FSCO A01–000521

BETWEEN:

PARISSA AHANIN

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Lawrence Blackman

Heard: By telephone conference call, December 11, 2001.
Written submissions were received December 10, 2001.

Appearances: Jadranka Cavrak for Ms. Ahanin
Eric Grossman for Allstate Insurance Company of Canada

Issues:

The Applicant, Ms. Parissa Ahanin, was injured in a motor vehicle accident on January 11, 2000. She applied, by Application for Accident Benefits dated January 27, 2000, for weekly income replacement benefits ("IRBs") from Allstate Insurance Company of Canada ("Allstate"), payable under the *Schedule.*[1] By Explanation of Benefits dated February 16, 2000, Allstate specified that Ms. Ahanin was not entitled to IRBs as no disability or employer certificate had yet been returned and the matter was under investigation. In response to the Applicant's subsequent medical assessments, Allstate indicated, by letter dated March 13, 2000, that it wished to obtain, pursuant to section 42 of the

[1] The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96 and 303/98.

Schedule, a "second and independent opinion" on March 31, 2000 through its own insurer medical examination ("IME"). The examination related to IRBs as well as medical/rehabilitation, attendant care and housekeeping/home maintenance expenses. The letter noted the adverse consequences of non-attendance set out in subsection 42(8) of the *Schedule*.

Letters dated March 13, 22 and 28, 2000 from the Applicant's then counsel indicated that because of the Insurer's purported failure to comply with its own obligations under the *Schedule*, the Applicant would not attend an examination at a Designated Assessment Centre ("DAC") (evidently requested by Allstate in a prior March 3, 2000 letter, which was not put before me). A DAC examination is, of course, distinct from an IME.

Nonetheless, the Applicant did not attend the March 31, 2000 IME. The Insurer confirmed the non-attendance with Ms. Ahanin's counsel by letter dated April 4, 2000, maintaining its intention to withhold benefits during the period the Applicant failed to attend either IMEs or DACs.

The Applicant's counsel subsequently wrote Allstate on April 6, 2000, indicating that his client would attend both the IME and the DAC assessment as the Insurer was holding his client "hostage by withholding any and all entitlements." The IME was rescheduled for May 4, 2000.

The Applicant, however, dismissed her counsel and wrote Allstate that she would not attend "the examination" until she was compensated for her lost time. Allstate corresponded directly with the Applicant, advising her of the statutory consequences of non-attendance at both an IME and a DAC (the latter under subsection 43(3) of the *Schedule*). Ms. Ahanin did not attend the May 4, 2000 IME. On June 2, 2000, Allstate wrote the Applicant, again referring her to the consequences of IME and DAC non-attendance under sections 42 and 43 respectively.

Ms. Ahanin subsequently retained her present counsel. By letter dated September 14, 2000, Allstate indicated that:

> Although our position is presently that benefits for income replacement benefit or medical / rehabilitation would not be entitled due to failure to attend an Insurer's Examination related to same expenses and a Medical DAC, I would be pleased to reconsider that position if your client would agree to attend same.

Allstate advises that the Applicant subsequently attended an IME on December 14, 2000. The Insurer maintained its denial of certain benefits claimed under the *Schedule*.

The parties were unable to resolve their disputes through mediation. By letter dated April 9, 2001, Ms. Ahanin applied for arbitration at the Financial Services Commission of Ontario ("FSCO") under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. An initial pre-hearing discussion was held September 20, 2001; a resumption, on November 23, 2001.

By letter dated November 23, 2001, Arbitrator Killoran set out the following preliminary hearing issues for determination:

1. Is Ms. Ahanin permitted to withdraw her claim for income replacement benefits from the arbitration process in order to pursue her claim for income replacement benefits in court?

2. If the answer to the above question is positive, is Allstate permitted to add the issue of income replacement benefits to the arbitration process?

During the preliminary issue hearing, both parties consented to adding the following issue:

3. If the answer to question #1 is in the negative or if the answer to question #2 is in the affirmative, can the Applicant withdraw the entire proceeding, and if so, on what terms?

Result:

1. Ms. Ahanin may not withdraw her claim for income replacement benefits from the arbitration process in order to pursue her claim for income replacement benefits in court.

2. Accordingly, it is not necessary to answer the second question.

3. Ms. Ahanin may withdraw from arbitration all of her dispute, without terms or conditions.

EVIDENCE AND ANALYSIS:

1. Is Ms. Ahanin permitted to withdraw her claim for income replacement benefits from the arbitration process in order to pursue her claim for income replacement benefits in court?

