



FSCO A09-000013

BETWEEN:

MOHAMMAD IRFAN SHAIKH

Applicant

and

AVIVA CANADA INC.

Insurer

DECISION ON A MOTION

Before: Arbitrator John Wilson

Heard: November 6, 2009, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Ryan M. Naimark for Mr. Shaikh
Kevin Griffiths for Aviva Canada Inc.

Issues:

The Applicant, Mohammad Irfan Shaikh, was injured in a motor vehicle accident on November 4, 2005. He applied for and received statutory accident benefits from Aviva Canada Inc. (“Aviva”), payable under the *Schedule*.¹ Aviva terminated weekly income replacement benefits and subsequently reinstated them several times. The parties were unable to resolve their disputes through mediation, and Mr. Shaikh applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹*The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

While there currently is no claim for an order for payment of income replacement benefits (these are said to be current), Mr. Shaikh is advancing a claim for a special award based on what he considers serial delays in their payment, including some which are said to have taken place subsequent to the application for arbitration.

Just prior to the first pre-hearing in this matter, Aviva brought a motion to strike out the claim for a special award. I declined to hear the motion at the pre-hearing due to the lack of reasonable notice to the insured, and the limited time available. Ultimately the motion was heard at a separate hearing on November 6, 2009.

The issue in this motion is:

1. Is Mr. Shaikh precluded from proceeding to arbitration on the issue of special award since there were no related expenses outstanding at the time that the special award claim was filed?

Result:

1. Mr. Shaikh is not precluded from proceeding to arbitration on the issue of a special award.

EVIDENCE AND ANALYSIS:

This is an unusual matter in which an insurer has moved to strike out a claim for a special award prior to the arbitration hearing. This is unusual in the arbitration context, not only because of the motion to strike out a specific allegation in a pleading (application for arbitration) but also for its subject matter, the special award.

I would emphasize that this motion is not about whether Mr. Shaikh is entitled to a special award in his arbitration, but whether, under the peculiar facts of this case, he is allowed to bring such a claim forward to arbitration.

The insurer alleges that in this particular matter, even if it is accepted that the insurer may have unreasonably delayed or withheld income replacement benefits, there can be no possible grounds to make an award of a special award since it is common ground that no income replacement benefits are being claimed in this arbitration, no income replacement benefits were outstanding at the time that the arbitration application was filed and, and none are outstanding at this time.

Mr. Shaikh, however, points to a series of delayed payments by the Insurer, some for significant periods of time, which were only addressed by Aviva after proceeding to mediation. He points out in each case of delay or stoppage of benefits that there was no legal reason for any withholding of payments by Aviva.

Mr. Shaikh, however concedes that in each case Aviva ultimately paid, in full, the funds owing due to the withheld income replacement benefits and that none were outstanding at the time the application for arbitration was filed.

Aviva for its part concedes, for the purposes of this motion, that any delay or suspension of benefits on its part was unreasonable as that expression is used in section 282 (10) of the *Insurance Act*. It maintains however, that in the light of the wording of section 282(10), that once the arrears are paid there can be no foundation for a special award, if there were no related benefits outstanding at the time of application for arbitration.

Jurisdiction to Dismiss or Strike Out

The striking out of an issue in an application for arbitration prior to a full hearing in the arbitration system is not an ordinary event in FSCO arbitrations. While the *Rules of Civil Procedure* provide a virtually complete code of practice for the courts, *The Dispute Resolution Practice Code* which applies to arbitration is not as comprehensive. In fact there is no specific foundation for a motion to strike a part of a pleading in the *Code*.

However, given Rule 1 of the *Code* which provides for “most just, quickest and least expensive resolution of the dispute,” I find not only is the absence of a Rule not only not a barrier to such motions but that in appropriate situations, such a procedure may provide the “most just, quickest and least expensive resolution of the dispute.

