Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-008265

BETWEEN:

DIESHA CHAMBERS

Applicant

and

AVIVA CANADA INC.

Insurer

DECISION ON A MOTION

Before: Arbitrator Irvin H. Sherman, Q.C.

Heard: By written submissions due September 12, 2016

Appearances: Mr. Shahen Alexanian for Ms. Diesha Chambers
Ms. Gina Nardella for Aviva Canada Inc.

Issues:

The Applicant, Ms. Diesha Chambers, was injured in a motor vehicle accident on March 6, 2014 and sought accident benefits from Aviva Canada Inc. ("Aviva") payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Ms. Chambers, through her representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act* ("the *Act*") R.S.O. 1990, c. I.8, as amended.

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

A Pre-Hearing discussion in this matter was held on April 20, 2016 at which time Aviva requested that this Motion be heard. Counsel for Ms. Chambers and Aviva agreed that I should hear this Motion.

The issues in this Motion are:

1. Should this Arbitration be permanently stayed?
2. Is either party entitled to its expenses of this Motion?

Result:

1. The Application for Arbitration brought by the Applicant is statute barred under subsections 281(1) and (2) of the *Act*. The Application for Arbitration is permanently stayed.
2. If the parties are unable to agree on the entitlement to or the quantum of the expenses, either party may request an appointment with me for the determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code* (" the *Code*").

EVIDENCE AND ANALYSIS:

The facts in this Motion are not in dispute.

Ms. Chambers filed an Application for Mediation on March 27, 2015 which was to proceed on June 2, 2015. Ms. Chambers' counsel requested an adjournment of the Mediation that was consented to by Aviva. The Mediation was rescheduled for June 22, 2015. Neither Ms. Chambers nor her counsel attended the Mediation scheduled for June 22, 2015. The Mediator attempted to call Ms. Chambers' counsel without apparent success. The Mediator waited for thirty minutes before issuing the Report of Mediator, dated June 22, 2015. Ms. Chambers filed her Application for Arbitration on November 19, 2015.

Insurer's Submissions

Aviva, relying on the cases of *Couraud*[2] and *Pararajasingam*,[3] submits that the Arbitration be permanently stayed.

In the *Couraud* case, the Applicant and his counsel walked out of the Mediation shortly after it began, thereby refusing to participate in the Mediation. Senior Arbitrator Rotter held that the parties to the Mediation are bound to participate in the Mediation process, at least to an extent sufficient to enable a Mediator to form an opinion on the case. Otherwise Mediation is reduced to an empty and meaningless formality.

In the *Pararajasingam* case, Arbitrator Reilly accepted the Insurer's submission that based on *Couraud*, the Mediator must make inquiries of the parties and attempt to settle as many of the disputed issues as possible. Because the Applicant did not participate in the Mediation and was accordingly not present at the Mediation, Arbitrator Reilly found that the Mediation did not fail. It did not take place.

The provisions of subsection 281(2) of the *Act* are offended when an Applicant fails to attend the Mediation. In the case of *Amorini*,[4] the court had no jurisdiction to hear the case because no Mediation occurred. The court concluded that the failure to mediate was not imperfect compliance with the *Act* – it was non-compliance which denied relief against forfeiture under section 129 of the *Act*. To allow an Applicant to by-pass the Mediation process by not attending the Mediation would amount to an abuse of process.

Aviva submitted that by failing to attend the Mediation, Ms. Chambers failed to mediate the issues in dispute. The facts in this case are analogous to those in the *Pararajasingam* case. The requirements stated in section 281(2) of the *Act* and Rule 21.3 of the *Code* have not been met. The Report of the Mediator was issued incorrectly. Ms. Chambers is barred under s. 281(2) of the *Act* from bringing her Application for Arbitration.

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[2] *Couraud and Co-Operators General Insurance Company*, FSCO A-006346, Sr. Arbitrator Rotter.

[3] *Pararajasingam and State Farm Mutual Automobile Insurance Company*, FSCO A13-012792, October 30, 2015, Arbitrator Reilly.

[4] *Amorini v. Select Coffee Roasters Inc.*, [2001] O.J. No. 581 (Divisional Court).

The Insurer submitted that while decisions of other FSCO Arbitrators are not matters of precedent, I should follow such decisions for the sake of consistency in administrative decision making.

