Financial Services Commission | **Commission des services financiers de l'Ontario**

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. The proceedings scheduled for November 5, 2001, are adjourned 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 intervener 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. These expenses are truly "expenses thrown away" in the sense that they could have been avoided if Ms. Glinka had applied for intervener status and made a request for the documents in *Persofsky* in a timely fashion, or at the very least have advised Dufferin's counsel of her intentions. The amount is based upon Mr. Grossman's submission that the time lost due to the adjournment is in the order of six hours, payable at the legal aid rate. I find the estimate of time lost to be more than reasonable.

November 13, 2001

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Stewart M. McMahon
Director's Delegate

REASONS FOR DECISION

I. ISSUE

This decision relates to Ms. Glinka's request that I adjourn the proceedings scheduled to proceed on Monday, November 5, 2001. After hearing from the parties, I adjourned two motions on certain conditions discussed below.

Once I made my rulings, Ms. Glinka's representative, Mr. Spiegel, stated that he intended to challenge the award of expenses in favour of Dufferin Mutual Insurance Company ("Dufferin"). More fundamentally, he stated that I did not have the authority to make any rulings in relation to the matter. After I indicated that I would reduce my rulings and reasons to writing, Dufferin's counsel asked that I also provide written reasons for adjourning its motion, as it wished to consider its options in the event that Ms. Glinka brought an application for judicial review.

II. HISTORY OF THE PROCEEDINGS

I will attempt to trace the protracted course of these proceedings, and their relationship to other proceedings presently before the Financial Services Commission of Ontario ("FSCO").

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*[1], in relation to a treatment plan involving various physical therapies. 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.

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[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.

Ms. Glinka appealed, seeking payment in full, of all the contested benefits. Dufferin also appealed. It did not challenge the rulings concerning the treatment expenses, but appealed the arbitrator's award relating to the s. 24 assessments.

The arbitrator made a number of harsh comments in her decision about Mr. Spiegel's conduct stating that he was not "competent to represent clients before this Tribunal." In these appeal proceedings Dufferin asked that I exercise my authority under Rule 63.6 of the *Dispute Resolution Practice Code*, [now Rule 9.9] to exclude Mr. Spiegel, who is not a barrister and solicitor, on the grounds that he "is not competent to properly represent the party or does not understand and comply with the duties and responsibilities of an advocate or adviser."

By way of a decision dated March 7, 2001, I dismissed Dufferin's motion without prejudice to its right to renew the request at a later date. At the core of my reasoning was the conclusion that the power to exclude an agent is principally designed to protect the agent's client, and the integrity of the tribunal, and that in most instances the opposing party's interests are better redressed by way of costs orders.

On July 3, 2001, the Director of Arbitrations released reasons on a motion to admit fresh evidence in *Liberty Mutual Insurance Company and Persofsky* (FSCO P00-00041). In that case Liberty Mutual brought an appeal relating to the amount of a "special award." Amongst other things, it is arguing that the entire arbitration order should be struck on the basis of institutional bias. Very briefly, the insured person has a choice of forums within which to dispute a denial of benefits. She may bring a proceeding in a court of competent jurisdiction [s. 281(1)(a)], she may refer the issues to an arbitration conducted by an arbitrator appointed by FSCO's Director of Arbitrations [s. 281(1)(b)], or the insurer and the insured person may agree to submit the dispute to a private arbitrator in accordance with the *Arbitration Act*, *1991* [s. 281(1)(c)]. Liberty Mutual argues that in light of this choice, FSCO's arbitrators have a vested interest in encouraging insured persons to elect to arbitrate at FSCO.

More particularly, it argues that because arbitrators do not have sufficient security of tenure, they have reason to make inappropriate use of their power to render a special award against the insurer, thereby making arbitration at FSCO a more attractive option. The Director's decision dealt only with procedural questions relating to Liberty's request to tender fresh evidence, however the basis of the argument discussed above was outlined in the reasons for the decision.

Shortly after the release of this decision, Mr. Spiegel faxed two documents to my attention that raised bias arguments in the context of two appeals that are not before me. The documents were not accompanied by a covering letter, but they had a scribbled notation on the first page advising that they were directed to my attention with respect to the Glinka appeal. I rejected these documents, but invited Mr. Spiegel to submit his argument in the proper fashion.