The courts have often justified the striking out of all or part of a pleading by characterizing such pleading as “vexatious” (in the context of “hopeless” litigation).

Vexatious litigation includes situations where the court has no power to grant the relief sought (see *Dreyfus v. Peruvian Guano Co.* (1889) 41 Ch.D. 151); if no reasonable person can possibly expect to obtain relief in it, (see *Lawrance v. Lord Norreys et al.*, (1888) 39 Ch. D. 213); or if the applicant has no proper authority to pursue the remedy (see *R. ex rel Tolfree v. Clark et al.* [1943] O.R. 501).

Although arbitrators are statutory tribunals and not judges with a full panoply of inherent powers, the *Insurance Act* and the *Statutory Powers Procedure Act* endow arbitrators with considerable direct and implied jurisdiction over the issues and parties in dispute. Specifically section 23(1) of the *SPPA* provides a separate and wide-ranging power to deal with an abuse of process.

Like FSCO, various courts in Canada have specific dismissal provisions in their rules of practice, while others do not. Whether or not specifically provided for in their rules all courts in Canada exercise this jurisdiction to dismiss matters or elements of pleadings as part of their inherent jurisdiction.²

As noted earlier, this same inherent jurisdiction of the courts to deal with abuse of process finds its statutory roots in arbitration in section 23(1) of the *SPPA* cited above.³

²*Glenko Enterprises Ltd. v. Keller* [2000] M.J. No. 444 Manitoba Court of Appeal

³See *Royal & SunAlliance Insurance Co. of Canada v. Volfson* [2005] O.J. No. 4523

Consequently I accept that there is jurisdiction for an arbitrator to dismiss a matter or strike out a portion of a claim, other than after a full hearing on the merits, where the continuation of the claim would constitute an abuse of process. In this case the abuse of process would be advancing a claim that had no possibility of success.

It should be noted that a finding of abuse of process in a tribunal setting does not require that the moving party prove that the tort of abuse of process has been committed. Indeed there need not be a conscious intention to abuse the power of a court or tribunal, although that is frequently the basis of such an order.

Notwithstanding the simplicity of the proposition, it is clear that such a power to dismiss should not be exercised except in the most clear and obvious situations:

As has been observed countless times:

The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence.⁴

I find, therefore, that if a pleading, or an element of a pleading, in this case, the claim for a special award, can be characterized beyond any doubt, incapable of success, then I may exercise a discretion to strike out that part of an arbitration claim.

Wilson J., in *Hunt* elaborated on the criteria for the exercise of this discretion:

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat.” Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant

⁴*Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959

to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).⁵

In this case Aviva relies on the wording of section 282(10) to claim that no special award could issue in a situation where, as in the present case, there were no outstanding benefits "to which the person was entitled at the time of the award". According to Aviva no special reward could ever issue in such circumstances.

For reasons which I elaborate on below, I am not convinced that, on the basis of the facts in this case, a claim for a special award is "certain to fail."

Nature of a Special Award

A special award is something that is unique to the arbitration system established in the context of the accident benefits programme. The legislative foundation for the award is set out in Section 282 (10) of the *Insurance Act*:

Special award

If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

⁵See *Hunt*, supra

The special award has been part of the present accident benefit scheme since its inception. Early on the provision was accepted and applied by arbitrators in a straightforward manner. It was clearly perceived to be a means of addressing the difficulties caused to an insured by unreasonable delay or a failure by an insurer to pay accident benefits.⁶

Like much of the accident benefits system there was an unspoken trade-off between the unrestricted damages available in the tort system but which were perceived to be subject to long delays, and the supposedly quicker but more restricted benefits available under a no-fault system.

Prior to the implementation of the no-fault system, an aggrieved party could potentially sue a tortfeasor for damages for economic loss, aggravated damages, and punitive damages. He could also sue his insurer under the law of contract if the insurer refused to indemnify losses covered by the insurance contract.

