2000 CarswellOnt 3573
Financial Services Commission of Ontario (Appeal Decision)

B. (A.) v. Royal Insurance Co. of Canada

2000 CarswellOnt 3573

# Royal Insurance Company of Canada, Appellant and A.B., Respondent

Naylor Dir. Delegate

Judgment: September 18, 2000
Docket: P99-00049

Proceedings: reversing in part (August 31, 1999), FSCO A97-000943 (Ont. Ins. Comm.)

Counsel: *Nestor Kostyniuk*, for Royal Insurance Company of Canada.
*Yvon Renaud*, for A.B.

Subject: Insurance; Torts

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

**Alternative dispute resolution**

IX Appeal from arbitration awards
IX.2 Question of law

**Insurance**

IX Claims
IX.8 Payment of insurance proceeds
IX.8.d Entitlement to proceeds
IX.8.d.iv Miscellaneous

**Insurance**

X Actions on policies
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**Headnote**

**Insurance --- Actions on policies — Practice and procedure — Miscellaneous issues**

Insured was involved in accident in car wash — Insured's application for income replacement benefits was allowed in part — Insurer denied claim — Insured's application to arbitration for benefits was allowed in part — Insurer appealed — Appeal allowed in part — Arbitrator did not err by allowing absence of formal report of expert witness, late production of records, and conducting part of hearing by conference telephone call — Insured gave notice of intent to give expert witness testimony by conference call — Commission's rules of procedure allowed for telephone conference calls with regard given to flexibility, fairness and efficiency — Insurer's true complaint was with testimony's content not method of production — Much of conduct at issue occured during insurer's cross-examination — Insurer not prejudiced by arbitrator's procedural arrangement — Insurance Act, R.S.O. 1990, c. I.8.

  

**Arbitration --- Appeal from award — General**

Insured was involved in accident in car wash — Insured applied for income replacement benefits — Insurer denied claim — Insured's application to arbitration for benefits was allowed in part — Application allowed in part — Insurer appealed — Appeal allowed in part — Arbitrator did not fail to consider source and quality of evidence when making decision — Insurer's objections were matter of law and were not appealable — Arbitrator did not discount functional abilities evaluation tests in general but merely questioned evidentiary value in particular circumstances — Arbitrator gave proper consideration to evidence and did not rely on insured's testimony alone — Insurance Act, R.S.O. 1990, c. I.8.

**Insurance --- Actions on policies — Practice and procedure — Miscellaneous issues**

Insured was involved in accident in car wash — Insured applied for income replacement benefits — Insurer denied claim — Insured's application to arbitration for benefits was allowed in part — Insurer appealed — Appeal allowed in part — Insured was not entitled to special award of $2,500 — Insured did not make claim for special damages — Arbitrator's direction regarding special damages was indirect and did not allow insurer to properly address issue — Arbitrator did not give proper weight to evidence regarding basis of special award — Arbitrator's refusal to impose 50 per cent limit on special award was arbitrary and unreasonable — Insurance Act, R.S.O. 1990, c. I.8.

## Table of Authorities

**Cases considered by *Naylor Dir. Delegate*:**

*Brady v. Personal Insurance Co. of Canada* (November 26, 1998), Doc. P98-00017 (Ont. Insurance Comm. Dir. of Arbs.) — considered

*Clark v. Royal Insurance Co. of Canada* (September 26, 1997), Doc. P97-00008 (Ont. Insurance Comm. Dir. of Arbs.) — considered

*Maas v. State Farm Mutual Automobile Insurance Co.* (December 8, 1997), Doc. P96-00080 (Ont. Insurance Comm. Dir. of Arbs.) — considered

*Walker v. State Farm Mutual Automobile Insurance Co.* (December 3, 1996), Doc. P96-000036 (Ont. Insurance Comm. Dir. of Arbs.) — considered

**Statutes considered:**

*Insurance Act*, R.S.O. 1990, c. I.8
Generally — considered

s. 268.3(2) [en. 1993, c. 10, s. 27] — considered

s. 282(10) — considered

*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22
Generally — considered

s. 5.2(1) [en. 1994, c. 27, s. 56(10)] — considered

s. 6(5) [en. 1994, c. 27, s. 56(13)] — considered

  

**Regulations considered:**

*Insurance Act*, R.S.O. 1990, c. I.8
*Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, O. Reg. 776/93

Pt. II

s. 36(4)

APPEAL by insurer of award by arbitrator of (August 31, 1999), Doc. FSCO A97-000943 (Ont. Ins. Comm.) for damages arising out of automobile accident.

