

2009 CarswellOnt 822
Financial Services Commission of Ontario (Arbitration Decision)

Yae v. Royal & SunAlliance Insurance Co. of Canada

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**Ming Siong Yae, Applicant and Royal & Sunalliance
Insurance Company of Canada, Insurer**

E. Bayefsky Member

Heard: November 21, 2008
Judgment: February 12, 2009
Docket: FSCO A08-001051

Counsel: Mr. Yae, for himself
Nestor E. Kostyniuk, for for Royal & SunAlliance Insurance Company of Canada

Subject: Insurance

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Insurance

[XII Automobile insurance](#)

[XII.5 No-fault benefits](#)

[XII.5.i Practice and procedure on claim for benefits](#)

[XII.5.i.ix Miscellaneous](#)

Headnote

Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits

Table of Authorities

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

s. 281(1) — referred to

s. 282 — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

Generally — referred to

E. Bayefsky Member:

Issues:

1 The Applicant, Ming Siong Yae, was injured in a motor vehicle accident on July 20, 1996. He applied for and was paid statutory accident benefits from Royal & SunAlliance Insurance Company of Canada ("Royal"), payable under the *Schedule*.¹ Royal terminated weekly income replacement benefits on November 15, 1996. The parties were unable to resolve their disputes through mediation, and Mr. Yae applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

2 The issue in this motion is:

1. Is Mr. Yae precluded from proceeding to arbitration on the basis of his having already commenced a civil action against Royal in the Superior Court of Ontario?

Result:

3

1. Mr. Yae is precluded from proceeding to arbitration. The arbitration is dismissed.

Evidence and Analysis:

4 Mr. Yae applied for mediation on December 23, 2007 in respect of income replacement benefits, medical benefits and interest. Royal maintained, among other things, that, on July 29, 1997, Mr. Yae had entered into a full and final settlement of claims arising from the July 20, 1996 accident. Mr. Yae applied for arbitration on May 12, 2008 in respect of income replacement benefits, medical benefits and interest.

5 In the context of this arbitration, Royal brought a motion for the dismissal of Mr. Yae's arbitration on the basis that he had already commenced a claim in the Ontario Superior Court against Royal in respect of the statutory accident benefits he claims in his arbitration. The motion was heard on November 21, 2008. Mr. Yae confirmed that he wished to represent himself in this matter. Mr. Yae has a limited ability in English and gave his evidence and submissions through an interpreter.

6 In support of its motion, Royal filed a duly sworn affidavit from Vikram Kapur, a lawyer at the firm of Kostyniuk & Greenside, counsel for the Insurer in this arbitration. Attached as an exhibit to the affidavit is Mr. Yae's Statement of Claim in Superior Court. The Statement of Claim was issued on December 13, 2007. Mr. Yae completed the Statement of Claim on his own. While not entirely clear from the Statement of Claim, given Mr. Yae's limited abilities in English, he appears to claim medical benefits in respect of medications and interest. Mr. Yae also seems to seek all benefits to which he is entitled by law arising from the pain and suffering he experienced as a result of the car accident. Mr. Yae appears to maintain that the settlement into which he had previously entered was invalid. In its Statement of Defence, Royal denies Mr. Yae's entitlement to income replacement benefits, medical benefits and interest.

7 Mr. Yae provided a letter to the Commission dated August 14, 2008 addressed to "Whom it May will concern" and citing the Superior Court File number. The letter is again somewhat difficult to understand, but Mr. Yae appears to indicate that, in his court action, he seeks all the money he has lost as a result of the accident and to which he is entitled by law, including income replacement benefits. He seems to suggest that he would like to withdraw his arbitration and proceed with his civil action. Mr. Yae also provided a sworn letter dated October 20, 2008, addressed to counsel for the Insurer, and entitled "Superior Court and Financial Service Commissioner," in which he indicates that he wishes to continue with both his court case and his arbitration "until we got the money." He indicates that he does not wish to withdraw either proceeding.

8 At the motion, Mr. Yae confirmed that he wished to proceed with both his court case and his arbitration simultaneously, and that once he obtained money in one forum, he would discontinue the proceeding in the other forum. Royal objected both to a stay of the arbitration pending the completion of the court case, and to permitting Mr. Yae to withdraw his arbitration with the option of reapplying at a later date. Mr. Yae stated that while he is familiar with the process at the Financial Services Commission, he wished to proceed in court in order to obtain experience in that forum.

