

Appeal P07-00028

**OFFICE OF THE DIRECTOR OF ARBITRATIONS**

ALEXANDER MAZIN

Appellant

and

PERSONAL INSURANCE COMPANY OF CANADA and ROMAN LUSKIN

Respondents

BEFORE: Delegate Lawrence Blackman

REPRESENTATIVES: Mr. Owen Elliot for Mr. Alexander Mazin  
Ms. Heather L. Kawaguchi for Personal  
Ms. Irena Luskin for her son, Mr. Roman Luskin

HEARING DATE: February 27, 2008. Written submissions were received March 28, 2008.

**APPEAL ORDER**

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

1. Messrs. Mazin Rooz Mazin and Mr. Alexander Mazin are permitted to withdraw as Mr. Luskin's representative in the within matter; and,
2. Mr. Mazin has standing as a party in this appeal proceeding.
3. The legal expenses of this motion are deferred to the conclusion of this appeal proceeding, subject to any further or other order of the Director or a Delegate.

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Lawrence Blackman  
Director's Delegate

\_\_\_\_\_  
April 25, 2008  
Date

## **REASONS FOR DECISION**

### **I. NATURE OF THE APPEAL AND BACKGROUND**

Mr. Luskin was involved in a July 13, 2005 car accident. By Application for Accident Benefits dated October 31, 2005, he applied to his first party insurer, the Personal Insurance Company of Canada (the “Personal”), for statutory accident benefits available under the *Schedule*.<sup>1</sup> Following a denial of benefits by the Personal, Mr. Luskin, represented by Messrs. Mazin & Rooz, applied for mediation at the Financial Services Commission of Ontario (the “Commission”).

Mediation held May 9, 2006 was not successful in resolving the issues in dispute between the parties and Mr. Luskin, who continued to be represented by Messrs. Mazin & Rooz, applied for arbitration at the Commission by Application for Arbitration received June 7, 2006.

Pre-hearing discussions were held before Arbitrator Slotnick on February 27, 2007 and before Arbitrator Wilson on April 23, 2007. Mr. Luskin did not attend on either occasion. In his letter dated April 23, 2007, Arbitrator Wilson (hereinafter referred to as “the Arbitrator”) ordered Mr. Luskin to attend personally at a further pre-hearing resumption on May 4, 2007.

Mr. Luskin did not attend on May 4, 2007. At the resumption, the Arbitrator held (as confirmed in his May 25, 2007 written decision) that Mr. Luskin and his counsel, Mr. Alexander Mazin, were jointly and severally liable for the Personal’s expenses thrown away due to Mr. Luskin’s non-attendance, fixed at \$800, payable forthwith and in any event of the cause. Mr. Mazin’s liability was pursuant to clause 282(11.2)(c) of the *Insurance Act*, R.S.O. 1990, c. I.8 (as amended), which provides that:

#### **Liability of representative for costs**

(11.2) An arbitrator may make an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that,

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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.*

- ...
- (c) the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default.

On June 1, 2007, the Arbitrator heard the Personal's motion to dismiss the arbitration. Mr. Luskin did not attend, although he left messages with the Case Administrator that he would not be attending, evidently due to a foot injury.

The Arbitrator orally dismissed the arbitration proceeding and found Mr. Luskin and Mr. Mazin jointly and severally responsible for the Personal's legal expenses, assessed at \$2,551.83, which included the \$800 previously ordered paid. The Arbitrator confirmed his order by letter dated June 1, 2007 and by full reasons in decision format dated October 1, 2007. In his June 1, 2007 letter, the Arbitrator stated that Mr. Mazin remained the solicitor of record as of the June 1, 2007 hearing. He noted that Mr. Mazin's firm "had apparently served notice the day before of its intention to remove itself from the file. No further action had been taken, however."

The Appellant's Notice of Appeal, received by the Commission on October 29, 2007, asked that the Arbitrator's Orders of May 25, 2007 and June 1, 2007 be set aside. The Notice of Appeal noted the Appellant as Alexander Mazin and his legal representative as Alexander Mazin of Messrs. Mazin Roos Mazin.