***Naylor Dir. Delegate*:**

**I. Nature of the Appeal**

1 This is an appeal brought by Royal Insurance Company of Canada ("Royal") from the decision of an arbitrator dated August 31, 1999.

2 It should be said at the outset that the case involves a perhaps unique combination of circumstances: It revolves around a rather unusual accident — an ostensibly minor incident in a car wash — with unlikely consequences. It concerns an individual, with significant pre-existing medical problems, who engaged in an atypical occupation/calling. A.B. worked out of her house, providing a home and care for developmentally disabled individuals. It was a time of transition. One of her two charges was leaving, and she continued to care for the other after the accident. It was A.B.'s position that her essential job tasks involved the care of two individuals, and that, but for the accident, she would have been able to take on a second charge.

3 Although initially in dispute, it was ultimately conceded that A.B., who was paid on a *per diem* basis, was gainfully employed. As such, she qualified for an income replacement benefit under Part II of *SABS-1994*.[1] After hearing a substantial amount of evidence, the arbitrator accepted A.B.'s position. He awarded her income replacement benefits from one week after the accident, onwards. The amount of the benefit payable has yet to be determined.

4 Royal appeals the order both on procedural and substantive grounds. It also appeals a special award relating to the non-payment of certain expenses. It does not appeal the disposition of other claims.

**II Income Replacement Benefits**

***A. Background***

5 The incident happened on June 18, 1996, as A.B. was driving her car through an automated car wash. According to the arbitrator's findings, the vehicle behind lurched forward and struck her car. The arbitrator found that, at the time of the impact, A.B. was leaning forward and twisting to get something out of her purse. Neither vehicle was damaged and no injuries were reported immediately. However, later in the day, A.B. started to feel stiffness and pain in her neck. Some days later, she developed low back pain. She has continued to complain about these problems, especially chronic low back pain. The arbitrator found that the pain stemmed from soft-tissue injuries sustained in the incident.

6 The arbitrator devoted a significant portion of his reasons to discussing A.B.'s pre-accident medical condition and the contribution of the accident to her present condition. He found that A.B. had "significantly underestimated her pre-accident medical difficulties." (p. 8).

  

7 A.B. had a 20 year history of chronic neck and low back pain. She suffered a whiplash injury in a car accident in 1975 and wrenched her back on several occasions afterwards. There was mention in the records of a possible disc injury ram, although the basis for this was disputed by Dr. I. Bernard Schacter, a neurosurgeon who saw A.B. after the accident. A.B. received treatment for back-related problems over the years, including substantial therapy in 1995 and 1996. She also had other health problems, which appeared to come to a head in 1995. The arbitrator found, however, that once her condition was diagnosed and treated, it improved, with episodic set-backs.

8 The arbitrator found that despite her problems, A.B. was able to cope with her duties, albeit with difficulty, up until the accident. He concluded that the accident significantly contributed to her post-accident condition. He preferred Dr. Schacter's opinion with respect to causation to that of Dr. Shamess, the doctor on whose opinion Royal principally relies.

9 Dr. Schacter did not think a subsequently-discovered small disc herniation at L5-S1 was directly responsible for A.B.'s pain but attributed her problems to the involvement of the "whole area" around it. He testified that A.B.'s condition was consistent with the described mechanism of the accident and that her pre-accident state may have made her vulnerable to a greater degree of injury. Both the arbitrator and Dr. Schacter placed importance on A.B.'s ability to cope, despite her difficulties, before the accident.

10 A.B.'s work history proved to be significant. She had worked as a home provider for more than a decade and, by all accounts, was a committed and dedicated caregiver. Throughout the time, and despite her documented medical difficulties, she had taken care of an autistic young man who required help with many of the activities of daily living, including bathing, grooming, toileting and physical support. She had also taken on a second individual, an elderly gentleman, who was largely independent. The placements were made through a community living agency, which set stringent requirements and closely supervised the arrangements. A.B. met these standards at all times.

11 Both charges were still living in A.B.'s home at the time of the accident, but arrangements were in place to move the young man to a group home. The young man was transferred, as scheduled, 10 days after the accident. A new placement was never arranged. The arbitrator accepted that the transfer was arranged largely because the young man's behavior (particularly, his seizures and constant screaming), was impacting on A.B.'s overall state of health. However, he found that A.B. planned to continue caring for two individuals in her home and had asked the agency to place another person, with less extensive needs, in her home. He found that A.B. cancelled the request after the accident, citing the effect of her injuries.