Under the current arbitration scheme established to regulate disputes over accident benefits, an insured can pursue his or her insurer for specified benefits under the *Schedule*, and a special award.⁷

It seems clear that the intention of creating the special award was to a degree to replace both aggravated damages and punitive damages, which would no longer be available to an insured who opted to take a dispute to arbitration.

While in a court or private arbitration an aggrieved insured could claim compensation for direct economic loss, aggravated damages, and punitive damages, statutory arbitration provides only for adjudication of benefit entitlement, interest (also a benefit) and costs (expenses) as well as a special award. As such the special award fills the gap covered by the absence of both aggravated damages and punitive damages.

⁶See *Plowright and Wellington Insurance Co.* (OIC A-003985, October 29, 1993)

⁷Under the current mixed system there is still a possibility of tort recovery, subject to a steep threshold, and deductibles but such recovery remains outside the realm of arbitration under the *Insurance Act*.

As Arbitrator Palmer noted in *Plowright*, the threshold for a special award is not terribly high. It requires no proof of intent by an insurer, no demonstration of malice, only an unreasonable withholding of benefits.

The decision of Senior Arbitrator Rotter in *Larry Erickson v. The Guarantee Company of North America* (O.I.C. File No. A-000560, dated July 16, 1992) comments on the nature of a special award under the *Insurance Act*. I agree, in general, with those comments. I find no evidence that there was deliberate misconduct or bad faith on the part of the Insurer; I find only that its conduct in terminating Mr. Plowright's weekly income benefits was unreasonable. The standard expected of an insurer's examiner and her supervisors is one of sound and moderate judgment. Unfortunately, this was not manifested in the unreasonable termination of Mr. Plowright's weekly income benefits.⁸

Like the death benefit in s. 25 of the *Schedule*, there is no requirement for the claimant to prove damages. He or she must only demonstrate the unreasonableness of the withholding or delay of benefits.

Just as the *Schedule* assumes that a dependant of a deceased insured has suffered loss, so the legislation also recognizes implicitly that there are consequences to an insured arising from delays and refusals to pay benefits under a contract. In tort or contract these would be addressed by aggravated damages.

Aggravated damages are damages which take into account the additional harm caused to the plaintiff's feelings by such reprehensible or outrageous conduct on the part of the defendant.⁹

⁸See *Plowright* supra

⁹Denis Boivin suggests that even in punitive damage cases more is at stake than just the punishment of the defendant: "D'une part, l'objectif compensatoire camoufle le fait que le comportement de la partie defenderesse est un facteur qui motive generalement l'attribution de dommages-interets majorés. D'autre part, cet objectif rassemble sous la rubrique de dommages-interets majorés une gamme de prejudices non pecuniaires, y compris les souffrances morales, l'anxiété, l'humiliation et l'atteinte à la dignité." *Revue de droit de McGill/McGill Law Journal* (1998) 43 R.D. McGill 221.

On the one hand the compensatory goal camouflages the fact that the conduct of the defending party is the factor which drives an award for exemplary damages (dommages-interets majores). On the other hand, this goal brings together under the heading of aggravated damages a range of non-pecuniary damages including mental distress, anxiety, humiliation and harm to dignity. (my translation – with apologies to Denis Boivin)

Their purpose is compensatory and, being compensatory, would normally form part of a general damage award.¹⁰

Unfortunately only the special award's similarity to punitive damages has been touched on by the most recent appeal decisions. This leaves an open question as to how an applicant is to be fairly compensated for the distress and anguish that may well accompany significant and unreasonable delay in the payment of needed benefits.

While, as in the case of the interest provisions of the *Schedule*, in the special award there is an element of punishment for the delay in paying accident benefits, a special award is more than just "punishment" of an insurer. A key concept in accident benefits is "prompt payment of an income benefit." This is reflected in the wording of section 282(10) dealing with special awards.