The parties agree, and I so find, that the *Dispute Resolution Practice Code* (Fourth Edition, May 31, 2001) (the "*Fourth Code*") applies to the question of the Applicant's requested withdrawal, the initial pre-hearing herein having been held on September 20, 2001.

Rule 70 of the *Fourth Code* provides that a party may seek permission to withdraw all or part of a dispute. Where another party does not agree to the withdrawal, an adjudicator may permit the withdrawal on such terms and conditions as he or she considers just, including the award of expenses (as permitted under the *Schedule*) and/or an amount up to the amount of the insurer's assessment (in this case, $3,000). The latter term requires as a prerequisite a finding that the insured person commenced an arbitration that was frivolous, vexatious or an abuse of process.

"A withdrawal is not within the sole purview" of an applicant.[2] "Each case is to be dealt with in accordance with the principles of natural justice, and a duty of fairness is owed to all parties."[3] The rule pertaining to a withdrawal "includes a discretion to refuse a withdrawal."[4] I find that these general principles apply to requests for withdrawal of part or all of a dispute.

The Applicant commenced this arbitration by application received by FSCO on April 11, 2001. In her application, Ms. Ahanin sought payment of IRBs, medical expenses, the cost of examinations, interest, legal expenses and a special award. Arbitrator Killoran's initial pre-hearing letter, dated September 26, 2001, notes the Insurer's position that Ms. Ahanin was not entitled to IRBs because she initially failed to attend a scheduled assessment and when she did attend, the medical examiner determined that she did not meet the requisite disability test.

The Applicant firstly argues that she should be permitted to withdraw from this proceeding solely the IRB entitlement issue. As Allstate submits that Ms. Ahanin is disentitled to IRBs from March 13 to December 14, 2000 (in part) for failing to submit to an examination upon being given requisite notice, Ms. Ahanin wishes, if required, to argue for relief from forfeiture, as provided under the *Insurance Act*. Ms. Ahanin submits that she can obtain such relief only from the court, FSCO case law having established that arbitrators do not possess such authority. In the alternative, the Applicant seeks to withdraw her entire Application for Arbitration.

The Insurer does not dispute the Applicant's submissions regarding the power to provide relief from forfeiture. Rather, it submits that the Applicant had, at the outset of the claim, her choice of forum (namely the courts, private arbitration or FSCO arbitration). Allstate argues that at that point in time,

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[2] *Chapman and Allstate Insurance Company of Canada and Wellington Insurance Company* (OIC P-001897 and OIC P-001898, October 6, 1994).

[3] *Ibid*.

[4] *Jevco Insurance Company and Catlos* (OIC P97-00013, September 26, 1997).

the Applicant herself certainly knew or should have known that the subsection 42(8) issue was "very much alive." Allstate specifically points to its letters of March 13, April 4, April 20, and June 2, 2000, all of which speak to the statutory consequences of non-attendance at an IME.

The Insurer further argues that as the Applicant had her choice of forum at the outset of this claim and chose to pursue arbitration, she cannot now split her case between two forums. The Insurer notes the concerns expressed by Director's Delegate Draper in *Non-Marine Underwriters, Mbrs. of Lloyd's and Mangat* (FSCO P00-00020, August 1, 2000) that multiple proceedings "will increase the cost and complexity of litigation, and lead to inconsistent results that undermine the credibility of the system." Director's Delegate Naylor, likewise, in *Allstate Insurance Company of Canada and Miller* (FSCO P99-00026, June 12, 2000) stated that "[m]ultiple proceedings expose parties to the inherent risk of inconsistent results, interminable adjudication and inordinate expense." Allstate further submits that "the Applicant's efforts in this regard are a transparent attempt to maintain part of the claim in arbitration so as not to expose her to an expense award by withdrawing the entire arbitration and proceeding to litigation."

Director's Delegate Draper suggested in *Mangat* that a "pragmatic balancing of interests" approach be taken in such cases. I agree.

In this case, on the one hand, there is the general concern about multiple proceedings noted above. In addition, in the specifics of this case, there is an overlap of potential witnesses such as representatives of the employer, who presumably would be called regarding entitlement to IRBs (should it proceed in court) and the quantum of the weekly IRB (should it continue in arbitration). In addition, the question of entitlement to IRBs appears, on its face, to be intertwined with the issue of the reasonableness of a job site assessment (which the Applicant proposes to leave in arbitration), claimed pursuant to section 24 of the *Schedule*.