12 A.B. continued to care for the elderly gentleman for more than two and a half years, until November 1998. There is no indication in the evidence that he moved out other than in the usual course. Since then, A.B. has taken on relief work but not a full-time placement. [2]

13 The arbitrator found that while A.B. was able to cope with the demands of caring for the relatively-independent individual who remained, this did not fairly reflect her essential job tasks, which were more demanding. The arbitrator considered A.B.'s duties in relation to the very different care requirements of her two charges before the accident. He found that there was no evidence that someone, whose needs were not of a physically demanding nature, could have been placed. He concluded that A.B.'s continuing pain level prevented her from taking on such additional duties.

14 The arbitrator found that, although A.B.'s pain complaints were not reflected in objective findings, any element of pain magnification was unconscious and her pain experience was real. He concluded that A.B.'s pain symptoms rendered her substantially unable to engage in the essential tasks of her employment. In arriving at this conclusion, the arbitrator rejected the outcome of a disability Designated Assessment Centre ("DAC") assessment and functional abilities evaluation ("FAE"), which basically turned on a lack of objective findings to support her complaints.

***B. Fairness Concerns***

  

15 Royal takes issue with the scope of Dr. Schacter's evidence and the fact his testimony was heard by telephone conference call. It complains that it was denied a fair opportunity to know, and respond to, crucial testimony. It relies on the cumulative effect of procedural shortcomings, including the absence of a formal report from the doctor, the late production of important records, including the last-minute provision of medical records to the doctor, and the ultimate decision to conduct that part of the hearing by telephone conference call.

16 Royal argues that the material filed in advance in respect of Dr. Schacter did not fulfill the requirements of the Commission's *Dispute Resolution Practice Code* (Third Edition — April 15, 1997) ("*Code*"). In particular, it notes that he was not given any prior records to review and did not know that A.B. had a history of back problems. It complains that had a proper expert's report been provided, including a review of A.B.'s history, it would not have been taken by surprise by the doctor's testimony in these areas.

17 Dr. Schacter saw A.B. in his Toronto office, in 1997 and again in 1998, on referral from A.B.'s family doctor. On both occasions, he sent a letter to the doctor, confirming the results of the consultation. These letters were filed, along with Dr. Schacter's clinical notes and records and a copy of his curriculum vitae.

18 An arbitrator has broad powers with respect to the introduction of evidence and the conduct of the proceedings, subject to the principles of natural justice and fairness. The Commission's practice rules are aimed at ensuring that the proceeding is carried out fairly, effectively and expeditiously, without unnecessary surprise.

19 There is no prohibition in this system on both calling doctors and filing their reports. The process is flexible. The governing principle is fairness. Rule 38.2 of the *Code* requires that if an expert, such as a doctor, is to testify, advance notice must be given of "the substance of the facts and opinion which the witness will present" and the identity and credentials of the person testifying. [3]

20 There is no set format or technicalities that must be adhered to. All that is required is that the document filed, whether it be a consultation report, as here, or any other form of report or record, sets out what is to be the substance or thrust of the doctor's testimony.

21 Dr. Schacter's consultation reports were provided within the time-lines set out in the Rule. They set out the history he took, his clinical findings, the results of the MRI investigations, as well as his conclusions, prognosis and recommendations for treatment and therapy. In my view, they clearly meet the requirements of the Commission's rules.

22 Royal complains that Dr. Schacter should not have been allowed to give testimony by electronic means.

23 It was initially contemplated that Dr. Schacter, whose practice is in Toronto, would travel to Sault Ste. Marie, where the hearing was held. However, shortly before the hearing, because of the cost and time constraints on the doctor, A.B. decided to seek leave to allow him to testify by telephone conference call. Royal objected to the proposed change in arrangements.

24 The issue was dealt with at the outset of the hearing. According to the transcript, Royal's lawyer initially objected quite strongly. She argued that, because Dr. Schacter apparently did not have copies of A.B.'s medical records, it would be unfair to allow him to testify by telephone. She stated that she would not have objected, had A.B.'s counsel provided the documents ahead of time. However, as things stood, she was concerned she would not have a reasonable opportunity to put those records to the doctor and to cross-examine him properly on them, especially because she had only just received much of the material herself.

25 At this point, the following exchange ensued: [4]

**Arbitrator:**

  

So what I am hearing, ... is your preference to have Dr. Schacter here, but I think you acknowledge that there are problems with costs and logistics. Your concerns would be alleviated, if not removed to a very large extent if all the documentation that you are going to be putting to Dr. Schacter was in front of him.

**Royal's Counsel:**

Yes

**Arbitrator:**

I mean, it is possible even if all the documentation has not already been sent to Dr. Schacter surely to Purolate to him or get those documents to him this afternoon, or to have him testify later in the week, if the documents cannot get to his attention before tomorrow morning. Is that not possible?