III. THE MOTION MATERIALS

On July 25, 2001, Mr. Spiegel filed a document that included something styled, SUBMISSIONS ON MOTION TO VOID ALL ORDERS, and REQUEST FOR A NEW HEARING BEFORE "A PROPER BODY" ARISES OUT OF 'INSTITUTIONAL BIAS OR A REASONABLE APPREHENSION OF BIAS." The preamble reads

> this moion [sic] is pursued as a consequence and as an extension/expansion on/to the Director of Arbitrations David Draper's 'Appeal order on motion to admit evidence, in Liberty Mutual Insurance Company and Molly R. Persofsky, (FSCO Appeal P00-00041, July 3, 2001). The 'Motion' arises on grounds of 'institutional bias or reasonable apprehension of bias' as it raises a jurisdictional question of law with reference to 'institutional independence.'

Mr. Spiegel has now advanced this bias argument in all the appeals in which he is acting on behalf of the appellant. More recently, Mr. Spiegel has advanced a bias argument in support of motions to withdraw cases that have not yet proceeded to an arbitration hearing. None of the cases before me, including this one, contain affidavits from Mr. Spiegel's client to the effect that they perceive bias, or that they otherwise believe that they were denied a fair hearing, or any other form of evidence.

Reviewing the body of the motion in this case, it would appear Ms. Glinka is submitting that in light of the arguments being advanced in *Persofsky*, arbitrators may be inclined to deflect criticism by "tilting the scale" in favour of insurers. Ms. Glinka also submits that "institutional bias and/or reasonable apprehension of bias" is caused by reason that the designated assessment centre (DAC) system is "governed, controlled and regulated by the authority of the Superintendent [of Financial Services]....which also governs and directs the FSCO (and the Dispute Resolution Practices and Arbitration and Appeal processes, including Arbitrators, Director's Delegates, and the Director of Arbitration)." In addition, Ms. Glinka submits that the existence of an internal appeal process gives rise to a "direct conflict of interest and institutional bias and/or reasonable apprehension of bias."

By way of relief, Ms. Glinka asks for a stay of the proceedings pending a resolution of the bias issue. In the alternative, Ms. Glinka proposes that "new proceedings are to be conducted before/by ('a proper body') an 'outside (third party) neutral Arbitrator/Adjudicator", to be mutually selected (agreed upon) and appointed by the Applicant (Insured Person) and the Insurer (in accordance with the *Arbitrations Act*)."

Ms. Glinka indicates at paragraph 8 of her submissions that she agrees with the Director's comments in *Persofsky* that there is an advantage to initially having the matter addressed at FSCO. This suggests to me that she intended that I hear and render a decision on the bias issue. To deal with the matter, I asked Ms. Glinka to file any additional materials by September 14, and Dufferin to file its materials by September 28. November 5, 2001 was set aside for oral argument.

At this juncture, Dufferin again raised the issue of Mr. Spiegel's competence. In a letter dated August 23, I replied that I would deal with the Insurer's concerns about the way in which the issue was being advanced, when I considered expenses. I intended to convey by this brief comment, that I was still not prepared to exclude Mr. Spiegel, and thought that any inappropriate behaviour was better dealt with by way of an expenses order.

On August 30, Ms. Glinka filed an "Addendum to Applicant's Submissions on Motion" which contained further submissions, but no evidence. The question of who should deal with the allegations of bias is confused by these submissions. In paragraph 8, Ms. Glinka submits that arbitrators would be placed in a conflict if called upon to rule on the bias issue. In their place, Ms. Glinka proposes that a "proper body" independent of FSCO be appointed in accordance with the *Arbitrations Act.* However, at paragraph 15, Ms. Glinka contradicts herself, and again submits that she agrees with the Director's suggestion in *Persofsky*, that there is an advantage to having the matter dealt with initially at FSCO.

Dufferin filed its materials on September 26. It submitted that the bias issue was not a proper issue for appeal as it was not raised at the arbitration level. In addition, it noted that Ms. Glinka had elected to proceed with an arbitration at FSCO, and questioned under what authority the matter could now be referred to an outside body. Dufferin also renewed its motion to have Mr. Spiegal excluded from the proceedings.

On October 1, Ms. Glinka filed a "Response to Dufferin Mutual's Submissions Ree [sic] Institutional Bias." Who should deal with the bias issue is further confused by these materials. In support of a submission that the bias issue is properly part of the appeal proceedings, Ms. Glinka again refers to the Director's comments in *Persofsky.* Similarly at paragraph 21, she asserts that the "Director of Arbitrations must address the matter and provide a further clarification and/or 'analysis based on a close understanding of the situation' as was referred by him in *Persofsky."* In contrast, at paragraph 30, she submits that "Director's determination" must be made in accordance with the *Arbitrations Act* and referred to the courts. The reference to a court application is repeated in paragraphs 31 and 32, where reference is made to the Director's prerogative to state a case to the Divisional Court. Finally, in paragraph 33 and 34, she submits that the Director and his delegates "must be precluded and rescues [sic] themselves from presiding over any and all such Tribunal proceedings, particularly those concerned with allegations of bias."