The Personal filed its Response to Appeal on November 14, 2007. It submitted, in part, that:

According to section 50.1 of the Dispute Resolution Practice Code, only a party to an arbitration may commence an appeal. The appellant, Mr. Alexander Mazin, is the solicitor who represented the applicant, Mr. Roman Luskin, in Mr. Luskin's arbitration proceedings. Mr. Mazin is not a "party" to the arbitration and, in fact, is still the solicitor of record for Mr. Luskin. Therefore, Personal submits that the Appellant is prohibited from commencing this appeal. [emphasis in the original]

Mr. Mazin filed his written submissions with the Commission on December 19, 2007. These submissions clarified that the relief sought was that the legal expense awards against Mr. Mazin personally be set aside, or in the alternative, that the orders be varied to relieve Mr. Mazin of personal liability for the Personal's expenses. No relief was sought regarding the expense awards against Mr. Luskin.

On December 21, 2007, I wrote Mr. Mazin, the Personal and Mr. Luskin confirming my appointment as Delegate and inquiring of Mr. Mazin whether he or his law firm was presently representing Mr. Luskin.

Mr. Mazin's law office responded by letter dated January 10, 2008 that it was their position that their firm no longer represented Mr. Luskin. They submitted that if the Commission felt otherwise, the appeal "does not affect Mr. Luskin's interests and therefore there is no conflict in Mr. Mazin bringing the current appeal on his own behalf." In the further alternative, Messrs. Mazin Rooz Mazin requested being allowed to bring a motion to be removed from the record.

My letter of January 16, 2008 noted that Rule 9 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2003) (the "Code") set out the procedure allowing counsel to be removed as solicitors of record. As I did not see any evidence in the file that these provisions had been followed, I found that Mr. Mazin's office remained counsel of record for Mr. Luskin.

I further noted that Rule 2.04(1) of the *Rules of Professional Conduct* states that:

a "conflict of interest" or a "conflicting interest" means an interest

- (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

My January 16, 2008 letter noted that the Arbitrator ordered both Mr. Luskin and Mr. Mazin to pay legal expenses. The intended result of the appeal, as I understood it, was that rather than both individuals being responsible for these expenses, Mr. Luskin alone should bear this monetary responsibility. Accordingly, I held that:

On the basis of the information and submissions before me, I am persuaded that the Appellant has an interest that would likely affect adversely his judgment on behalf of, or loyalty to, Mr. Luskin and/or that he might be prompted to prefer to Mr. Luskin's interests. Accordingly, I am persuaded that the Appellant has a conflict of interest as regards Mr. Luskin.

On January 17, 2008, the Personal filed its written submissions. It reiterated that Mr. Mazin was not an insured person and, therefore, could not be a party either to an arbitration or to this appeal.

By Notice of Motion dated January 24, 2008, returnable February 27, 2008, the following questions were to be determined:

1. Shall Messrs. Mazin Rooz Mazin and/or Mr. Alexander Mazin be permitted to withdraw as Mr. Luskin's representative in the within matter, and if so, on what, if any, terms; and,
2. What is the standing of Mr. Alexander Mazin in the within proceeding and what, if any, are the consequences thereof?

On February 14, 2008, Mr. Mazin filed his motion to remove Messrs. Mazin Rooz Mazin as solicitors of record. The motion proceeded before me on February 27, 2008.

By letter dated March 3, 2008, I confirmed that Ms. Irena Luskin had appeared at the motion on behalf of her son, Mr. Roman Luskin. Ms. Luskin advised that she had received the January 24, 2008 Notice of Motion. She stated that her son was not attending the hearing as he was working.

Ms. Luskin's main concern was the \$2,551.83 expense order against her son. I indicated to Ms. Luskin that this matter was not before me; that the only present appeal was that of Mr. Mazin regarding the expense orders made personally against counsel. I directed Ms. Luskin to the procedure regarding appeals and variation/revocation under Parts 4 and 5 of the *Code*.

Ms. Luskin indicated she was not able to take a position regarding the issues in the motion, including whether to allow her son's present counsel to be allowed off the record. She stated that her son had not tried to contact any other legal representative to help him in this proceeding.

I stated to Ms. Luskin that if her son wished to retain counsel, he should do so immediately. My March 3, 2008 letter indicated that I would allow Mr. Luskin a further opportunity to retain a representative, should that be his choice, but should I not hear from Mr. Luskin or anyone on his behalf by March 28, 2008, I would proceed to issue my decision regarding the question of representation as well as the issue of standing.

My March 3, 2008 letter also confirmed that further written submissions addressing questions I had raised at the motion regarding Mr. Mazin's standing could be served and filed by March 28,

2008.

The Personal and Mr. Mazin filed their further written submissions with the Commission on March 28, 2008. I have not heard further from Mr. Luskin, himself, or anyone on his behalf.

