CITATION: Aviva Canada Inc. v. Comegna, 2019 ONSC 4435
DIVISIONAL COURT FILE NO.: 558/17
DATE: 20190723

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

SWINTON, BACKHOUSE, and WILTON-SIEGEL JJ.

BETWEEN:	
AVIVA CANADA INC.	*Derek Greenside*, for the Applicant
Applicant	
– and –	
COLLEEN COMEGNA and the FINANCIAL SERVICES COMMISSION OF ONTARIO	*Andrew Franzke*, for the Respondent Colleen Comegna *Kari Chan* and *Sona Dhawan*, for the Respondent Financial Services Commission of Ontario
Respondents	
	HEARD at Toronto: July 23, 2019

WILTON-SIEGEL J. (Orally)

[1] The applicant, Aviva Canada Inc. (the "applicant"), seeks judicial review of the appeal order made August 24, 2017 of the Director's Delegate Jeffrey Rogers (the "Director's Delegate") of the Financial Services Commission of Ontario (the "Order"). The Order partially rescinded the arbitration award dated February 21, 2017 of Arbitrator Charles Matheson (the "Arbitrator") (the "Arbitration Award") and directed that the issues of entitlement of the respondent, Colleen

Comegna (the "Respondent"), to non-earner benefits ("NEBs") and to any special award be remitted to a *de novo* hearing before a different arbitrator.

MOTION FOR FRESH EVIDENCE

[2] As a preliminary matter, the applicant sought an order permitting the introduction of fresh evidence in the form of the facta submitted to the Arbitrator, the transcript of the arbitration hearing, and the written submissions to the Director's Delegate. The motion was dismissed earlier for the following reasons.

[3] This proceeding is not an appeal. Therefore, s. 134(4) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 does not apply.

[4] On an application for judicial review like the present one, this Court is tasked with determining the reasonableness of the administrative decision-maker's decision based on the evidence that was before the decision-maker.

[5] As set out in *Namgis First Nation v. Canada (Fisheries & Oceans)*, 2019 FCA 149, evidence that was not before the administrative decision-maker is only admissible in judicial review proceedings in exceptional circumstances – for example, to demonstrate bias or a denial of procedural fairness (at para. 10). This is because the initial decision-maker is the "merits decider", not the courts. There are no exceptional circumstances in the present case that justify the admission of this evidence.

[6] In this case, this Court is reviewing the decision of the Director's Delegate who was hearing an appeal on a question of law from a decision of an arbitrator. This Court should do so on the basis of the record before the Director's Delegate.

[7] In any event, none of the evidence that the applicant seeks to introduce will assist this Court in its judicial review function. In particular, insofar as the applicant seeks the introduction of such evidence to demonstrate that the Director's Delegate erred in proceeding on the basis that the Arbitrator failed to address certain issues, such evidence is unnecessary. The parties agree that such issues were raised in the arbitration.

[8] Accordingly, the motion to admit fresh evidence was dismissed.

THE MERITS OF THE APPLICATION

[9] The parties agree that the standard of review of the Order is reasonableness. As mentioned, the appeal before the Director's Delegate was limited to questions of law and accordingly the issue for this Court is whether the determination of the Director's Delegate on the legal issues raised before him was unreasonable.

[10] In our view, the Order was reasonable on the following grounds.

[11] The Director's Delegate made two principal determinations.

[12] First, he determined that the Arbitrator failed to address the respondent's submissions that the scheduled examination by Dr. Syed was not reasonable and necessary and that her conduct did not constitute a failure or refusal to comply with s. 44 of the *Statutory Accident Benefits Schedule*, O.Reg 34/10. Without addressing these issues, the Arbitrator held that the respondent's failure to attend the examination precluded commencement of a mediation proceeding and therefore proceeding to arbitration.

[13] Second, he determined that the Arbitrator had failed to address the respondent's claim for NEBs for the period prior to the date of the scheduled examination by Dr. Syed. The applicant concedes that the Arbitrator failed to address this issue and that the Arbitrator failed to make the necessary findings that would permit a determination to be made by the Director's Delegate or otherwise on this issue.

[14] In our view, the Director's Delegate reasonably concluded that, with respect to both issues, the Arbitrator erred in law. Indeed, the applicant conceded that the Arbitrator erred in failing to address the respondent's entitlement to NEBs prior to the scheduled examination.

[15] With respect to the first issue, the applicant submits that the Arbitrator did address these issues even if not explicitly. It suggests that the evidence that the examination was reasonable, and that the respondent's conduct amounted to a failure or refusal to comply with s. 44, was so overwhelming that it must be inferred that the necessary findings were implicit in the Arbitrator's determination.

[16] In our view, it was reasonable to conclude that the Arbitrator's failure to address these issues on an explicit basis constituted an error of law. It is not clear from the Arbitration Award that the Arbitrator addressed these questions which are material to any determination regarding a claimant's entitlement to mediation and arbitration. In this regard, we note that in the decision of *Volpe v. Co-operators General Insurance Company*, 2017 ONSC 261, to which the Arbitrator referred in the Arbitration Award, an explicit finding was made on the reasonableness of the request for an examination.

[17] As mentioned, the Director's Delegate set aside the Arbitration Award and remitted the foregoing issues to a different arbitrator to be determined in a *de novo* hearing.

[18] The applicant argues that the Director's Delegate erred in law in so doing. It submits that the Director's Delegate should have made the necessary findings of fact relevant for a determination of the foregoing issues or alternatively remitted the determination of these issues to the Arbitrator.

[19] It is not clear that the Director's Delegate had the authority to make the necessary findings of fact to decide the foregoing issues. Even if he did however, the Director's Delegate's decision involved the exercise of a discretion. We see no error in principle in his decision, particularly in view of the number of findings required to address these issues.

[20] In fairness to all parties, it is also reasonable to have the matter reheard by a new arbitrator to avoid any appearance of pre-determination of the issues by the decision-maker. We note that in view of the need for findings of credibility it also is not reasonable to conduct a new hearing on the basis of a written record.

[21] Finally, we note that the applicant also submitted that this Court should make the necessary factual findings in order to determine these issues. In our view, in this administrative scheme, the Legislature has conferred the fact-finding role on the Arbitrator with an appeal on a question of law to the Director's Delegate. It is not this Court's role to act as a fact finder in this case.

[22] For the foregoing reasons, the application for judicial review is dismissed.

SWINTON J.

[23] I have endorsed the Motion Book as follows: "For oral reasons delivered today, the motion for fresh evidence is dismissed."

[24] I have endorsed the Application Record of the applicant as follows: "This application is dismissed for oral reasons delivered today. Costs to the respondent fixed at $7,500. FSCO does not seek costs."

J.
Wilton-Siegel J.

I agree
Swinton J.

I agree
Backhouse J.

Date of Reasons for Judgment: July 23, 2019

Date of Release:
AUG 0 6 2019

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ORAL REASONS FOR JUDGMENT

WILTON-SIEGEL J.

Date of Reasons for Judgment: July 23, 2019

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