Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-005555

BETWEEN:

COLLEEN COMEGNA

Applicant

and

AVIVA CANADA INC.

Insurer

REASONS FOR DECISION

Before: Arbitrator Charles Matheson

Heard: In person at ADR Chambers on January 17, 18 and 19, 2017 and by written submissions completed on January 20, 2017

Appearances: Ms. Georgiana Masgras, lawyer, particpated for Ms. Colleen Comegna
Mr. Derek Greenside, lawyer, participated for Aviva Canada Inc.

Issues:

The Applicant, Ms. Colleen Comegna, was injured in a motor vehicle accident on February 13, 2014. She applied for and received statutory accident benefits from Aviva Canada Inc. ("Aviva"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Ms. Colleen Comegna applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

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

The issues in this Hearing are:

1. Is Ms. Comegna entitled to receive a non-earner benefit of $185.00 per week, commencing August 13, 2014 up to December 15, 2014?
2. Is Ms. Comegna's impairment(s) properly characterized by Aviva as predominantly minor in nature and subject to the Minor Injury Guideline ("MIG")?
3. Is Aviva liable to pay a special award because it unreasonably withheld or delayed payments to Ms. Comegna?
4. Is Ms. Comegna entitled to interest for the overdue payment of benefits?
5. Is Aviva liable to pay Ms. Comegna's expenses in respect of the Arbitration?
6. Is Ms. Comegna liable to pay Aviva's expenses in respect of the Arbitration?

Result:

1. The Applicant has no entitlement to a non-earner benefit and is precluded from arbitrating the non-earner benefit.
2. I am unable to find compelling evidence that the Applicant's injuries or impairments are linked to the car accident. Therefore, on a balance of probabilities, I find that the Applicant's injuries fall within the MIG at this time.
3. I have not been able to find any delayed payments of benefits or interest on same, therefore I find that a special award is not applicable.
4. There are no overdue or delayed payments of benefits for which interest could be assessed. Therefore, I find that there is no interest to be awarded.
5. I find and order that the Insurer is owed its reasonable expenses of this Arbitration from the Applicant. Although the Insurer has requested orders granting it its costs, it has not submitted its Bill of Costs. I shall leave the negotiations of expenses to the parties; however, should the parties become unable to resolve the expenses of this Hearing, they shall subsequently schedule an Expense Hearing before me in accordance with the provisions of the *Dispute Resolution Practice Code* ("*DRPC*").

EVIDENCE AND ANALYSIS:

Legislation and Case Law considered

S.(F.) v. Belair Insurance Company, [1996] O.I.C.D. No. 92
Dela Cruz and TD Home and Automobile Insurance Company (FSCO A14-005530, November 20, 2015)
Armean and State Farm Mutual Automobile Insurance Company (FSCO A15-005494, July 19, 2016)
Maude and State Farm Mutual Automobile Insurance Company (FSCO A12-003997, September 30, 2014)
Volpe v. Co-operators General Insurance Company, 2017 ONSC 261

Statutory Accident Benefits Schedule – Accidents on or after September 1, 2010, O. Reg. 34/10

Dispute Resolution Practice Code, Fourth Edition

Background

The Applicant and Aviva reached a settlement of this Arbitration on December 21, 2016. The Applicant then attempted to rescind the settlement which raised the first of four preliminary issues for this Arbitration. The preliminary issues were raised in this sequence:

1) The Insurer raises: Is the settlement of December 2016 enforceable, making this Arbitration moot?
2) The Applicant raises: Is this Arbitrator able to hear this Arbitration after reading the settlement documents?
3) The Applicant raises: Is the Applicant able to withdraw certain issues in dispute at Arbitration?
4) The Insurer raises: Is the Applicant able to bring a non-earner benefit dispute to Arbitration when she did not attend the requested s. 44 examinations for the non-earner benefit?