In addition to these matters, Ms. Glinka raises the question of a contravention of the Charter, and her intention to advance a constitutional argument. However, Ms. Glinka filed no evidence that she had put the Attorneys General on notice of the question.

IV. THE PROCEEDINGS ON NOVEMBER 5, 2001

Mr. Spiegel and Dufferin's counsel, Mr. Eric Grossman, appeared as scheduled on November 5. Mr. Spiegel commenced by asking that I consider three new documents. Two of them appeared to be bias motions brought in two other proceedings. The third appeared to be a generic motion to the Director asking him to stay all proceedings in which Mr. Spiegel appeared as a representative. Mr. Grossman opposed the introduction of these new materials citing: the directions provided by Rule 54 of the *Dispute Resolution Practice Code - Fourth Edition* regarding the filing of submissions, my direction that Ms. Glinka's submissions were to be filed by September 14, the potential prejudice to his client if he were required to review these lengthy documents at a moments notice, and the fact that Ms. Glinka had already been afforded the privilege of filing addendums and responses.

I briefly reviewed the documents and advised the parties that I would not consider them. Time-frames for the filing of materials cannot be applied rigidly. Nor should they be applied in a fashion that invites abuse. In this case, the following factors militate against considering the new material:

- Mr. Spiegel provided no advance notice of his intention to seek permission to file additional materials.
- The motion materials in the other two appeals presumed a knowledge of the history of those proceedings that I do not have, and appear in part to turn on issues not before me in the Glinka appeal.
- The generic proceeding did not appear to offer anything new.
- Mr. Spiegel has already been allowed to file supplementary materials.

Having made this ruling I asked Mr. Spiegel what relief he was seeking at this time. Mr. Spiegel advised that he was asking for an adjournment. I emphasize that Mr. Spiegel was not asking that I recuse myself, or that I refer the matter to some "proper body." Instead he simply asked that I adjourn the matter indefinitely. Mr. Grossman opposed the adjournment.

Mr. Spiegel advanced two separate but related grounds for the adjournment.

First, he has applied for intervener status in *Persofsky*, and submits that all other proceedings should await the outcome of that case. Mr. Spiegel advised that he had not yet heard if he will be granted standing. In the alternative, Mr. Spiegel submits that even if he is not granted standing, this case should be adjourned until after *Persofsky* has been disposed of.

Second, he has requested copies of the material filed in the *Persofsky* appeal and he needs these to support his argument in this case. Mr. Spiegel advised that he has not yet received these materials. In addition, Mr. Spiegel advised that he intended to put the Attorneys General on notice of his constitutional challenge, but that he wanted to review materials from *Persoksky* beforehand.

Mr. Spiegel provided me with a copy of the *Application for Intervention*, which had attached to it a letter from the Director advising that it was incomplete. Mr. Spiegel submitted that contrary to the Director's advise, the *Application* was complete. I reviewed the materials and found that the second page of the *Application* was missing. This page asks the Applicant to provide statements concerning the reasons for the application, the legal issues on which leave is sought, and the materials to be relied upon. Mr. Spiegel undertook before me, to make a proper application by the next day.

The suggestion that Mr. Spiegel was awaiting delivery of the materials filed in *Persofsky* also requires some comment. If I understand Mr. Spiegel's submission, he suggests that his application for intervener status is also a request for the documents. Mr. Spiegel does not appear to have made any discrete

request for this documentation apart from his request to intervene. Mr. Spiegel did not appear to have given any thought to how to obtain these documents outside of the intervention process.

Dufferin submits that I should refuse the adjournment for the following reasons:

- A lack of courtesy. Mr. Spiegel provided no advanced notice of his intention to ask for an adjournment.
- Mr. Spiegel could have applied for intervener status, requested copies of the materials filed in *Persofsky*, and put the offices of the Attorneys General on notice before hand, and he did not provide any good reasons why he had not done so.
- The entire motion is so ill-founded that it will inevitabley fail, and hence there is no reason to adjourn it.

I have dealt with the first two submissions by awarding expenses that are payable forthwith in any event of the cause. The third submission requires some further comment.