Even the author of the appeal decisions in *Liberty Mutual Insurance Company and Persofsky*¹¹, and *Chafe-Moote and Prudential of America General Insurance Company (Canada)*¹², acting as Director's Delegate earlier in his career as an adjudicator, recognized that the lack of prompt payment was undesirable under the scheme of the *Act*:

Section 282(10) is clearly meant to encourage the timely payment of benefits, as are various sections of the *SABS-1994*. A special award is payable if the insurer unreasonably withholds or delays *payments*. The amount of the special award is based on a percentage of the amount to which the person was *entitled* at the time of the award. In this case, however, entitlement was not in issue.¹³

In *Leitgeb and Allstate Insurance Company of Canada*, the then Director's Delegate stated:

¹⁰*Walker et al v. CFTO Ltd. et al.* (1987), 59 O.R. (2d) 104

¹¹(FSCO P00-00041), Appeal, January 31, 2003

¹²(FSCO P99-00044), Appeal, September 8, 2000

¹³See *Persofsky*, *supra*

I agree with the arbitration decisions that have held that a special award is not a claim to be advanced like a claim for benefits . . . Rather, it is a statutory authority, or a direction, given to the arbitrator to make an award if he or she finds that, not only are benefits owing to the applicant, but that they were unreasonably withheld or delayed by the insurer.¹⁴

Until the issuance of the *Persofsky* appeal decision there was a general consensus that:

1. A Special Award was mandatory once a finding was made of unreasonable delay or withholding of payments.
2. The Special award could be based on the overall value of the award made.
3. The quantum of the award could be expressed as a percentage of the total award.
4. A Special Award was not avoided by the Insurer paying up the outstanding amounts prior.
5. A Special Award could be in issue either at the instance of the insured, or the arbitrator hearing the matter, provided only that fair notice is given.

With the appointment of the former Director's Delegate as Director of Arbitrations¹⁵ there was a coincidental and profound shift of focus in appeal decisions to the punitive aspects of the special award, as well as what seems in retrospect to be a purposeful reduction in the availability and amount of special awards.

In *Persofsky* the Director stated unequivocally:

The purpose of s. 282(10) is to punish insurers that unreasonably fail to pay accident benefits promptly, as required by the *SABS* , and to deter that company and others from acting similarly in the future. The size of the special award should be aimed at that purpose. While I am not prepared to say that special awards must be "modest," whatever that means, it is not obvious that they should exceed the amounts typically awarded in bad faith claims involving more serious misconduct.

¹⁴(OIC P-012407, November 16, 1995), Appeal

¹⁵The Director of Arbitrations is a statutory member of the Financial Services Commission that works closely with stakeholders in regulating *inter alia* the insurance industry. S. 2(2) *Financial Services Commission of Ontario Act, 1997*

The new approach as outlined in *Persofsky* was that an arbitrator should:

1. Determine the benefits owing to the insured person, including interest calculated under the applicable version of the *SABS*;
2. Decide whether the insurer unreasonably withheld or delayed the payment of these benefits. If so, the insurer will be ordered to pay a lump sum amount in addition to the benefits and interest calculated in #1;
3. If the insurer did not act unreasonably in respect of all the benefits owing under #1, determine the amount of the benefits that were unreasonably withheld or delayed, and the interest payable on these benefits under the applicable version of the *SABS*.
4. Determine the maximum special award that can be awarded under s. 282(10), or at least a reasonable approximation. This is done by taking the amount in #1 or #3, whichever is applicable, and adding the additional interest component in s. 282(10) — two per cent per month, compounded monthly. To be clear, this calculation includes interest on the unpaid *SABS* interest. The maximum special award is 50 per cent of this total. Expressed as a formula, the calculation is as follows:

Maximum special award = 50% x (benefits that were unreasonably withheld or delayed + interest on these benefits calculated under the *SABS* + compound interest calculated according to s. 282(10))