As well, in the materials before me, there is a question raised by the Insurer, having obtained a forensic engineering opinion, as to whether "the forces of impact involved" in this accident (see April 10, 2000 letter) "were sufficient to produce an injury, disabling injury or an injury that would require treatment such as that which is being recommended" (see February 18, 2000 letter). This causation issue, as well as perhaps other medical issues, would apply both to IRB and medical expense entitlement.

On the other hand, while the Applicant sought to minimize the significance of the possible adverse consequences of two first-party claims brought against the same insurer by the same insured arising out of the same accident proceeding in two different forums, she failed to advance any reason, let alone any compelling reason, why two separate proceedings should be permitted, as opposed to permitting this entire arbitration to be withdrawn, with or without terms. Indeed, the Applicant's counsel conceded, early in her submissions, that had the Applicant known earlier that Allstate was indeed relying on subsection 42(8), she would have proceeded to litigation rather than arbitration.

Accordingly, "on a pragmatic balancing of interests" and in accordance with a duty of fairness to both parties and to the principles of natural justice, I am not persuaded that I should exercise my discretion to permit the Applicant to withdraw solely her claim for IRBs from the arbitration process in order to pursue her IRB claim in court.

2. If the answer to the first question is positive, is Allstate permitted to add the issue of income replacement benefits to the arbitration process?

As the answer to the first question was in the negative, this issue need not be addressed.

3. If the answer to question #1 is in the negative or if the answer to question #2 is in the affirmative, can the Applicant withdraw the entire proceeding, and if so, on what terms?

As noted above, the Applicant argued, in the alternative, that she be permitted to withdraw all of her dispute herein.

Allstate submits that if the Applicant is permitted to withdraw this entire Application, she should be allowed to do so only on stringent terms, including paying the Insurer's legal expenses fixed at $1,000 (inclusive of G.S.T.) plus $45.17 in disbursements, in addition to paying part or all of the Insurer's assessment fee. Allstate submits that the Applicant has abused the arbitration system by failing, in the face of full notice of the Insurer's reliance on subsection 42(8), to commence her proceeding in the forum where she could advance all possible claims for relief.

The Insurer's letters of March 13, April 4, April 20, and June 2, 2000, noted above, would be very compelling, if they were not in significant measure negated by the last letter from Allstate which I have as an exhibit before me, being that of September 14, 2000. In that letter, the senior claims representative writes, as noted above, that he would be pleased to reconsider Allstate's position that failure to attend an IME or DAC disentitled the Applicant to benefits, if Ms. Ahanin would agree to attend same (which she, in fact, subsequently did).

I have submissions, but little evidence as to what, if any, further discussion was held between the parties regarding Allstate's reliance or lack of reliance on the *Schedule*'s subsection 42(8), following Allstate's September 14, 2000 letter and prior to the initial pre-hearing a year later.

The mandatory mediation herein was held March 22, 2001. At that time, the *Dispute Resolution Practice Code* (Third Edition, April 15, 1997) (the "*Third Code*") was in effect. Rule 22 of the *Third Code* provides that the mediator "will record", amongst other things, "the mediator's description of the issues that were in dispute." The Report of Mediator issued March 22, 2001, however, is silent regarding the Applicant's failure to attend either a DAC or an IME. Rule 23 of the *Third Code* provides that if a party believes that the Report of Mediator is not accurate, it should so notify both the mediator and the other party in order to allow the mediator to consider the comments of the parties and, if appropriate, issue an amended Report. I received no evidence that the mediator had issued any clarification of his Report, or that any request had been made in this regard.

The Application for Arbitration received by FSCO April 11, 2001 and the Response to an Application for Arbitration received May 10, 2001 (using the November 1996 form) are likewise both silent regarding subsection 42(8). Curiously, the Response does raise, regarding medical benefits, the failure of the Applicant to attend a medical DAC assessment. However, I have no indication that subsection 43(3) continues to be an issue.

Section 2.1 of Part D of the *Fourth Code* provides that:

> The insurer assessment charged to an insurer that is named as a party to an arbitration proceeding after March 31, 1997 where an arbitrator is appointed without a neutral evaluation being commenced at the Commission is **$3,000**. The insurer assessment is triggered by the Commission on the due date for filing the ***Response by Insurer to an Application for Arbitration*** **(FORM E)**. The insurer assessment will not be charged where the Commission has received written confirmation that all issues in dispute in the arbitration proceeding have been resolved, provided that the written confirmation is received by the Commission prior to the due date for filing the ***Response by Insurer to an Application for Arbitration***.