Applicant's Submissions

The Applicant submitted that section 282 and subsections 280(4) and (7) the *Act* as interpreted by the Ontario Court of Appeal in the case of *Cornie*[5] and by Director's Delegate Evans in *Leone*,[6] permit an Application for Arbitration to proceed once the extended time period for the Mediation has expired, which, in this case, would be July 22, 2015 being the date on which the Applicant failed to attend the Mediation. The Mediator fulfilled his statutory obligation by issuing the Report of Mediator regardless if the Mediation took place.

The Applicant further submitted that Mediations from time to time do not occur for reasons such as FSCO failing to schedule the Mediation within 60 days or by a party's failure to attend the Mediation, and this does not preclude an application from proceeding to Arbitration. To hold otherwise would deny an insured person the right to claim statutory accident benefits.

The Applicant submits that the *Cornie* case ought to be applied in this instance because the Applicant did not attend the date ultimately scheduled for the Mediation and made no attempt to mediate the issues in dispute. They proceeded to apply for Arbitration after the statutorily prescribed 60 day time period had expired. The Applicant was permitted by the Court to proceed to Arbitration. In this case, the Applicant agreed to extend the time period for Medication but did not attend the dated scheduled for the Mediation to occur. The Court of Appeal referred to section 10 of the *Schedule* that requires a Mediator to attempt to effect a settlement of the dispute within 60 days after the date on which the Application for Mediation is filed. Under Rule 19 of the *Code*, the Mediation must be completed within 60 days of the filing of a properly completed Application for Mediation unless the parties agree otherwise. Subsection 280(1) of the *Act* provides that a Mediation has failed when the prescribed time or the agreed upon time for Mediation has expired

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[5] *Cornie v. Security National Insurance Company*, [2012] O.J. No. 5602

[6] *State Farm Mutual Automobile Insurance Company and Leone*, P12-00004, July 31, 2012

and no settlement has been reached. Mr. Cornie waited at least 60 days after he filed his application for FSCO to appoint a Mediator and for the Mediation to take place. No Mediator was appointed and no Mediation took place. Mr. Cornie then commenced a court action for accident benefits. The defendant Insurer then brought a Motion to strike out the action or alternately to stay the action. Both Motions were dismissed by the Court of Appeal. The Court held that to hold that the clock does not begin to run until FSCO has assessed an Application for Mediation as being complete would allow FSCO to accumulate a backlog of any length that would ignore the legislative purpose of providing for a speedy Mediation. The 60 day time period is not merely directory in purpose, it forms part of the legislative scheme that is aimed at providing a speedy Mediation process. The Applicant accordingly submitted that she should be able to proceed to Arbitration.

Rule 17.1 of the *Code* provides that if a party fails to participate in good faith in the Mediation process, the Mediator may either adjourn the Mediation on terms he or she considers appropriate or report that the Mediation did not take place.

The Applicant submitted that while subsection 280(4) of the *Act* requires the Mediator to attempt to effect a settlement of the dispute, there is no requirement under the *Act* for either the Applicant or the Insurer to participate in the Mediation in good faith or otherwise.

It was submitted that the *Pararajasingam* case (that is currently on Appeal to the Director's Delegate) was wrongfully decided because the Arbitrator erred in holding that the failed Report of Mediator was incorrectly issued. There is no authority or power conferred under the *Act* that allows an Arbitrator to prevent a Mediator from performing the duties required of him or her under subsection 280(8) of the *Act.* The Mediator was required under paragraph 280(8)(a) of the *Act* to list in her Report those issues in dispute that had not been resolved which she in fact did. The Arbitrator erred in law in holding that the Mediation did not occur.

It was further submitted that the Arbitrator further erred in *Pararajasingam* by misinterpreting subsection 280(7) of the *Act* and by applying the *Couraud* case because the parties did not have to actively participate in the Mediation process.

Insurer's Reply

In reply, the Insurer submitted that the Applicant has misinterpreted the provisions of the *Act* by submitting that a Mediation has failed when the Applicant does not attend a scheduled Mediation.

Further, the Applicant erroneously refers to the *Cornie* and *Leone* decisions by submitting that the Mediation failed when the agreed-upon time for the Mediation had expired regardless if the Mediation occurred. The cases are readily distinguishable on their facts from the facts of the within case.