**Royal's Counsel:**

I don't think I would have a problem with that. My major concern is that there are numerous documents and I notice that, I definitely would like to put to him. If that is going to be the case, I'd like to ensure that all the documents to go, as in my friend's submissions, in terms of if I haven't missed everything, maybe not just the medical documents. But I certainly would be much more agreeable to that, as long as I get a chance to properly cross-examine him and have him to respond to the issues raised, basically.

**Arbitrator to A.B.'s Counsel:**

I take it there is not an objection to that getting all the documentation that [the Insurer's Counsel] wishes to cross-examine on, get all that information to Dr. Schacter?

26 Counsel for A.B. then agreed to arrange to have the to-be-identified documents sent by overnight courier to Dr. Schacter, who was scheduled to testify the next day.

27 Although in-person hearings are the usual practice, the Commission's rules allow all or part of a hearing to take place by telephone conference call. [5] There is, however, an important qualification. Rule 34.2 provides that an electronic hearing may only be held if the arbitrator is satisfied that it will not significantly prejudice a party. These rules are modelled after similar provisions in the *Statutory Powers Procedure Act ("SPPA")*. [6]

28 In this case, A.B. gave notice of her request that Dr. Schacter's evidence be heard by telephone. Both counsel made submissions on the motion. The upshot of the discussions was that Royal's counsel expressed concern about the procedure, but confirmed that her concerns would be alleviated if the documentation was provided to Dr. Schacter by overnight courier.

29 Given counsel's response, it is difficult to argue that the arbitrator should not have gone ahead or should have concluded that a party, whose concerns appeared to have been largely put to rest, was likely to suffer significant prejudice from the procedure followed.

30 Royal argues that, by putting the option of transmitting the documents to Dr. Schacter up front and hinting at the preferred outcome, the arbitrator gave counsel little real option but to agree to the arrangement. I do not discount the practical dimension of the problem confronting counsel. However, I am not persuaded that the arbitrator overstepped the mark, thereby depriving counsel of a realistic opportunity to object to the arrangement, had she wished to do so. Arbitrators have a responsibility to facilitate an efficient hearing process. That includes putting out for discussion possible solutions to problems arising in the course of a hearing that might otherwise derail or delay the process. In my view, the arbitrator was attempting to do no more than this.

31 There is no indication or suggestion that proceeding by telephone, in fact, hindered or constrained Royal's cross-examination or was otherwise prejudicial. No time constraints were put on the telephone call. Dr. Schacter was examined at some length. He confirmed that he had received the material sent to him. There is no suggestion in the material before me that the process gave rise to any difficulties, and no further objections appear to have been registered. The hearing appeared to be, for all intents and purposes, running smoothly.

32 At its heart, Royal's concern was not with the means by which Dr. Schacter's testimony was heard but the content of his testimony. Fairness, and the Commission's rules, requires disclosure of the principal elements of the facts and opinion to be presented. However, an expert is given scope to clarify, explain and qualify his or her opinion, in response to questions put to him or her. The aim is not the elimination of any uncertainty with respect to the evidence given, but the avoidance of unfair surprise.

33 I am not persuaded that Dr. Schacter's testimony delved into unexpected areas or involved an element of unfair surprise. Most of the testimony complained about came on cross-examination. A specific example is Dr. Schacter's testimony as to the efficacy of FAEs, to which Royal now objects. Royal did not object to any questions asked on the applicant's behalf, nor did it seek an adjournment or other recourse in order to respond to the testimony given. While the procedure must be fair, the arbitrator should have the benefit of relevant evidence. It is open to an arbitrator to adjourn a hearing or take other steps to ensure both objectives are met. There is, correspondingly, some obligation on a party to signal its concern.

34 In this case, A.B.'s medical records were provided to Dr. Schacter for his review, and he was asked questions in relation to certain aspects of them. The testimony Dr. Schacter gave was well within the scope of his expertise. As a neurosurgeon, Dr. Schacter had relevant evidence to give, including that relating to a suggested history of pre-existing disc problems, and the role of the accident in A.B.'s subsequent condition. In the documents provided, he confirmed his opinion that, although some improvement was to be expected, as of a year before the start of the hearing, A.B. was disabled because of the accident. At the hearing, despite receiving new information, Dr. Schacter maintained his opinion that A.B. remained disabled as a result of the accident.

35 A similar issue was raised in *Brady v. Personal Insurance Co. of Canada* (November 26, 1998), Doc. P98-00017 (Ont. Insurance Comm. Dir. of Arbs.), in which it was argued that a doctor whose evidence turned out to be very important, had gone beyond the opinions expressed in the reports. Director's Delegate Draper acknowledged that parties to an arbitration should not be ambushed by unanticipated evidence. However, he concluded, that the doctor was simply asked to expand on his opinion and that much of the evidence complained about came in cross-examination. He cautioned against a party second-guessing strategy as a basis for appeal.