I shall examine each of these preliminary issues first. I note that the Insurer chose to argue the fourth preliminary issue at the end of the Hearing within closing arguments, after the Applicant rested her case and after the Insurer declined to call any witnesses.

Preliminary Issues

1) Is the settlement of December 2016 enforceable, making this Arbitration moot?

The Insurer argues that the letter, dated December 23, 2016, from Applicant's counsel's office, attempts to confirm that the Applicant rescinds the settlement. The issue for the Insurer is that this letter is not proper notice as contemplated by s. 64(19) of the *Schedule* and/or Rule 7.2 of the *DRPC* and as such, is not a valid rescission, thereby making this Arbitration unnecessary. The Insurer requests that I find and order the settlement valid and binding on the parties. The two provisions the Insurer relies upon read as follows:

> *Schedule*
>
> **Notices and delivery**
>
> 64. (19) A document that is delivered by fax **must** include a cover page indicating,
>
> (a) the sender's name, address and telephone number;
>
> (b) the name of the person for whom the document is intended;
>
> (c) the date of the accident to which the document relates;
>
> **(d) the name, address and telephone number of the person to whom the document relates;**
>
> (e) the date and time the fax is sent;
>
> **(f) the total number of pages faxed, including the cover page;**
>
> (g) the telephone number from which the document is faxed; and
>
> **(h) the name and telephone number of a person to contact in the event of transmission problems with the fax. O. Reg. 34/10, s. 64 (19).**

(Bold added for emphasis)

Dispute Resolution Practice Code

7.2 A document that is served by facsimile **must** include a cover page indicating:

(a) the name, address, telephone number, and (if any) the e mail address (if any) of the sender;

(b) the name of the individual to be served;

(c) the date and time the document is being sent;

(d) the total number of pages being sent including the cover page; and

(e) the name and telephone number and (if any) the e-mail address of an individual to contact in the event of a problem.

(Bold added for emphasis)

The Insurer argues that paragraphs d, f, and h of section 64(19) of the *Schedule* were not complied with as the letter of rescission did not have a cover page with the required information on it. The Insurer submits that the language used in the legislation is mandatory and without these conditions being met renders the rescission letter void, thus making the rescission itself void.

The Applicant argues, in part, that all the required information is present and contained within the rescission letter. The Applicant continues to argue that the lack of a cover page is a small technical defect and that the *DRPC*'s Rules give the Arbitrator the ability to allow the document to stand.

I agree with Applicant's counsel that all the required information is contained within the December 23, 2016 rescission letter.

In my view, the language used by the legislature—in this instance the word "must"—is directorial in nature and not mandatory. The word "shall" as used throughout the legislation is mandatory in

nature. If the legislature wanted a cover page to be included in a faxed document then they would have done so and used a mandatory word. Therefore, I conclude that the Applicant's rescission letter is valid and the Applicant is not bound by the settlement and is able to proceed with this Arbitration.

2) Is this Arbitrator able to hear this Arbitration after reading the evidenced settlement documents?

Applicant's counsel argued that because I read the now-defunct settlement documents, I am prejudiced and no longer impartial. She argues that this Arbitrator should recuse himself from being the Hearing Arbitrator. I note that Applicant's counsel did not present any case law that would support her position.

Insurer's counsel disagreed that I was prejudiced and no longer impartial.

In my view, it does not strike me as odd that the Insurer would offer what it did when it, in its view, thought that the Applicant had no chance of success. I do not know the mindset of either party or the steps that the settlement went through to get to the final documents.

At this point, I do not know what the issues in dispute are or the logic of either party; therefore, I do not believe that I am no longer impartial. I believe that I am able to remain steadfastly neutral, therefore I shall not recuse myself.

3) Is the Applicant able to withdraw certain issues in dispute at Arbitration?

Applicant's counsel wanted to:

a) withdraw the Spinetec Healthcare Solution treatment plans because there were no outstanding incurred amounts at the clinic,
b) withdraw the MIG issue because the medical benefits are no longer in dispute, and
c) limit the non-earner benefit being claimed to December 15, 2016.