On the materials filed to date, I have significant difficulty understanding the link between the situation faced by Ms. Glinka who elected to advance her claim in this forum, and the situation faced by the insurer in *Persofsky* which appeared to defend a proceeding commenced by its insured. Ms. Glinka's notion of reverse discrimination seems strained at best, and notwithstanding the submission that recent cases support the proposition, no evidence has been tendered to date. However, I am not prepared to say at this stage that the proposition is so devoid of merit that I need not even bother granting an adjournment.

I also have concerns about the foundation of the institutional independence argument, both as it relates to the security of tenure question raised in *Persofsky* and as it relates to the internal organization of FSCO. Many of the complaints being advanced independently by Ms. Glinka, or adopted from the *Persofsky* matter, are rooted in or authorized by legislation. The submissions filed by Ms. Glinka do not evidence any appreciation of the implications raised by this fact, nor do the submissions cite any

jurisprudence or analysis of the factors discussed in recent Supreme Court of Canada cases. Similarly, beyond citing the *Charter*, the submissions evidence no appreciation of the limits of its application. While I am not prepared to say, at this juncture, that the issues raised by Ms. Glinka are so flawed that I need not consider them further, I am prepared to say that unless they are advanced in a more intelligible fashion, they are ultimately doomed to fail. In the circumstances, I am prepared to adjourn the matter so that Mr. Spiegel can properly prepare the case.

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

- Ms. Glinka shall immediately file with the Director a properly completed *Application for Intervention* in the *Persofsky* 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 intervener 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. These expenses are truly "expenses thrown away" in the sense that they could have been avoided if Ms. Glinka had applied for intervener status and made a request for the documents in *Persofsky* in a timely fashion, or at the very least have advised Dufferin's counsel of her intentions. The amount is based upon Mr. Grossman's submission that the time lost due to the adjournment is in the order of six hours, payable at the legal aid rate. I find the estimate of time lost to be more than reasonable.

Immediately after I made this ruling, Mr. Spiegel submitted that I had no authority to make any order other than to refer the matter to a "proper body."

I harken back to my earlier comment that I had asked Mr. Spiegel what he wanted me to do. The motion proper included a preliminary question of who should deal with the allegations of bias. This preliminary question would have involved a consideration of amongst other things; whether I should deal with such questions at first instance or refer them to some other person or institution, and what if any authority I had to refer the matter. The outcome of such a discussion is far from evident. If anything, I am inclined to the view of the Director that there are good reasons for me to deal initially with the allegations of bias myself. Instead, Mr. Spiegel decided not to proceed with the motion at all, and asked that I adjourn the matter. Asking me to adjourn the matter implies that he recognized that at the very least, I have the requisite authority to act on that request. It follows that I have the authority to impose conditions on the adjournment

Finally, I wish to address the manner in which Mr. Spiegel is to file any new materials. He is in the habit of faxing documents to FSCO addressed to an individual with a number of people listed after a "cc" notation. These documents come without any covering letter explaining what the attachments are, who they are intended for, what file they relate to, or what use the author wants the recipients to make of them. When Mr. Spiegel is complying with the terms of this order he shall write a letter addressed to me and properly referencing the name of these proceedings and the appeal unit's file number. The letter shall identify the attached documents and advise why they are being filed. I will not consider any documents that are not delivered in this fashion. I am not prepared to consider copies of submissions filed in other cases. If there are points from these cases that he wishes me to consider, the discreet point should be extracted and filed in the proper form.

Once the request for intervener status has been determined and there is some better idea of what if any documents Ms. Glinka will be able to obtain from the *Persofsky* file, I can be spoken to about fixing a date for the return of the motion. Alternatively, if Dufferin believes that Ms. Glinka has failed to follow through with any of the obligations listed above, it may bring the matter back on.

Mr. Spiegel's generic motion would appear to be an attempt to deal with all of his cases at one time. There is certainly merit in trying to sort out a sensible way to resolve this issue. Hopefully, this can be done once the Director makes a decision regarding Mr. Spiegel's request for intervener status.

Having decided to adjourn the bias motion I also adjourned Dufferin's motion to exclude Mr. Spiegel from these proceedings. In response to Mr Grossman's request for written reasons, I would state very briefly that I intended to address the inconvenience, time and expense caused by the adjournment, at least in part, through an award of expense. I recognize that at $83.75 per hour, the award does not come close to indemnifying the Insurer, but that is the hourly rate stipulated by the legislation. The bias motion and the request to exclude Mr. Spiegel are intimately connected. I think that it would be wiser to deal with them together, rather than dealing with the exclusion in advance.

__________________________ November 13, 2001

Stewart M. McMahon
Director's Delegate