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Appeal P01-00002

**OFFICE OF THE DIRECTOR OF ARBITRATIONS**

MARY GLINKA

Appellant  
Respondent  
on Cross-Appeal

and

DUFFERIN MUTUAL INSURANCE COMPANY

Respondent  
Appellant  
on Cross-Appeal

BEFORE: Stewart McMahon, Director's Delegate

REPRESENTATIVE: Roland Spiegel (for Ms. Glinka)

COUNSEL: Eric Grossman (for Dufferin)

**APPEAL ORDER ON A PRELIMINARY ISSUE**

Under section 283 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, **it is ordered that:**

1. Ms. Glinka's motion alleging bias on the part of the adjudicators employed by the Financial Services Commission of Ontario, is dismissed.
2. Dufferin Mutual Insurance Company is awarded its expenses in relation to the motion, payable in any event of the cause.

December 24, 2001

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Stewart M. McMahon  
Director's Delegate

## **REASONS FOR DECISION**

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### **I. THE ISSUE**

Ms. Glinka has failed to comply fully with the terms of my order of November 13, 2001. The order related to Ms. Glinka's request for an adjournment of her motion alleging bias on the part of the adjudicators employed by the Financial Services Commission of Ontario ("FSCO"). Dufferin submits that a dismissal of Ms. Glinka's motion is the appropriate consequence for what appears to be a deliberate refusal to comply fully with the terms of the order. In addition, Dufferin asks for its expenses associated with the motion, payable forthwith. For the reasons that follow, I accept Dufferin's submission that the proper disposition is a dismissal, and I award Dufferin its expenses, payable in any event of the cause, but not forthwith.

### **II. BACKGROUND**

Ms. Glinka was injured in a motor vehicle accident on September 2, 1998. She applied for and received benefits pursuant to s.14 of the *SABS-96*<sup>1</sup>, in relation to a treatment plan involving various physical therapies. Dufferin Mutual Insurance Company ("Dufferin") denied a request for benefits relating to subsequent treatment plans. It also denied a request made pursuant to s.24, for payment of a number of medical assessments. The matter proceeded to an arbitration hearing, after which Ms. Glinka was awarded some of her treatment expenses and most of the expenses relating to the s.24 assessments.

Ms. Glinka appealed, seeking payment of all the contested benefits. Dufferin also appealed. It did not

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<sup>1</sup>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.

challenge the rulings concerning the treatment expenses, but appealed the arbitrator's award relating to the s.24 assessments.

In the midst of the appeal, Ms. Glinka's representative brought a motion alleging that all of FSCO's adjudicators, including the Director of Arbitrations and his delegates, are biased. Mr. Spiegel has brought a similar motion in all cases in which he acts as a representative. Mr. Spiegel's materials are very difficult to follow, but there appear to be two main thrusts to his argument. One, he asserts that FSCO's adjudicators have used their decision-making authority to advance their own interests. No evidence was tendered in support of these attacks on the adjudicators' integrity. Nor was there even an affidavit from Ms. Glinka expressing concerns about the arbitration or appeal process. Two, he submits that the adjudicators are not sufficiently independent. More details about the background of the motion, and its relation to other proceedings can be found in an earlier decision in this matter, dated November 13, 2001.

Oral submissions on the motion were scheduled to be heard on November 5, 2001. The motion did not go ahead because Mr. Spiegel asked for, and was granted, an adjournment. He advanced two separate but related grounds for the adjournment.

First, he indicated that he had applied for intervenor status in *Liberty Mutual Insurance Company and Persofsky* (FSCO P00-00041), and submitted that all other proceedings should await the outcome of that case. Mr. Spiegel advised that he had not yet heard if he would be granted standing. In the alternative, Mr. Spiegel submitted that even if he was not granted standing, this case should be adjourned until after *Persofsky* has been disposed of. I reviewed his application, and found that it had not been properly completed.

Second, he indicated that he had requested copies of the material filed in the *Persofsky* appeal, but had not yet received a reply. The *Persofsky* appeal involves an insurer's challenge to a special award.