I note that all of these disputed issues were previously summarized and listed within the Pre-Hearing letter of Arbitrator Drory, dated January 5, 2017. Applicant's counsel relied upon s. 70 of the *DRPC* to make these last minute requests.

Insurer's counsel objected to the withdrawal of the MIG issue only, and added that the medical benefits as listed in the January 5, 2017 Pre-Hearing letter must be withdrawn with prejudice, as to not allow these issues to resurface at another forum. Further, the Insurer argued that the MIG issue was ultimately attached to the non-earner benefit in this case and it would be inappropriate to remove same in this Hearing. Further, the Insurer argued that the Applicant has submitted an application to the Licensing and Appeals Tribunal and allowing her to withdraw this issue would only allow the Applicant a second attempt to arbitrate the MIG issue.

Applicant's counsel argued that there is case law that suggests that the MIG does not affect an Applicant's ability to collect a weekly benefit, such as income replacement benefits. It is only a threshold test to allow the Applicant to access a second tier of benefits. Applicant's counsel implies that if income replacement benefits are payable within the MIG then this allows for the other weekly benefits (non-earner benefit) to be paid within the MIG. Applicant's counsel did not provide me with any case law to support her position.

In my view, the non-earner benefit is different from the income replacement benefit as the non-earner benefit test is extremely different and meant to be awarded for different reasons.

The non-earner benefit is generally prefaced with a medical condition which removes the applicant from within the MIG, and is severe enough that the Applicant's life has changed to an extreme, usually never to return to pre-accident normal life activities.

I accept that like a catastrophic determination, being removed from the MIG is also a gateway to a higher tier of benefits. But I also view that being removed from the MIG does not entitle any specific benefits to an Applicant, which also mirrors the catastrophic determination. Therefore, more than one MIG determination may be applied for without prejudicing either party.

For the reasons above, I shall allow the withdrawal of the medical benefits on a with prejudice basis, limit the non-earner benefits up to the date of December 15, 2016, and not allow the withdrawal of the MIG argument from this Arbitration.

4) Is the Applicant able to bring a non-earner benefit dispute to this Arbitration when she did not attend the requested s. 44 examinations for the non-earner benefit?

Through the timeline that was submitted in the Applicant's Factum and also contained within the Affidavit of Catherine Raver, the Applicant alleges she was entitled to non-earner benefits from August 14, 2014 and likely would have been successful up to and/or beyond December 15, 2016, as the arguments of Applicant's counsel are effective and concise; however, the Applicant made a critical and fatal mistake when she refused to complete the s. 44 examination of Dr. Syed on October 22, 2016. This is the overriding factor that determines whether or not this issue can be arbitrated at all; therefore, the events leading to October 22, 2016 are of no consequence.

Applicant's counsel argues, in part, that the Insurer's initial notice of the s. 44 assessments were not delivered to the Applicant, therefore she could not be in violation of s. 55. Unfortunately, the facts are that the Applicant was eventually informed of the s. 44 requests and their importance to her claim for non-earner benefits. It was after the Insurer reorganized the s. 44 requests to be held on a Saturday, as requested by the Applicant, that the Applicant refused to complete Dr. Syed's assessment. In my view, the Applicant failed to show her entitlement for the non-earner benefit.

I find myself unable to escape from the jurisprudence which gives meaning to s. 55(2) of the *Schedule,* which reads as follows:

> **Mediation proceeding**
>
> **55.** An insured person shall not commence a mediation proceeding under section 280 of the Act if any of the following circumstances exist:

> 1. The insured person has not notified the insurer of the circumstances giving rise to a claim for a benefit or has not submitted an application for the benefit within the times prescribed by this Regulation.
> 2. The insurer has provided the insured person with notice in accordance with this Regulation that it requires an examination under section 44, but the insured person has not complied with that section.
>
> (Underlined for emphasis)

I find myself in agreement with Arbitrator Arbus in *Maude and State Farm* where he found that the word "shall" is mandatory and there are no exceptions to this subsection. The Arbitrator then confirmed the issue in dispute could not be mediated and by extension could not be arbitrated.