## II. ANALYSIS

### (a) *Representation*

Rule 9.7 of the *Code* provides that if a representative seeks to withdraw from a proceeding, the representative must, amongst other things, provide a written request for withdrawal, with reasons, to the Dispute Resolution Group and all parties to the proceeding. Rule 9.8 provides that where the represented party does not provide written consent to the representative's withdrawal, an adjudicator may permit the representative to withdraw, subject to such terms as the adjudicator considers just.

The grounds for Mr. Mazin's motion to be removed as counsel of record, as set out in his February 12, 2008 motion record, were that:

- (a) Messrs. Mazin Rooz Mazin had been unable to secure meaningful instructions from Mr. Luskin. In his affidavit, sworn February 12, 2007, Mr. Mazin states that it is his information and belief that Mazin Rooz Mazin had made repeated efforts to contact Mr. Luskin and get instructions and that those efforts continued. No particulars, however, are given of these efforts;
- (b) There had been a material breakdown of the solicitor-client relationship; and,
- (c) As a result of the Arbitrator's orders, Messrs. Mazin Rooz Mazin had been placed in a conflict of interest with Mr. Luskin.

I find, as stated in my correspondence of January 16, 2008, that, pursuant to Rule 2.04(1) of the *Rules of Professional Conduct*, there is a conflict of interest between Mr. Luskin, on the one hand, and Mr. Mazin and his law firm, on the other, that would likely affect adversely counsel's

judgment on behalf of, or loyalty to, Mr. Luskin or that may prompt counsel to prefer his interests to that of Mr. Luskin.

Accordingly, I am persuaded that Mr. Alexander Mazin, and Messrs. Mazin Rooz Mazin should be permitted to withdraw as counsel of record for Mr. Luskin. There was no objection to such an order. Nor was there any request that any terms be imposed on this withdrawal, and none are made.

**(b) Standing**

**(i) The Personal's Submissions**

The Personal notes that Rule 50.1 of the *Code* states that:

50.1 A party to an arbitration may appeal an order of an arbitrator to the Director only on a question of law.

The Personal further notes that subsection 282(1) of the *Insurance Act* only allows an insured person to commence a Commission arbitration. As Mr. Mazin is not an insured person, he cannot initiate an arbitration proceeding. Hence, he is not a “party to an arbitration” and, therefore, cannot advance an appeal on his own behalf. While subsection 282(11.2) of the *Insurance Act* gives an arbitrator the right to order costs against a representative, the Personal submits that it does not give, nor should it be read in, that a representative has the right to appeal such an order.

The Personal relies on *Liberty Mutual Insurance Co. v. Fernandes*, 82 O.R. (3d) 524, wherein the Ontario Court of Appeal held that an insurer cannot commence an arbitration or a court proceeding if it disagrees with a determination of a catastrophic impairment designated assessment centre (“CAT DAT”). The Court stated that “the insurer is not left without a remedy when it wishes to dispute the finding of CAT DAC,” it can commence mediation. If mediation fails, the CAT DAC finding is not binding; rather the insurer can deny a higher benefit available to a person with a catastrophic impairment. The insured would then be obliged to proceed through court, the Commission or private arbitration to determine his or her entitlement.

The Personal argued that the remedy available to a representative facing personal responsibility for legal expenses is the opportunity to make representations, as provided for by subsection 282(11.4) of the *Insurance Act*. A representative's remedy is available only in advance of an expense order; "any further recourse by appeal . . . is not justified nor is it supported by any law." The Personal submits that this is supported by Delegate Makepeace's decision in *Gurevich and Royal and SunAlliance of Canada*, (FSCO P02-00011, September 18, 2002).

The Personal further relied on Delegate Makepeace's decisions in *Gracey et al. and Alamin*, (FSCO P03-00001, September 11, 2003) and *Volfson and Shuster et al.* (FSCO P02-00028, August 7, 2003), which considered the law prior to subsection 282(11.2) establishing the liability of representatives for costs. Delegate Makepeace held that it was settled law that an arbitrator did not have the power to make an expense award against a representative, as the latter was not entitled to commence a proceeding in his or her own name, as decided in her earlier decision in *Adusei and Royal Insurance Company of Canada*, (OIC A-004404, September 7, 1993).