5. Consider all relevant factors (discussed below) to determine an appropriate lump sum special award, not a percentage, that responds to the facts of the case and bears a reasonable relationship to other special awards, and does not exceed the maximum.
6. Provide reasons for concluding that the special award is payable, and for the amount of the award.
7. In the order, express the special award as a specific, lump sum amount. No interest is payable on this amount, except as part of the enforcement process.¹⁶

¹⁶The courts have been clear in resisting limitations on the application of interest. Boswell J. stated: “To find otherwise would be to allow the insurer to delay payments to insureds without consequence, a result that is not in keeping with the design of the interest provisions of the *SABS*, as described by Mr. Justice Laskin in *Attavar*. To interpret s. 46(2) of the *SABS* as precluding the accrual of interest on overdue interest would effect a result that is, in my view, commercially unreasonable”. *Sorokin v. Wawanesa Mutual Insurance Co.* R.C. Boswell J. [2008] O.J. No. 2141

It is also clear that to the Director, the element of delay referred to in section 282(10) was addressed to a large degree by the statutory interest provisions which he viewed as complementary¹⁷ to a punitive special award, and to be considered in setting the value of such.¹⁸

Certainly such a view of the role of interest was in line with other contemporary FSCO decisions.¹⁹ This view however has been discounted by both the court in *Sorokin* and the court of Appeal in *Attavar vs. Allstate Insurance Company of Canada*:²⁰

It is now well settled that the interest provisions of the SABS are compensatory in nature and not punitive. As such, the decisions relied on by the Defendant, specifically *Lionti* and those that followed are not, with respect, good law, as they are based on the notion that the interest provisions in the SABS are a penalty and not a benefit.²¹

Significantly the Director observed:

The focus on delay is reinforced by the nature of the award. As discussed above, the maximum that can be ordered is based on the amount that was unreasonably withheld or delayed, including interest, plus an additional interest component that magnifies the potential consequences for an insurer that fails to meet its obligations.

¹⁷“Section 282(10) should be viewed in this context. It requires arbitrators to impose a penalty — a special award — where the insurer's conduct goes beyond delay, which is addressed through interest, and amounts to unreasonable delay.” *Persofsky*

¹⁸“Interest has been a matter of some debate. While I agree with the Arbitrator in *Graper and Liberty Mutual Fire Insurance Company* (FSCO A00-000133, July 20, 2001) that interest and special awards are distinct responses, I conclude that the insurer's obligation to pay interest at the high rate imposed by the *SABS* may be a factor in assessing the proportionality of the award - *Persofsky*

¹⁹Arbitrator McMahon said in *Mendez and AXA Insurance Company* (FSCO A96-001355, January 25, 2000) :

However at 2% per month the interest provided for under Bill 68 [the *Schedule*] goes well beyond compensating for loss of use. It is punitive in nature and must be seen as part of a scheme designed to produce prompt payment of benefits.

²⁰ [2003] C.C.S. No. 4464

²¹ See *Sorokin*, supra

Of course, the Director in *Persofsky* did not elaborate on the interaction between delay in payment and the legislative direction that the amount be outstanding at the time of the order.

While there has been no opportunity for the courts to determine the exact nature of a special award, or to interpret the *Persofsky* approach, it is significant that a similar “punitive” approach to statutory interest has been flatly rejected by the courts.

The *Persofsky* decision simply does not address or distinguish the prior jurisprudence with regard to special awards in any detail. Nor is there an attempt to interpret special awards in the context of the accident benefit scheme itself. The decision merely states what the Director seems to feel is obvious. This, notwithstanding the concession at the beginning of the decision that the interpretation of this provision is difficult:

This section is a 92-word sentence. As Director’s Delegate Naylor said in *Jensen and GAN Canada Insurance Company*, (FSCO P96-00079, March 31, 1999), “[t]he meaning of s. 282(10) is not straightforward” - not by any means

To completely ignore the effect of the principles of statutory interpretation which apply in the presence of such acknowledged ambiguity is to cast the value of the decision and the principles it enunciates into doubt.