The Insurer further submitted that the Applicant erred in law by relying on the *Cornie* case as authority for the proposition that Mediation between the parties does not actually have to be attempted and failed prior to the commencement of the Arbitration. The Court of Appeal in *Cornie* held that the purpose of the legislation is to make mandatory a Mediation process that is both timely and effective.

The Insurer submitted that subsection 280(7) of the *Act* and Rule 17.3 of the *Code* are compatible with each other such that they should be interpreted in a consistent manner. Subsection 280(7) of the *Act* does not permit the Applicant from by-passing the Mediation process. This subsection was designed to avoid unnecessary delays in the Mediation process. This subsection refers to the situation where a Mediation has failed but does not refer to the situation where the Mediation has not occurred. Rule 17 of the *Code* relates to instances where a Mediation has not occurred.

With respect to the *Pararajasingam* case, *supra*, the Insurer submitted that if a Mediation did not occur, and by application of Rule 17.3 of the *Code*, the Mediator should not have issued the Report of Mediator. The Mediator should only issue her Report where the Mediation fails under subsection 280(8) of the *Act*. The Insurer therefore submitted that the Arbitration should be stayed with expenses payable by the Applicant on a substantial indemnity basis.

A Further Matter

Subsequent to the Reply submissions being received and before a decision was made on this Motion, counsel for the Applicant requested leave to late-file a copy of the recent decision of Arbitrator Robinson in the case of *Gilliland.*[7] I invited counsel for the Insurer to make submissions on the applicability of the *Gilliland* decision to the within Motion. Neither counsel made submissions on the late-filing issue. Each counsel made submissions on the applicability of this decision to the facts of the case at hand. I am permitting the Applicant to late-file the *Gilliland* decision because of its recent date. This decision was not available when the Applicant filed her submissions. There is no apparent prejudice to the parties by reason of the late-filing of the *Gilliland* decision.

The Applicant submitted that the *Gilliland* decision reached a result which is opposite to that reached in the *Pararajasingam* case. *Gilliland* takes "a more forward and correct approach" in interpreting the legislation relating to the preconditions to be met in order for an Applicant to proceed to Arbitration. This case is relevant and "potentially determinative" of the issues to be decided in this Motion.

The Insurer submitted that the *Gilliland* case is distinguishable on its facts from those in the within case. In *Gilliland*, the Applicant applied for Mediation that was not processed or even considered by FSCO until the following year. No date for Mediation was set and the time for Mediation expired. There was no Report of Mediator because of the failure to process the Application for Mediation.

Arbitrator Robinson, upon referring to subsection 281(2) of the *Act* and applying the decision of the Ontario Court of Appeal in *Hurst*,[8] decided that the presence or absence of a Mediator's Report is irrelevant, provided that an Application for Mediation was actually commenced and that the 60 days prescribed for Mediation had expired.

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[7] *Gilliland and Echelon General Insurance Company*, FSCO A15-004947, August 15, 2016, Arbitrator Robinson.

[8] *Hurst v. Aviva Insurance Company*, 2012 ONCA 837.

Arbitrator Robinson subsequently relied on the maxim *omnia praesumuntur rite acta essa* that has been interpreted as meaning "where acts are of an official nature or require the concurrence of official persons a presumption arises in favour of their due execution" in permitting the Applicant to proceed to Arbitration.

The Insurer submitted that the within case is distinguishable from *Gilliland* because in this case, the Application for Mediation was received and processed by FSCO and a date for Mediation was set. The parties, on consent, agreed to adjourn the Mediation. The Applicant and her counsel failed to attend the Mediation such that no Mediation took place. The Report of Mediator was improperly issued.

Analysis

The issues in dispute in this matter may only be referred to an Arbitrator under s. 282 of the *Act* if the following two pre-conditions are met: the Mediation must have been sought and failed. In this case, the Applicant sought Mediation and a date was set for the Mediation to take place. The Applicant then sought to adjourn the date of her Mediation. A new date was set with the consent of the Insurer. Neither the Applicant nor her representative attended the Mediation on the agreed-upon date. Neither the Applicant nor her counsel has offered any reason for their failure to attend the Mediation. Under Rule 17.1 of the *Code*, parties must participate in good faith in the Mediation process. The Applicant was injured in an accident and sought accident benefits from the Insurer. Once her entitlement to accident benefits is in dispute she must pursue her entitlement to these benefits in the manner proscribed by law. She appropriately sought to mediate her claim. She then failed to pursue that claim by failing to appear at the Mediation without excuse. She has acted in bad faith. Under Rule 17.3 of the *Code*, the Mediator must report to the parties that the Mediation has not taken place. Under subsection 282 of the *Act*, the Applicant is not eligible to refer the issues in dispute to Arbitration. The Ontario Court of Appeal in the case of *Mader*,[9] stated at paragraph 33 of the reasons for the decision that: "Mediation is central to the statutory

[9] *Mader v. South Easthope Mutual Insurance Company*, 2014 ONCA 714.

scheme for resolving disputes between insured persons and their insurers and is a statutory precondition to an insured bringing court proceedings."