The most significant policy reason in not allowing a representative to personally appeal a decision, in the Personal's view, is conflict of interest. In this case, should Mr. Mazin be successful on appeal, "then the expense award would fall squarely on Mr. Luskin." Allowing a representative to appeal opens the "floodgates for multiple appeals (or multiple arbitrations at first instance)." As an example, treatment providers could personally seek payment of their accounts. The Personal submits that *Becker v. Ontario (Financial Services Commission)*, [2000] O.J. No. 210 supports its submissions that adverse findings against an individual in a decision does not automatically give that individual standing to advance an appeal.

**(ii) Mr. Mazin's Submissions**

Mr. Mazin responds that the Arbitrator's orders effectively add him as a party to this proceeding by making him personally responsible for the Personal's expenses. He submits that pursuant to section 5 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 (the "SPPA"), he is a person "entitled by law" to be a party to the proceeding, and that the "test for whether one is entitled to be a party is whether they have a substantial and direct interest in the outcome of a proceeding."

Mr. Mazin relies upon *Gracey* wherein Delegate Makepeace stated in her appended letter of March 10, 2003 that:

In my view, justice requires that [Mrs. Alamin's representatives] be given an opportunity to appeal that order, in which they have a direct financial interest.

Mr. Mazin argues that if a representative was found to have standing to advance an appeal when the Delegate ultimately found that the arbitrator did not have jurisdiction to award legal expenses against the representative personally, how much clearer is the case now that representative liability has been legislatively enshrined.

Mr. Mazin relies upon *Volfson* as supporting a representative's right to appeal an order requiring the representative to personally pay arbitration legal expenses. Mr. Mazin also submits that *Bershteyn and Spiegel and Allstate Insurance Company of Canada*, (FSCO P04-00020, November 4, 2004) and *McCormack and Aviva Canada Inc. and Isabella & Associates*, (FSCO P06-00024, March 3, 2008) are cases where representatives who had legal costs awarded against them were able to appeal without addressing the issue of standing.

Lastly, Mr. Mazin submits that the rules of natural justice and fairness determine that he should have standing to appeal the Arbitrator's orders.

### **(iii) Decision Regarding Standing**

Subsection 282(11.2) of the *Insurance Act* now provides statutory authority for an arbitrator to make an order requiring a representative to pay legal costs in the circumstances specified.

Subsection 283(7) gives equivalent powers to the Director on an appeal.

Subsection 283(1) of the *Insurance Act* states that:

A party to an arbitration under section 282 may appeal the order of the arbitrator to the Director on a question of law.

However, regarding applications for variation, subsection 284(1) of the *Insurance Act* states that:

Either the insured person or the insurer may apply to the Director to vary or revoke an order made by the Director or an arbitrator appointed by the Director.

*Sullivan and Driedger on the Construction of Statutes*, Fourth Edition (Ottawa: Butterworths, 2002) states, at page 158 that “[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.” The courts have invoked this “presumption against tautology” to, amongst other things, “determine the scope of general terms.” There is also “the presumption of consistent expression,” stated at page 162, that “the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meaning.”

Applications for Variation substantially pertain to material changes occurring in an insured’s circumstances or new evidence becoming available. By their very nature, such applications are personal to the insured and the insurer, rather than also potentially encompassing review of expense orders made against representatives. I am persuaded that the Legislature, by using different terms in subsections 282(1) and 284(1), meant there to be a difference. I am not persuaded that the term “party” in subsection 283(1) of the *Insurance Act* is limited to the insured person and the insurer.

The term “party” is not defined in either the *Insurance Act* or in the *Code*. One, therefore, turns to section 5 of the *SPPA*, which provides the following definition of the term “Parties:”

The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises, or, if not so specified, persons entitled by law to be parties to the proceeding.

As the statute under which this proceeding arises, namely the *Insurance Act*, does not specify who are “parties,” the question is whether, and if so, under what circumstances, representatives are “persons entitled by law to be parties.”

*Wentworth County Board of Education v. Wentworth Women Teacher’s Assn.*, [1990] O.P.E.D. No. 4 (Ont. P.E.H.T.) held that persons who are not expressly required by statute to be parties may be added as parties pursuant to section 5, on the condition they have a substantial and direct interest in the outcome of the case.

In the *Becker* decision, Dr. Becker, by way of judicial review, attacked his treatment as a witness at a Commission hearing. The Divisional Court upheld the finding by the Director of Arbitration that Dr. Becker “had no standing to appeal the decision of the Arbitrator, he not being an insured nor an insurer as defined in the Insurance Act.” The Court noted that:

Here, Dr. Becker had no personal stake in the outcome of the arbitration; nor was he a person that might suffer prejudice because of the result, except to the extent he might suffer in his reputation if his evidence led to findings that he should not be believed . . .