36 Royal distinguishes *Brady* on the basis that, unlike here, there were no production problems. However, even assuming there was some element of surprise in Dr. Schacter's testimony, it was not flagged for the arbitrator. The time to raise such objections is at the hearing, not after the fact.

***C. The Evidentiary Basis***

37 Royal takes issue with the acceptance of, and probative value given to, the medical evidence. It argues that the validity of Dr. Schacter's evidence was fundamentally compromised, in particular, by his lack of knowledge of the extent of A.B's pre-accident problems and his reliance on her subjective, and unreliable, account. It argues that the arbitrator failed to consider the source and quality of the information underlying the doctor's opinion, and that his findings lacked foundation in the evidence.

38 It further argues that the arbitrator erred in discounting the value of other evidence, particularly the evidence of Dr. Shamess, the disability DAC assessment results and the outcome of the FAE. Dr. Shamess, who has a referral practice in the area of sports and orthopaedic medicine, treated A.B. for a period after the accident and, with the parties' consent, also conducted a medical and rehabilitation assessment in the capacity of a DAC assessor.

  

39 Under the *Insurance Act*, R.S.O. 1990, c.I-8, as amended, only appeals on questions of law may be entertained. This restriction raises a substantial barrier to Royal's appeal. While an arbitrator's findings must have a sufficient evidentiary basis, the value to be given to the evidence is a matter for the arbitrator, not for me, to decide. In my view, the appellant's objections fall on the wrong side of the line.

40 Dr. Schacter's evidence undoubtedly was a fruitful area for challenge on cross-examination. He had an incomplete picture of A.B.'s pre-accident condition, the accident details and A.B.'s occupational circumstances. However, his evidence was tested, and he maintained his opinion, explaining why, when presented with more complete information.

41 I have no reason to conclude that the arbitrator failed to consider the extent to which Dr. Schacter's opinion rested on subjective findings, and the quality of that information. He explicitly recognised the unreliability of A.B.'s evidence and took it into account in his reasons. It is also fair to say that while Dr. Schacter's evidence was important, he was not a lone voice nor was his opinion outlandish. A.B.'s claim was supported by her family doctor and her treating chiropractor, both of whom were better informed about her pre-accident problems. Furthermore, Dr. Schacter and Dr. Shamess were not entirely at odds in their views. As the arbitrator noted, Dr. Shamess initially provided an, albeit qualified, opinion that the accident had a substantial impact on A.B.'s condition. [7] Dr. Shamess also accepted that there was no necessary correlation between the low velocity of the accident and the degree of injury, and that A.B. may have been predisposed to greater injury.

42 Despite the atypical facts, this raises, in some respects, a classic question of whether the applicant was "a thin skull" claimant, whose pre-existing vulnerability made her particularly susceptible to injury. These can be difficult questions to answer. However, ultimately, it was a question of fact for the arbitrator to decide.

43 Royal argues the arbitrator ignored the Commission's *Guideline on the Management of Claims involving Whiplash-Associated Disorders, ("WAD Guidelines")*. Under s.268.3(2) of the *Insurance Act*, a guideline issued by the Superintendent "shall be considered in any determination involving the interpretation of the *Statutory Accident Benefits Schedule*."

44 Royal submits that, had the arbitrator had regard to the guidelines, he would have accepted Dr. Shamess' opinion because it more closely reflected the criteria in the *Guidelines*.

45 The difficulty with this argument is that the *Guidelines* were not referred to in the course of any evidence. The *Guidelines* are a guide to the clinical management of claims involving whiplash-associated disorders, and caution that they only apply in cases where no other injury applies. This case involves someone with significant pre-accident problems and continuing low back problems. In the absence of more specific information as to the applicability of the guidelines, it is not clear to me how the arbitrator erred in relation to them.

46 Royal argues that the arbitrator erred in discounting the weight to be given to the outcome of the disability DAC, including the FAE.

47 It is clear that DAC assessment results can be challenged. The responsibility for determining the applicant's entitlement rests with the arbitrator, based on his or her assessment of all the evidence, including any DAC reports. [8] Here, the arbitrator found that there were shortcomings in the evidence of Mr. Salituri, the DAC assessor, and that the DAC report and FAE were of limited value in this case.