I note as well that it is not a foregone conclusion that an arbitrator hearing a matter involving a special award will necessarily apply the principles created by the former Director.

While there is no question that arbitrators should take into consideration any appeal decision, including *Persofsky* when deciding a particular issue, it is not at all clear that they are bound to follow suit blindly.²² Rather, it should be examined in the light of the general jurisprudence in that area, and applied, if at all, where appropriate.

²²*TransCanada Pipelines v. Beardmore* (Township) [2000] O.J. No. 1066 : “Moreover, there is a well-accepted principle of administrative law that *stare decisis* does not apply to administrative tribunals. A tribunal is not bound to follow its own decisions on similar issues, although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it. See, e.g., *Evans v. Public Service Commission Appeal Board; Domtar Inc. v. Québec*”

However, the importance of the *Persofsky* approach to this matter is not its underlying assumption that the delay aspect of a special award would be addressed by the provision of statutory interest, but its consequent focus on limiting any special award to the “amount that was unreasonably withheld” by the insurer, rather than the more generalized “the amount to which the person was entitled”. The latter wording, that of the legislation itself, suggests that all potential outstanding entitlements can be used in the calculation of a special award, whether or not the unreasonable actions of the Insurer were directed at that specific element of the claim.

I note in this context that even the *Persofsky* analysis does not sit well with a literal reading of the legislative provision.

To try to understand whether it is possible that a special award could be sustained in this particular matter, it is perhaps best to return to the basics of just what the legislative provision means. While as an example of legislative draughting, section 282(10), may not be a paragon, certain elements of the provision are clear.

If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount.

Where there is a finding of unreasonable delay or withholding of benefits, the legislation mandates a special award. There is no discretion, except as to quantum, which is dealt with in the latter part of the provision.

It is in this second part that the language of the provision becomes more problematic. That portion of section 282(10) dealing with the quantum of the award provides that an arbitrator calculate the award to a maximum of:

50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest)²³

Taken separately from the rest of the provision, this section appears to imply that there must be an entitlement “at the time of the award” for any amount to be ordered. A literal interpretation of this section would lead one to believe that an insurer could pay up a benefit any time prior to the decision of making the award, with no consequence. Since no amount that was merely delayed could be outstanding at the time that a special award was made, the amount of the award could only be zero. A zero award is no award at all.

As has been noted before there is a tension between this provision and the first part of section 282(10) which mandates a special award to be made not only where an amount was withheld unreasonably but where “an insurer has unreasonably withheld or *delayed* payments”.

A delayed payment is one that is actually made, but at a date later than when it was due. Since it was only “delayed” and not withheld, a literal interpretation of “at the time of the award” would make an award solely for a delayed payment impossible.

This, notwithstanding the mandatory nature of an award where there has been a finding of an unreasonably delayed payment. Clearly a strict reading of the section would produce a tension between the mandatory special award for delay in payment, and the necessarily zero quantum of such an award if the amounts owed are paid up prior to adjudication. Such would be an absurdity.

The modern rule with regard to absurdities has been re-stated by Ruth Sullivan:

²³The French version reads: “une somme globale maximale de 50 *pour cent* du montant auquel elle avait droit au moment où l’indemnité a été accordée plus les intérêts sur tous les montants dus à l’assuré à ce moment (y compris les intérêts non payés)” The use of “accordee” removes any doubt that the entitlement is to be read as of the time when an arbitrator makes an award, and not when entitlement to such an award may have crystallized.