Amongst other matters, the insurer alleges that the structure of the arbitration process leaves a reasonable apprehension that arbitrators may be biased in favour of insured persons. It would appear that the *Persofsky* appeal is the genesis of much of Mr. Spiegel's reasoning, although it is hard to comprehend how an argument mounted by an insurer, alleging bias in favour of insured persons, can form the foundation of a claim by an insured person that the same adjudicators are biased against her. In any event, Mr. Spiegel argued that he intended to rely on the evidence filed in *Persofsky* in support of Ms. Glinka's allegations. I reviewed the request, and it did not appear to me that Mr. Spiegel had made any attempt to obtain the documents other than requesting intervenor status. Reference can be made to my November 13 decision for a fuller discussion of this matter.

In addition, Mr. Spiegel advised that he intended to put the Attorneys General on notice that his clients' *Charter* rights were infringed, but that he wanted to review the materials from *Persofsky* beforehand.

I granted Ms. Glinka's request for an adjournment on the following conditions:

- Ms. Glinka shall immediately file with the Director a properly completed *Application for Intervention in Liberty Mutual Insurance Company and Persofsky* (FSCO P00-00041) matter, together with all necessary statements of service. Ms. Glinka shall file proof of this act, together with a copy of any response by the Director, by Friday, November 16, 2001.
- If the application for intervention is denied, Ms. Glinka shall forthwith take immediate steps to obtain the documents in the *Persofsky* file she seeks to rely upon in these proceedings, and shall file proof of these efforts and any reply from FSCO, within 10 days of the Director's decision on her application for intervenor status.
- Ms. Glinka shall forthwith put the Attorneys General on notice of her intention to pursue a constitutional challenge
- Ms. Glinka shall pay Dufferin \$500.00, payable forthwith and in any event of the cause. Ms. Glinka shall file proof of payment by November 16, 2001.

After I announced the award of expenses in favour of Dufferin, Mr. Spiegel declared that I had no authority to make such an order, and that he intended to challenge my order. To the date of this decision, I have received no indication that Mr. Spiegel has applied for judicial review.

A number of events overtook some of the time-frames I imposed.

First, on November 7, 2001, I received three lengthy faxes from Mr. Spiegel. The first appeared to be the *Application for Intervention* in the *Persofsky* appeal. The last two pages of that document were copies of the first page of a fax to the Attorney General of Canada, and the first page of a fax to the Attorney General of Ontario. I have no way of knowing what was contained in the subsequent pages. If, as I suspect, it was a portion of the *Application for Intervention*, it does not satisfy the terms of my order concerning notice to the Attorneys General of the constitutional issue in this matter. First, it makes no mention of the motion in *Glinka*. Second, it does not contain the information called for in Form 4F of the Rules of Practice, or in Rule 80.2 of the *Dispute Resolution Practice Code*. Amongst other deficiencies, it does not identify the sections of the *Insurance Act* or related Regulations that are being attacked. Finally, no proof of service was filed.

Second, on November 21, the Director of Arbitrations released reasons in *Liberty Mutual Insurance Company and Persofsky*, (FSCO P00-00041, November 21, 2001), and in *Tanzos and State Farm Mutual Insurance Company*, (FSCO, P01-00017, November 21, 2001). In the *Persofsky* decision, he rejected Mr. Spiegel's request for intervenor status. In *Tanzos*, the Director stated that he would not refer Mr. Spiegel's bias motions to an outside arbitrator, nor was he prepared to stay all of Mr. Spiegel's cases pending the disposition of the *Persofsky* appeal. The effect of these two decisions was to leave the delegation of the *Glinka* appeals with me, including the bias motion. The release of the Director's decision in *Persofsky* disposed of the first condition upon which I granted the adjournment.

Third, the Director wrote to Mr. Spiegel on November 29, 2001, to advise him that he could obtain copies of the evidence filed in the *Persofsky* appeal upon payment of FSCO's standard photocopying charge.

In addition, on November 21, Dufferin's counsel wrote to me advising that neither he or his client had received payment in satisfaction of the expenses portion of my order. Mr. Grossman asked me to bring the motion back on to consider the consequences, which he suggested ought to include the possibility of a dismissal of Ms. Glinka's appeal and the striking of her *Response* to Dufferin's appeal.

