* but also, in the words of McLachlin J., "acted in bad faith in encouraging this abuse and delay." I need not add that any bad faith was compounded by Mr. Baradaran's patent ignorance of the law and the legal system in place in Ontario.

The above-mentioned conduct would be sufficient to attract an order of expenses against the Applicants in this matter. I find, however, that such delay and default, although nominally the responsibility of an applicant, directly lies at the feet of Mr. Baradaran.

I therefore order that Mr. Baradaran personally pay to the Insurer its expenses thrown away at the two incomplete pre-hearings held before me on April 20 and May 14, 2004. I fix these at $400, payable forthwith, and in any event of the cause. Since the actions complained of occurred when Mr. Baradaran was counsel of record, I accept that he is properly the subject of an award pursuant to section 282(11.2) of the *Insurance Act.*

Although the matter is now moot, different counsel having been retained, I find that Mr. Baradaran's conduct in this matter would have been sufficient to bar him, pursuant to section 23(3) of the *Statutory Powers Procedure Act* from appearing as agent or adviser in these matters.

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[9] See *Shirzad, Shirzad, Akbari, Akbari and RBC Insurance Company* (FSCO A01-000514, May 22, 2002), and *Hezavian and Jahangirvand and Allstate Insurance Company of Canada* (FSCO A01-000164, February 28, 2002)

I find that Mr. Baradaran clearly does not understand and has not complied with the duties and responsibilities of an advocate, adviser or agent, and that he is not competent to represent the Applicants in this arbitration. Consequently, he is henceforth barred from appearing in the capacity of agent, advocate or representative in any further stage of this proceeding.

October 27, 2004

John Wilson
Arbitrator

Date

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MR. SAEED BARADAR-GOHARI, and
MS. AFSANEH AMIN-AKBARI

Applicants

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. Baradaran shall be barred, pursuant to section 23(3) of the *Statutory Powers Procedure Act,* from appearing as agent or adviser in these proceedings.
2. Mr. Baradaran shall personally pay to the Insurer, its expenses thrown away at the two incomplete pre-hearings held before me on April 20 and May 14, 2004, which I fix at $400, payable forthwith, and in any event of the cause

October 27, 2004
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Arbitrator