This provision encapsulates FSCO's practice prior to the *Fourth Code* coming into effect. This procedure allows the parties a further opportunity to endeavour on their own to resolve matters (now based on the clarifications and information contained in the application and response), either by settlement or withdrawal, prior to the insurer being charged an assessment fee.

I have no evidence of any communication by the Insurer to the Applicant between its letter of September 14, 2000 (reconsidering its position should the Applicant attend the IME) and the pre-hearing discussion of September 20, 2001 that the subsection 42(8) issue was being maintained, or to use the Insurer's words, that this issue was still "very much alive." Nor do I have any evidence that the subsection 42(8) issue had in fact been conclusively abandoned by the Insurer.

The Applicant bears responsibility for failing to confirm the Insurer's apparently equivocal post-September 14, 2000 position regarding subsection 42(8), before making a considered choice as to the appropriate forum in which to proceed to resolve the issues in dispute. However, in the words of Director's Delegate Draper in *Mangat*, "[i]n my view [the insurer] bears some responsibility for the current situation." A significant purpose of both mediation and the arbitral equivalent of pleadings, is to flush out all of the issues truly in dispute and to clarify the positions of the parties. The practice codes provide a mechanism for parties to rectify possible omissions by the mediator. As well, the codes require the issues raised by both parties to be mediated.

Allstate argued vigorously, filing case law in support, that the 1996 amendments to the *Insurance Act* (that the arbitrator shall determine all issues in dispute, whether the issues are raised by the insured person or the insurer), meant that as an arbitrator, I did not have jurisdiction to refuse to add back into this process the Insurer's issue of IRB entitlement and the Applicant's purported failure to attend at an IME, should I initially permit the Applicant to withdraw the IRB entitlement issue. My only comment in this regard is that with statutory rights, also come obligations. As a statement applying generally to all cases, one may say that unfortunate consequences may follow should a party, through inadvertence or otherwise, pay scant attention to correspondence and forms, "boiler plate" pleadings and possibly engage in "gotcha" litigation.

In *Mangat*, Director's Delegate Draper referred to Justice Macdonald's decision in *Victoria Property and Investment Co. (Canada) Ltd. et al. v. Vitznau Management Ltd.* (1978), 22 O.R. (2d) 193 (H.C.J.), which reflected, in the Delegate's view, "a pragmatic balancing of the criteria, with the outcome arising from a concern that the insurer might lose its remedy if it were not allowed to proceed." In the case before me, I have a concern that the Applicant not lose a possible remedy available only in the court. Accordingly, pursuant to Rule 70 of the *Fourth Code*, I exercise my discretion to permit Ms. Ahanin to withdraw all of her dispute.

Regarding possible terms and conditions to this withdrawal, I find that the current situation is contributed to by both parties. On the limited evidence that I have, I am not able to fine-tune the exact degree of responsibility of each party. Nor do I suspect that in this case such an evidentiary inquiry would be productive.

On the evidence before me, I am not able to find that the claim herein was “trivial or inconsequential,” that the application was “designed primarily to inconvenience the Insurer and cause it to go to unnecessary expenses,” or that the conduct “on the part of the Applicant demonstrates a wilful disregard for the arbitration process.”[5] Hence, I do not find that Ms. Ahanin commenced an arbitration that was frivolous, vexatious or an abuse of process, to warrant payment of any part of the Insurer’s assessment fee.

The Insurer conceded in submissions that there was “nothing [subsequent to the September 14, 2000 letter] that speaks to the [subsection 42(8)] issue before the Application for Arbitration was filed.” I note that the Applicant moved quickly to withdraw after this issue apparently next resurfaced at the September 20, 2001 pre-hearing discussion (after mediation and pleadings failed to identify the issue). I am not persuaded that I should exercise my discretion and require the payment of expenses by this Applicant as a term of her withdrawal. As in the appeal decision in *Mangat*, I find it appropriate to have each party bear its own expenses. No other term or condition of withdrawal was requested; none is ordered.

___________________________	January 9, 2002
Lawrence Blackman Arbitrator	Date

[5] *Imalele and Zurich Insurance Company* (FSCO A98-000531, July 19, 1999).

FSCO A01–000521

BETWEEN:

PARISSA AHANIN

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. Ms. Ahanin may withdraw from arbitration all of her dispute, without terms or conditions.

________________________________ January 9, 2002

Lawrence Blackman
Arbitrator

Date