48 Royal argues, with some justification, that the arbitrator appeared to cast doubt on the efficacy of FAEs in general, even though they are well recognised and commonly-used tools for evaluating a person's ability to return to work and for rehabilitation purposes. In my view, the arbitrator's reasons should be viewed as confined to the particular facts of the case. The arbitrator could legitimately conclude that the assessment was of limited value in this particular case. There was little focus on A.B.'s particular pre-accident job demands. Her job was recorded as a home provider for the

  

agency, listed at medium-level physical demands work. Neither her abilities as found on testing, or as estimated, taking into account evidence of a lack of maximum effort, coincided with the identified demands of her job.

49 In addition to the FAE, the DAC assessment consisted of a physiotherapy examination by Mr. Salituri. He also prepared the summary report and gave evidence at the hearing. The arbitrator found that the value of the DAC assessment was compromised and of limited value. Mr. Salituri's evidence reflected confusion as to the scope of the evaluation. Neither the FAE nor the DAC assessment as a whole answered the question whether A.B.'s pain level, even if not proportionate to objective findings, in fact disabled her.

50 The arbitrator addressed this question of fact. He reviewed, and relied upon, the evidence of Dr. Shamess and Mr. Salituri, as well as that of Dr. Schacter, all of whom stated that A.B. was not intentionally exaggerating her pain and that her pain experience was genuine. His findings do not rest on A.B.'s subjective account, by itself. Rather, he looked for confirmation of her evidence from other sources, such as A.B.'s husband, whom he found to be "a very reliable and credible witness." (p. 22).

51 This is a case that, in my view, turned on the particular, and exceptionally unusual facts. The issues were clearly defined from the outset. The arbitrator accepted that performance of A.B.'s essential tasks as a home provider required a high degree of care, including significant physical duties. He made crucial findings of fact regarding A.B.'s plan, before the accident, to continue caring for two charges. There were conflicting medical opinions to be evaluated. The arbitrator also had the task of determining the credibility of A.B.'s pain complaints. This evidence was submitted to the arbitrator as trier of fact. Each side presented its evidence. The evidence was tested and full submissions were made. The arbitrator made a judgment call as to the weight to be given to it. There was evidence to support his findings. In the circumstances, there are insufficient grounds to disturb his findings and conclusions.

52 I arrive at a different conclusion in regards to the remaining issue: the special award.

**III. Special Award**

53 The arbitrator awarded a $2,500 special award against Royal with respect to the non-payment of certain claims for medical expenses. A variety of medical and rehabilitation expenses were claimed, with varying measures of success. The special award related to successful claims for the cost of purchasing and installing a whirlpool ($991.85), the cost of an aquatherapy program ($57.35) and car and hotel expenses for two trips to Toronto for medical tests ($1,893.75, less $541.79 paid)). Royal does not appeal the arbitrator's ruling on the substance of these claims.

54 The authority to order a special award is found at s. 282(10) of the *Insurance Act.* It says

> If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

55 The nature of a special award has been discussed in a number of cases. Although applicants may, and often do, assert to a claim to a special award, an arbitrator has authority to consider a special award on his or her own initiative. However, the principles of fairness must be complied with. [9] The insurer must be given notice that it is facing a special award and a reasonable opportunity to respond.

56 A.B. did not seek a special award. At the outset of the hearing, as is usual, counsel clarified the issues for the hearing including listing the expenses in issue. The arbitrator referred to his jurisdiction to order a special award in the context of the requirement that reasonable notice be given. He asked A.B.'s counsel, in relation to the medical expense claims, whether such a claim was being made and was told that it was not being advanced. [10]

  

57 On the second day, A.B. gave brief testimony with respect to the expenses she had previously listed. The arbitrator again raised the issue of the special award. He stated that notwithstanding that A.B.'s counsel was not seeking the special award, he was giving counsel for the insurer early warning that this was something he was going to be considering and "something that the insurer might wish to address either in cross-examination or in calling their own witnesses." [11]

58 The arbitrator based a special award squarely on what he considered to be the insurer's failure to comply with pay-pending-dispute requirements set out in s.36(4) of *SABS-1994*. Under that provision, insurers must pay medical expenses pending resolution of a dispute in relation to the expense. The requirement is subject to certain qualifications including the insurer's right, in some circumstances, to refer the insured to a medical and rehabilitation DAC.

59 The arbitrator addressed the issue of a special award at pp. 32-33 of his decision. His reasons are succinct. He stated that only one medical and rehabilitation DAC assessment had been performed, in which Dr. Shamess had specifically recommended "whirlpool and sauna." He stated:

> I raised the question of a special award early in the morning of the second day of this hearing during the examination of the first witness called, namely A.B. I. invited Royal to address this issue in cross-examination or by calling their own witnesses. I received no evidence as to why Royal did not comply with subsection 36(4). I find Royal's failure to comply with this statutory requirement to be unreasonable.