In *Gurevich*, Delegate Makepeace referred to section 5 of the *SPPA* and the question of persons “entitled by law to be parties.” In that case, the issue in appeal was whether an arbitrator could order a representative to pay an insurer’s arbitration expenses. The Delegate rejected the appeal as being premature as the arbitrator had set out an (as yet) uncompleted procedure for the representatives to present evidence and make submissions before a final order was made. However, Delegate Makepeace went on to say that her order that the appeal was premature would not “affect anyone’s right to appeal if the Arbitrator makes a final order for the payment of expenses,” which I take to include the representatives.

As noted above, Delegate Makepeace also, in her letter decision of March 10, 2003 in *Gracey*, held that justice required that representatives be given an opportunity to appeal an expense order in which they had a direct financial interest.

The Divisional Court, in *Royal & SunAlliance Insurance Company of Canada and Volfson et al.*, 2005 CanLII 38902, on judicial review, overturned Delegate Makepeace’s decision (the latter being relied upon by the Personal), and confirmed the arbitrator’s expense order personally against a representative. This was prior to subsection 282(11.2) of the *Insurance Act*, or any specific statutory authority to make such a ruling. The Court held that the adjudicator’s authority was found in the general remedial powers under subsection 23(1) of the *SPPA* to deal with an abuse of process. The Court further held that:

Volfson had a direct interest in the outcome of the hearing. It was therefore necessary and appropriate to give Volfson the opportunity to participate fully in the proceeding in his own right, whether that be by formal party status or otherwise, and the Arbitrator correctly gave him that opportunity.

I find these comments of the Court most persuasive beyond the precise factual situation in *Volfson*. I am persuaded that, unlike a witness called to give evidence at a hearing or a treatment provider whose contractual rights are against the insured person and not the insurer, where an expense award is made against a representative, the latter has “a substantial and direct interest” in the outcome of the hearing such as to justify being entitled by law to be a party for the purpose of advancing an appeal specific to an expense award made personally against him or her.

I am not persuaded that it is sufficient that those against whom an expense award is made are restricted to presenting evidence and making submissions prior to the arbitrator’s decision. While the *Insurance Act* is clear that deference should be given to the decisions of arbitrators (appeals being restricted to questions of law and there being no automatic stay of arbitration orders on appeal) that does not, in my view, translate into *carte blanche*, unfettered discretion.

Appellate review exists because adjudicators are human, and may be subject to error. The need for finality, expeditiousness, and cost effectiveness, on the one hand, and fairness and justice on the other, has restricted appeals from arbitration decisions to questions of law.

I find that when an expense order is made against a representative, their substantial, personal and direct interest in the outcome of the issue makes them a party to the proceeding pursuant to section 5 of the *SPPA*. As such, that person has the right to appeal the expense order of an arbitrator on a question of law, in accordance with subsection 283(1) of the *Insurance Act*. To decide otherwise would allow adjudicators (who are, in the vernacular, “creatures of statute”) to potentially err in law by imposing an expense order against a representative for reasons not provided by statute, or in amounts not sanctioned by legislation, without any available remedy (in the absence of their clients, be it the insurer or the insured, agreeing to advance an appeal).

The Personal raises an important point regarding the issue of a conflict of interest in these cases. Rule 2.04(4) of the *Rules of Professional Conduct* states that a lawyer who has acted for a client in a matter shall not thereafter act against the client. Implicitly, in cases such as this, if the representative is successful, the full brunt of the award falls on the insured person.

Rule 2.04(5) of the *Rules of Professional Conduct* addresses the circumstances when a lawyer's partner or associate can act in a new matter against the lawyer's former client, where the lawyer had obtained in the initial matter, confidential information relevant to the new matter. The *Rules* provide that the partner or associate can act if the law firm establishes that it is in the interests of justice.

I am not persuaded that it is in the interests of justice that there must be a blanket barrier to appeals by legal representatives when expense awards have been made personally against them. However, the appellate officer, in controlling the proceedings under section 23 of the *SPPA*, has the right to decide what, if any, evidence may be admitted from the representative and what submissions may be advanced, without improperly compromising the representative's duty to his or her present, or former, client.

### **III. EXPENSES**

The legal expenses of this motion are deferred to the conclusion of this appeal proceeding, subject to any further or other order of the Director or a Delegate.

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Lawrence Blackman  
Director's Delegate

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April 25, 2008  
Date