Although Arbitrator Arbus' decision is not binding on me, the recent Ontario Superior Court decision of *Volpe v. Co-operators* is binding on my decision, as it is directly on point. Justice Lofchik found that as a result of non-compliance in completing a s. 44 assessment, the mandatory Mediation, which is the first step in the dispute resolution process for an Arbitration or court action for benefits to proceed, was "invalid and void" and therefore, the litigation proceeding was via a summary judgement.

Therefore, for the above reasons, I find that the Applicant is precluded from arbitrating the non-earner benefit.

The Hearing

2. Is Ms. Comegna's impairment(s) properly characterized by Aviva as predominantly minor in nature and subject to the MIG?

In her testimony, the Applicant complained of being in constant pain, but was not specific to which area of her body the pain radiated from, or the activities in which the pain prevented her from participating.

The Applicant also complained of having several seizures. The first documented seizure was on August 18, 2014 and a second documented seizure was on November 29, 2016. The Applicant strongly suggested that said seizures were a consequence of a head injury from the car accident as the air bags deployed in the accident. There was no evidence provided to me that there is a clear link between the car accident and the seizures via any medical opinions or reports.

To the issue of causation of the seizures, the Insurer relies upon the evidence that the Applicant gave, in which she verified that she fell in her shower, in early August 2014, causing her to have a black eye and to have lost consciousness for a period of time. The Applicant claims the air bag deployed and hit her in the head during the February 2014 accident.

Further, the Insurer asserts that the Grand River Hospital's medical team concluded that these two seizures were related to alcohol withdrawal. The Insurer points to the family doctor's records (both Dr. Arora and Dr. Main) which evidence that the Applicant has been struggling with alcohol for some time. The Applicant made it clear that the Grand River Hospital team did not continue with any tests to confirm their suspicions that the seizures were alcohol related.

The Applicant admits that she did not take any pain medications as a result of the accident but claims she is in constant pain. The Applicant admits to drinking alcohol but does not admit to being an alcoholic. The Applicant points out that she has never had any police charges involving alcohol nor has she had any blood tests which show she had any alcohol in her system. There is no evidence before me that suggests breathalyzers or blood tests show she is an alcoholic.

The Applicant's undisputed evidence is that she lost her licence because of the seizures and not because of alcoholism. I am unconvinced that the Applicant was an alcoholic at any point in her life, therefore alcoholism cannot be considered as a pre-existing condition to be relied upon by the Applicant in order to be removed from the MIG at this time.

The video evidence shows the Applicant walking and shopping while carrying bags of groceries and dog food without any signs of pain or limitations.

The Insurer relies upon three other doctor's reports, besides her family doctors, that outline the same opinions that the Applicant has suffered a minor injury. Dr. Kopyto examined the Applicant on October 27, 2014, and Dr. Paitich examined the Applicant on December 2, 2014; the two doctors found that the Applicant's injuries were predominantly minor in nature. Dr. Valentin examined the Applicant on May 9, 2015 and found that the Applicant had no psychiatric disorders. Dr. Valentin then authored a psychological report on August 18, 2015 that concluded that the Applicant's issues with alcohol pre- or post-accident would not take the Applicant out of the MIG.

The Insurer continued to monitor the MIG issue as late as October 29, 2016 when Derek Adam, an Occupational Therapist, assessed the Applicant and then on November 5, 2016 had Dr. Oshidari examine the Applicant. Both assessors came up with the same results as the previous assessors.

For all the reasons above, I am unable to find compelling evidence that the Applicant's injuries or impairments are linked to the car accident. Therefore, on a balance of probabilities, I find that the Applicant's injuries fall within the MIG at this time.