60 He then turned his consideration to the amount of the award. He ruled that he was not bound by a limit of 50% of those benefits that had been found unreasonably withheld. Citing the need for a meaningful award and the insurer's lack of explanation, he awarded a special award of $2,500 [12] in respect of unreasonably-withheld benefits totalling around $2,400.

61 The legislation mandates an arbitrator to make an award if he or she finds that benefits found owing have been unreasonably withheld or delayed. It has been said that while the special award is not strictly discretionary — the language states the arbitrator *shall* award — a finding of unreasonableness depends to a large extent on the arbitrator's view of the evidence. [13]

62 Arbitrators have rightly emphasised the importance of reinforcing compliance with pay-pending-dispute requirements, through the special award authority. In this case, however, the arbitrator went too far. Whether or not an insurer is required to pay an expense pending a dispute and has acted unreasonably in withholding payment is not necessarily clear-cut. Arbitrators have authority to raise a special award on their own initiative. However, the approach should be circumspect. This is particularly so where the applicant, with the benefit of counsel and all the facts, signals clearly that he or she is not questioning that the insurer acted reasonably. There is nothing inappropriate in an arbitrator, as a starting position, taking his or her cue from that applicant as to whether the insurer's actions warrant further scrutiny. Furthermore, if the arbitrator proceeds, he or she must be crystal-clear as to the concerns to which the inquiry relates and the procedural implications, in order that the parties may have a fair opportunity to address the issue.

63 In this case, I cannot be confident that the arbitrator gave consideration to the evidence before him in the context of the inquiry required of him.

64 The arbitrator relied on the fact that the DAC report specifically recommended whirlpool and sauna treatment. This is, however, an incomplete picture of the DAC recommendations. The evidence that was before the arbitrator showed that the therapy was recommended as part of a six-month active exercise program at a local health facility, to be arranged after A.B.'s physiotherapy finished. Dr. Shamess' DAC report dated December 31, 1996, suggested:

> Ongoing physiotherapy, with aggressive attempts to improve the recruitment of the gluteal muscles...After her physio program, she will require, at least, a 6 month membership at a local health club facility for ongoing:

  

1. Aerobics

2. Stretching

3. Whirlpool and Sauna

4. Strengthening

65 The summary of the doctor's assessment report stated; "Continue physio. Then exercise facility. Times 6 months." A subsequent letter of June 5, 1997, indicated that A.B. has not completed physiotherapy and that afterwards, she would be sent to an exercise facility "hopefully with whirlpool available."

66 By this time, A.B. had already purchased the whirlpool. [14] On cross-examination, she conceded that she did not attend a gym program, nor did she seek the cost of membership. Later on, the following year, she joined an aquatherapy program, at the suggestion of another doctor.

67 Based on A.B.'s testimony that she continued to derive benefit from the whirlpool, the arbitrator held that she was entitled to payment. However, that is a different question from whether Royal was obliged to pay the capital cost of the item pending dispute and whether it acted unreasonably in failing to pay. The expense claimed deviated substantially from the focussed recommendations of the DAC report. It was incurred within four months of the report, purportedly in reliance on it. In the circumstances, I do not think it can be said that Royal's obligations were clear-cut.

68 The arbitrator did not discuss this evidence in the context of assessing the reasonableness of the insurer's position or in the exercise of his discretion to fix the amount of the penalty.

69 There are also issues of fairness. Although, as the arbitrator noted, A.B. was the first witness, her testimony was interrupted on a number of occasions so that various doctors could be scheduled. By the time the arbitrator revisited the issue of the special award on the second day, Dr. Shamess, the DAC doctor, had already given his testimony and had been discharged. The arbitrator's reasons do not reflect that Royal had already started its case, proceeding on the basis that it would not have to address a special award. In the absence of clear direction from the arbitrator, a party cannot reasonably be expected to take the step of recalling an expert witness.

70 I also disagree with the arbitrator's approach to the exercise of his discretion in determining the amount of the award. The amount awarded does not appear to take account of any mitigating factors, and I cannot be certain he gave consideration to relevant evidence. [15] Furthermore, the basis for the amount awarded is unclear. The arbitrator stated that, in calculating the award, he was not bound by the amount found to be unreasonably withheld. However, he does not set out his analysis or his calculation. The language, particularly the words "a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing...," is not readily understandable and is capable of more than one meaning. However, when viewed in context, there is a strong suggestion that it is intended to capture those benefits in respect of which the insurer has acted unreasonably. Whether an arbitration involves other amounts and their relationship to the benefits unreasonably withheld, is happenstance. The award involves a significant compound interest component accruing from the date the benefits first become payable. This suggests that the penalty is directed at unreasonable, not reasonable, delay. The percentage cap on awards provides both a maximum and a reference point for determining where on the scale the insurer's actions should lie. Remove the basis of the calculation from the amount unreasonably withheld, and one is left with an amount that is, as here, essentially arbitrary. There is no valid basis by which to judge the reasonableness or proportionality of the amount levied.