On December 10, I wrote to the parties to deal with these matters. At the start of the letter, I noted that in the absence of an application for judicial review, the terms of my order had to be complied with.

With respect to evidence filed in *Persofsky*, I set out a procedure and time-frames for requesting the evidence. Mr. Spiegel complied and has been provided with the material.

With respect to notice to the Attorneys General, I indicated that absent proof of proper notice within 10 days, I would not entertain any Constitutional or *Charter* arguments as part of the bias motion. I subsequently received a "cc" of a fax from Mr. Spiegel to Director's Delegate Makepeace that had attached to it a letter from the Attorney General of Ontario indicating that it did not intend to intervene in the *Persofsky* appeal. This decision is not surprising in light of the fact that a lawyer from the Attorney General's office is already participating in the *Persofsky* appeal on behalf of the Ministry of Finance, which had been granted intervenor status. The letter from the Attorney General's office does not suggest in any way that it had received notice of the constitutional challenge in this proceeding or that it had decided not to participate. If this matter had gone ahead, without further notice to the Attorney General, I would not have entertained a constitutional or *Charter* challenge as part of the motion.

Most importantly for present purposes, I indicated that I was not prepared to ignore Ms. Glinka's apparent refusal to comply with the expenses part of my order of November 13, 2001. I addressed the matter in the following terms:

Finally, the fourth condition was payment of Dufferin's expenses "thrown away," fixed at \$500 payable forthwith in any event of the cause. Ms. Glinka was to file proof that she had complied with this aspect of the order by November 16, 2001. No such proof has been filed, and on November 21, Mr. Grossman wrote to advise that the expenses had not yet been paid. I am not prepared to ignore this default. Mr. Grossman has asked that I reconvene the hearing to consider the consequences. He proposes that Ms. Glinka's appeal should be dismissed, and her *Response* to Dufferin's appeal should be struck. Subject to further submissions, I am not inclined to dismiss Ms. Glinka's entire appeal. This sanction would appear to be disproportionate to a default that relates to an interlocutory proceeding. However, I am prepared to consider dismissing Ms. Glinka's bias motion, with costs of the motion payable forthwith. **The parties have until Friday, December 14, to file submissions regarding the consequences that should attach to Ms. Glinka's failure to comply with the expenses order. Please be advised that I do not intend to call for oral submissions on this question, and will dispose of it once I have received the written submissions.** [emphasis in original]

To date, I have received nothing from Mr. Spiegel to suggest that the expenses have been paid, nor has he filed any submissions regarding what if any sanctions ought to apply. Dufferin has filed submissions requesting that I dismiss Ms. Glinka's motion, and that the costs of the motion be payable as a condition precedent to continuing with the appeal.

### III ARGUMENT AND DISPOSITION

Dufferin submits that a dismissal is justified on a number of grounds, including the following:

- the motion has been advanced without any foundation and has no hope of success.
- continuing with the motion prejudices the Insurer by inordinately delaying the hearing and disposition of the appeals.
- continuing with the motion exacerbates the Insurer's exposure for expenses that it can never be properly compensated for.

I accept Dufferin's submission that the appropriate sanction is a dismissal of Ms. Glinka's motion.

In addition to the arguments made by Dufferin, to which I shall return, I am charged with protecting the integrity of FSCO's appeal process. The expenses portion of my order of November 13 was clear and unequivocal. Ms. Glinka had two choices. One, to challenge my order by way of judicial review. Two, to comply with it. She did neither. My letter of December 10 made it clear that I was not prepared to ignore Ms. Glinka's failure to comply, and that she was at risk of having the motion dismissed. Despite this warning, Ms. Glinka did not pay the expenses, or even to try to explain the default. Nor did Mr. Spiegel file submissions regarding the consequences that should attach to the default. The only conclusion I can draw is that Ms. Glinka has no intention of abiding by my order. Allowing Ms. Glinka to continue with her motion, in the face of her deliberate refusal to comply with the terms of my order would bring the administration of FSCO's process into disrepute.