9 Section 281(1) the *Insurance Act* provides, in part, that if mediation fails, the insured person may bring a proceeding in a court of competent jurisdiction or may refer the issues in dispute to an arbitrator. Arbitral decisions have established a number of principles governing the question of whether a person is precluded from proceeding before both a court and the Commission.² As set out in the decision of *King and Royal Insurance Company of Canada*³, the most basic of these principles is that an insured may not pursue a dispute in more than one forum, but is not required to pursue all of his or her disputes in only one forum. *King* summarizes the remaining principles as follows:

- 1) Does the arbitration involve issues substantially similar to those in the civil action?
- 2) How far along has the civil action proceeded (for example, have discoveries taken place on the issues before the court)?
- 3) Is the civil action broader in scope than the arbitration, both in terms of the issues involved and the relief sought?
- 4) Is there any serious impediment to having the issues in the arbitration dealt with in the court proceeding?
- 5) Would permitting the Applicant to proceed with the arbitration unduly duplicate proceedings, leading to greater costs and delays and raising the spectre of inconsistent results?

10 *King* was applied in the appeal decision of *Non-Marine Underwriters, Mbrs. of Lloyd's and Mangat*⁴, in which the Director's Delegate held that "an election to go to court does not necessarily govern all future claims," but "it is not enough...to simply ask whether the new claim involves a different benefit...[for] what is required is the kind of pragmatic balancing of interests seen in *Gogna* and *King*, and suggested in the recent appeal decision in *Miller*." In *Miller*⁵, the Director's Delegate stated as follows:

An insured is not necessarily stuck with their initial choice of forum. In a number of cases, for example, where an insured has started an action before mediating the dispute but then chooses to go to arbitration, arbitrators have not held insureds to their initial choice and have permitted them to continue in arbitration, provided the action is promptly discontinued.

11 In *Mangat*, the Director's Delegate further stated as follows:

The rule against multiple proceedings is one of the more basic common law principles. It is based on concerns that multiple proceedings will increase the cost and complexity of litigation, and lead to inconsistent results that undermine the credibility of the system.

...

The situation is fundamentally different if, as here, the insured person first elects to go to court. While a subsequent mediation may offer a further choice of forum, the insured person may not be allowed to proceed in arbitration if the claims could reasonably have been added to the court action, and allowing both proceedings to continue would result in both forums dealing with evidence or issues that substantially overlap.

12 I find that Mr. Yae is precluded from proceeding with his arbitration. I find that Mr. Yae's arbitration involves substantially similar issues to those in his civil action. While not entirely clear on the face of Mr. Yae's Statement of

Claim, I find that his intention is to pursue all of the statutory accident benefits to which he is entitled, including those he seeks in the arbitration, namely, income replacement benefits, medical benefits and interest. I note that Royal responded to Mr. Yae's court action on the basis that it included the same issues as those in the arbitration.

13 Mr. Yae began his court action prior to his arbitration. While the court proceeding does not appear to have proceeded very far, Mr. Yae seems intent on carrying on with it, at the same time as his arbitration. I find that his court case, in fact, involves broader issues to those in the arbitration, given his apparent intention to seek all benefits to which he is entitled, including those arising from his pain and suffering. To the extent that there is any difference between the issues raised in the arbitration and those raised in the civil action, there appears to be no serious impediment to having the arbitration issues dealt with in the context of the court proceeding (particularly given that Royal has already responded to Mr. Yae's Statement of Claim on the basis that it includes the issues in the arbitration).

14 I find that allowing Mr. Yae to proceed with the arbitration would unduly duplicate proceedings, leading to greater costs and delays and raising the possibility of inconsistent results. I find as well that it would be inappropriate and potentially an abuse of process to allow Mr. Yae to proceed with his arbitration given his stated intention to carry on with his court case in order to gain experience in that forum. For similar reasons, I find that Mr. Yae should not be permitted to withdraw his arbitration and/or have his arbitration stayed pending the outcome of the civil action.

15 In all of the circumstances, I find that Mr. Yae is precluded from proceeding with his arbitration on the basis of his having already commenced a civil action against Royal in the Superior Court of Ontario.

Expenses:

16 The parties did not address the issue of expenses. If the parties are unable to agree on this matter, they may make submissions in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

E. Bayefsky Member:

17 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The arbitration is dismissed.

Footnotes

- 1 *The Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended.
- 2 For example, *Miller and Allstate Insurance Company of Canada* (FSCO P99-00026, June 12, 2000) Appeal, *Reid and Royal & SunAlliance Insurance Company of Canada* (FSCO P00-00014, August 1, 2000) Appeal, *CGU Insurance Company of Canada and Bolger* (FSCO P03-00018, May 29, 2003) Appeal, and *Murphy and Certas Direct Insurance Company* (FSCO A07-000984, March 25, 2008)
- 3 (FSCO A98-000234, March 24, 1999)
- 4 (FSCO P00-00020, August 1, 2000) Appeal
- 5 *Supra*, note 2