71 For the above reasons, I would rescind the special award.

**IV. Conclusion**

  

72 Royal argues that the arbitrator's approach to the special award colours the entire decision. It argues that when the decision is taken as a whole, it raises a reasonable perception of a lack of impartiality on the arbitrator's part. I do not find the insurer's generalised concerns are well-founded. The arbitrator erred in relation to the special award, but there is no basis on which to conclude that the errors had broader implications.

73 The appeal with respect to ongoing income replacement benefits is dismissed. Like many cases, the 104-week mark was passed while the proceedings were pending. The arbitrator ordered that income replacement benefits be paid until such time as the requirements of the process for determining the loss of earning capacity benefits are met. This was listed as a ground of appeal, but not pursued in submissions. The arbitrator's order in this regard therefore is not disturbed.

74 The amount of benefits remains in dispute. A.B. has been out of benefits since the accident. Every effort needs to be made to resolve the outstanding issues quickly. With this in mind, the matter is remitted to arbitration to be fast-tracked. Given my conclusions with respect to the special award, unless the parties agree otherwise, the matter should be remitted to another arbitrator.

**V. Expenses**

75 The parties may address expenses in writing within 10 days of receipt of the decision.

*Appeal allowed in part.*

Footnotes

1 *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended.

2 The arbitrator referred to a letter from the agency indicating that A.B. expressed a desire to continue with either relief work, or with a full-time placement, provided the person's needs did not require care of a physically-demanding nature.

3 Rule 38.2 states:
If a party intends to call an expert witness to present evidence at a hearing, the party must serve and file a document setting out the following not less than 10 days before the first day of the hearing, or on such terms as the arbitrator considers appropriate:
(a) the name and qualifications of the expert witness;

(b) the subject matter of the testimony to be presented; and

(c) the substance of the facts and opinion which the witness will present.

4 Transcript of testimony taken on May 3, 1999, p.33, para.20

5 Rule 34.1 (c) and (d).

6 *SPPA*, R.S.O. 1990, c. S.22, as amended, s. 5.2(1). As an aside, I note that while the *Code* requires that the parties get reasonable notice of a hearing, there is presently no special provision respecting the content of the notice of electronic hearings. Cf. section 6(5) of the *SPPA*. It sets out specific notice requirements including the need for a statement of a party's right to have an oral hearing if the party satisfies the tribunal that an electronic hearing is likely to cause significant prejudice. In this case, the request was made by motion of the applicant. The transcript makes it clear that Royal's counsel knew the rules relating to electronic hearings and what had to be shown.

7 In his report of December 30, 1996, Dr. Shamess stated that "Pursuant to further information such as a psychological report and understanding the inherent lack of appropriate objective data, I would think it probable that her current complaints are 35% related to the MVA and 65% previous injuries."

  

8 *Walker v. State Farm Mutual Automobile Insurance Co.* (December 3, 1996), Doc. P96-000036 (Ont. Insurance Comm. Dir. of Arbs.)

9 *Clark v. Royal Insurance Co. of Canada* (September 26, 1997), Doc. P97-00008 (Ont. Insurance Comm. Dir. of Arbs.)

10 Transcript of the hearing May 3, 1999, p.24 para. 20.

11 Transcript of the testimony given on May 4, 1999, p. 169, para. 15.

12 Although not specifically mentioned, I assume the sum is inclusive of interest.

13 *Maas v. State Farm Mutual Automobile Insurance Co.* (December 8, 1997), Doc. P96-00080 (Ont. Insurance Comm. Dir. of Arbs.)

14 According to the decision, the whirlpool was purchased on April 29, 1997 and the installment costs paid on June 10, 1997.

15 For example, Royal had paid $541.79 of the $831.12 claimed in transportation expenses in relation to the first trip. This represented the cost of a round trip air fare to Toronto, whereas the claim was for a four-day trip by rental car, plus accommodation and meals for two. The arbitrator offset the payment in calculating the pay-pending dispute total owing, but did not address it specifically as a mitigating factor in the award. The arbitrator stated that he was unclear why A.B., who owned a car, needed to rent one, but allowed the expense on the basis that the cost of driving was equivalent to the cost of flying.

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