Returning to Dufferin's submissions, they are in essence a complaint that in an effort to afford Ms. Glinka every opportunity to advance her motion, the interests of the Insurer have been ignored, and that no further indulgences should be granted. It puts the matter this way in its submissions:

It is respectfully submitted that FSCO has allowed for an inordinate amount of laxity and discretion to Ms. Glinka. The Commission has made various efforts to protect Ms. Glinka's interests and accommodate her intentions to bring forward Charter challenged [sic] and institutional bias motion. This has been done with little consideration to the fact

that the constitutional challenged [sic] and institutional bias motion have been initiated without factual foundation or merit, and without regard to the considerable expense same has put the Insurer, Dufferin Mutual to, in responding to same.

Without endorsing all of the commentary, I agree that Dufferin's interests must be taken into account. Dufferin has a legitimate appeal that has been effectively put on hold pending the disposition of the bias allegations. It also has an interest in having the appeal brought by Ms. Glinka decided in a timely fashion. In that regard, I note that a portion of the arbitrator's order, including an award of expenses in favour of Dufferin, has been stayed pending the disposition of the appeal.

I noted in my November 13 decision that the motion had virtually no chance of succeeding in its present form. In particular, no evidence had been tendered, and the submissions contained little discussion of relevant principles or jurisprudence. I allowed the adjournment to afford Ms. Glinka an opportunity to put together a better case. The addition of the evidence from *Persofsky* on its own will be insufficient, and I remain of the view that in its present form the motion has virtually no chance of success. Mr. Spiegel appears to have done little else to advance this motion. I have taken this into account in considering the prejudice to Dufferin caused by the delay in adjudicating on the merits of the appeals.

I agree with Dufferin's submission that, in all of the circumstances, the motion should be dismissed, so that the merits of the two appeals can be adjudicated.

Dufferin's request for expenses must be seen against the backdrop of its repeated request that I exclude Mr. Spiegel from the appeal pursuant to Rule 63.6 of the *Dispute Resolution Practice Code*. At the outset of the appeals, Dufferin asked that I exclude Mr. Spiegel, who is not a barrister and solicitor, on the basis that he was not competent to properly represent Ms. Glinka, or that he did not understand or failed to comply with his duties and responsibilities as an advocate or adviser.

Dufferin relied principally on comments in the arbitration decision to the effect that Mr. Spiegel was not competent to represent insured persons appearing at FSCO. After reviewing *Codina v. Law Society of Upper Canada*, [1969] O.J. No. 3348, and *R. v. Romanowicz* (1999), 45 O.R. (3d) 506 (C.A.), I dismissed the motion without prejudice to Dufferin's right to revisit the issue at a later date.

At each stage of the bias motion, Dufferin has repeated its request, pointing to the materials filed by Mr. Spiegel as further proof of his inability to advance the case. I have continued to resist these calls, principally on the basis that the power to exclude an agent has less to do with protecting the interest of the opposing party than with protecting the interests of the party represented by the non-lawyer. My decision of March 7, 2001 chronicled a number of Mr. Spiegel's more glaring failings. Notwithstanding that these circumstances were brought to Ms. Glinka's attention, she signed an authorization permitting Mr. Spiegel to continue to act as her representative. In the face of this, I am reluctant to interfere with her choice of representative. However, as the named party to the appeal, she must bear responsibility for the conduct of the appeal, including exposure to an award of expenses.

Dufferin argues that an award of expenses is insufficient to protect its interests because it is limited to the legal aid scale. To my mind, this is really a complaint about the expense provisions in the legislation, and does not justify exercising a power to exclude the opposing party's agent.

I can see no valid reason for denying Dufferin's request for expenses, which are awarded in any event of the cause. The materials filed by Dufferin make reference to the hours spent on the entire appeal. I ask counsel for Dufferin to file their dockets in relation to the motion and, if it is not apparent on the face of the docket, to distinguish between the time spent by senior and junior counsel.

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Stewart M. McMahon  
Director's Delegate

December 24, 2001