In *Cornie*, *supra*, the Ontario Court of Appeal held that:

> the speedy mediation process is part of the legislative scheme to be conducted on a strict timetable in order to settle disputes quickly and economically. The applicant, by her conduct, seeks to by-pass the statutorily proscribed process that is designed to assist her in resolving her claim for accident benefits.

In *Amorini*, *supra*, the Ontario Divisional Court held that without Mediation, the Court has no jurisdiction to hear the appellant's claim.

The *Cornie* and *Leone* cases, *supra*, are distinguishable from the facts of this case and cannot be relied upon by the Applicant in support of her submission that there has been a failed Mediation thereby permitting her to proceed to Arbitration. The *Cornie* and *Leone* cases arose by reason of systemic delay in circumstances where the Applicants were initially willing to participate in the Mediation process but were frustrated in so doing by reason of the that delay.

The Applicant has offered no reason for her failure to attend the Mediation on the resumed date agreeable to her. The facts in this case are more closely related to those in the *Couraud* and *Pararajasingam* cases where the Applicant did not participate in the Mediation and, as in *Pararajasingam*, the Applicant did not attend the Mediation without excuse. I agree with Senior Arbitrator Rotter who, in *Couraud*, stated that if a party frustrates or attempts to short circuit the Mediation process, the Mediator is free to form the opinion that the Mediation did not take place.

The Mediator at the Mediation must make inquiries of the parties and attempt to achieve a consensus on, or a settlement of the issues in dispute between the Insured and the Insurer. The Applicant has failed to give the Mediator the opportunity of doing what he was obliged to do. It is only reasonable for similar cases to be treated similarly, which in turn gives rise to the desirable objective of achieving consistency in administrative decision making. Accordingly, I

follow the *Couraud* and *Pararajasingam* cases and find that the Mediation in this case did not take place.

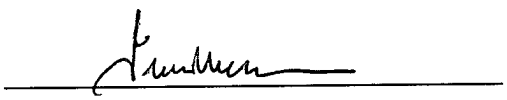
The *Gilliland* case is also distinguishable on its facts from the facts of this case. In *Gilliland,* the matter did not proceed to Mediation through no fault or act of the Applicant. The Application for Mediation was not processed or even considered by FSCO for over one year. No date for Mediation was set. No Report of Mediator was issued. The facts of that case are more closely related to that in the *Cornie* and *Hurst* cases then they are to the facts in this case.

Subsection 280(7) of the *Act* does not refer to circumstances where an Applicant without cause failed to attend the Mediation. In such circumstances, there has been no Mediation which is the precondition to Arbitration. The Applicant has not acted in good faith because she failed to attend the Mediation she sought. The Mediator under Rule 17.3 of the *Code* is permitted to report that the Mediation has not taken place. The provisions found in subsection 280(7) of the *Act* and Rule 17.3 of the *Code* are compatible with each other.

The Application for Arbitration brought by the Applicant is statute barred under subsections 281(1) and (2) of the *Act*. The Application for Arbitration is permanently stayed.

EXPENSES:

If the parties are unable to agree on the entitlement to or the quantum of the expenses in this matter, the parties may request an appointment with me for the determination of same in accordance with Rules 75 to 79 of the *Code*.



Irvin H. Sherman, Q.C.
Arbitrator

November 7, 2016

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-008265

BETWEEN:

DIESHA CHAMBERS

Applicant

and

AVIVA CANADA INC.

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. The Application for Arbitration brought by the Applicant is statute barred under ss. 281(1) and (2) of the *Act*. The Application for Arbitration is permanently stayed.
2. If the parties are unable to agree on the entitlement to or the quantum of the expenses in this matter, the parties may request an appointment with me for the determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Irvin H. Sherman, Q.C.
Arbitrator

November 7, 2016

Date