3. Is Ms. Comegna entitled to interest for the overdue payment of benefits?

There are no overdue or delayed payments of benefits for which interest could be assessed. Therefore, I find that there is no interest to be awarded.

4. Is Aviva liable to pay a special award because it unreasonably withheld or delayed payments to Ms. Comegna?

Pursuant to s. 282(10) of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, where an Insurer has unreasonably withheld or delayed payments, an Arbitrator can, in addition to awarding the benefits and interest to which an insured person is entitled under the *Schedule*, 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 1 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

In this case, I have not been able to find any delayed payments of benefits or interest on same; therefore, I find a special award is not applicable.

EXPENSES:

Section 282(11) of the *Insurance Act* and Rule 75 of the *DRPC* allow for an Arbitrator to award expenses of an Arbitration Hearing. Rule 75 lists the issues that an Arbitrator must consider when deciding the issue of expenses. Rule 75 reads as follows:

> **Award of expenses**
>
> 75.1 An adjudicator may award expenses to a party if the adjudicator is satisfied that the award is justified having regard to the criteria set out in **Rule 75.2**. The items and amounts which may be awarded are found in **Rule 78** and the **Schedule** to the **Expense Regulation** found in **Section F** of the **Code**.
> 75.2 The adjudicator will consider only the criteria referred to in the Expense Regulation found in Section F of the Code. These criteria are:
>
> (a) each party's degree of success in the outcome of the proceeding;
> (b) any written offers to settle made in accordance with **Rule 76**;
> (c) whether novel issues are raised in the proceeding;
> (d) the conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders;
> (e) whether any aspect of the proceeding was improper, vexatious or unnecessary.
> (f) whether the insured person refused or failed to submit to an examination as required under section 42 of Ontario Regulation 403/96 (Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996) made under the Act

or refused or failed to provide any material required to be provided by subsection 42 (10) of that regulation; and

(g) whether the insured person refused or failed to submit to an examination as required under section 44 of Ontario Regulation 34/10 (Statutory Accident Benefits Schedule — Effective September 1, 2010), made under the Act, or refused or failed to provide any material required to be provided under subsection 44 (9) of that regulation.

In consideration of the criteria above in Rule 75, I find and order that the Insurer is owed its reasonable expenses of this Arbitration from the Applicant. Although the Insurer has requested orders granting it its costs, it has not submitted its Bill of Costs. I shall leave the negotiations of expenses to the parties; however, should the parties become unable to resolve the expense of this Hearing, they shall subsequently schedule an Expense Hearing before me in accordance with the provisions of the *DRPC*.

C. D. Matheson

Charles Matheson
Arbitrator

February 21, 2017
Date

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Ontario

FSCO A15-005555

BETWEEN:

COLLEEN COMEGNA

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 Applicant has no entitlement to a non-earner benefit and is precluded from arbitrating the non-earner benefit.
2. I am unable to find compelling evidence that the Applicant's injuries or impairments are linked to the car accident. Therefore, on a balance of probabilities, I find that the Applicant's injuries fall within the Minor Injury Guideline at this time.
3. I have not been able to find any delayed payments of benefits or interest on same, therefore I find that a special award is not applicable.
4. There are no overdue or delayed payments of benefits for which interest could be assessed. Therefore, I find that there is no interest to be awarded.
5. I find and order that the Insurer is owed its reasonable expenses of this Arbitration from the Applicant. Although the Insurer has requested orders granting it its costs, it has not submitted its Bill of Costs. I shall leave the negotiations of expenses to the parties, however, should the parties become unable to resolve the expenses of this Hearing, they

shall subsequently schedule an Expense Hearing before me in accordance with the provisions of the *Dispute Resolution Practice Code*.

C. D. Matheson

Charles Matheson
Arbitrator

February 21, 2017
Date