- 1) It is presumed that legislation is not intended to produce absurd consequences.
- 2) Absurdity is not limited to logical contradictions and internal incoherence; it includes violations of justice, reasonableness, common sense and other public standards. Also absurdity is not limited to what is shocking or unthinkable; it may include any consequences that are judged to be undesirable because they contradict values or principles that are considered important by the courts.
- 3) Where the words of a legislative text allow for more than one interpretation, avoiding absurd consequences is a good reason to prefer one interpretation over the other. Even where the words are clear, the ordinary interpretation may be rejected if it would lead to an absurdity.
- 4) The more compelling the reasons for avoiding an absurdity, the greater the departure from ordinary meaning that may be tolerated. However the interpretation that is adopted should be plausible.

Avoiding absurdity is only one of the interpretive tools available. Indeed even the resolution of absurdity must be done in the context of the overall spirit of the legislation. The Supreme Court has endorsed this approach as follows:

In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.²⁴

Iacobucci J. went on to observe that:

...where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".²⁵

²⁴*Bell ExpressVu Limited Partnership v. Rex* [2002] S.C.J. No. 43

²⁵See *Bell Expressvu* supra

What that approach entails for the accident benefit scheme set out in the *Schedule* and the *Insurance Act* has been stated by the court of Appeal as follows:

Bill 164 is remedial legislation declared in case law to be consumer protection legislation. The words of the *Act* and Regulations are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature. The Supreme Court, in *Citco Gas v. Alberta*, [2006] 1 S.C.R. 140, para. 37, adopted E.A. Driedger, *Construction of Statutes* (2 ed. 1983) as above set out. In circumstances of ambiguity, the most favourable of two interpretations equally applicable is to be given to the insured.²⁶

According to the Supreme Court the mandate of the accident benefit scheme is consumer protection.²⁷ According to Eberhard J., in *Gill v. Zurich Insurance Company*²⁸ the provisions are to be interpreted in a broad and liberal manner:

I adopt the statement of purpose articulated by Arbitrator Mackintosh at page 12 in *Edgar v. Wellington Insurance Co.* [1994] O.I.C.D. No. 34 File No. A-005441 that SABS is remedial, that is to be interpreted in a broad and liberal way, and that its principal object is to provide a "fair and adequate income stream to those who are injured and disabled from work". The victim is to receive an approximation of wages and not be compensated more or less.

Cameron J. in *Youden v. Economical Insurance Company* identified the trade-off implicit in the accident benefit scheme as follows:

This is remedial legislation. The "no fault" legislation deprived the plaintiff of his common law right to sue for damages for loss of income due to another's negligence. The Regulation provides for prompt payment of an income benefit to replace income lost due to the accident without need to prove fault and in lieu of any amount the plaintiff might have been awarded and recovered at common law.²⁹

²⁶*Hogan v. State Farm Mutual Automobile Insurance Co.* [2008] O.J. No. 50

²⁷*Smith v. Co-operators General Insurance Co.* [2002] 2 S.C.R. 129

²⁸[1999] O.J. No. 4333

²⁹[1996] O.J. No. 2044

It is clear that the unavailability of either punitive or aggravated damages in statutory arbitration means that part of the trade-off included incorporating these heads of damages under the rubric of special award. Consequently the analysis in *Persofsky* is incomplete, founded as it is on a mirroring of punitive damages.

Given these parameters, it is clear that not only is section 282(10) internally inconsistent but that a literal reading of its provisions would run counter to both the consumer protection mandate, and the goal of providing accident benefits to injured persons in a timely manner.

Mandating a special award but requiring that it be zero, if it relates to unreasonable delay, simply does not encourage the timely payment of benefits. As such it is inconsistent with both the consumer protection mandate, and the mandate to provide some sort of compensation to those insured whose payments were unreasonably delayed.

The problem then becomes how to apply the internally inconsistent legislation.

Material errors may slip into a legislative text during the process of drafting or publication. The result may be absurd either in itself, in relation to other provisions of the enactment, or with respect to the aim of the legislation. The law should be interpreted in the light of its aims, passing over obviously defective written expression.³⁰

In this matter, the “obviously defective” provision would be the reference in the section to “at the time of the award” in the context of the “amount owing”. Indeed to remove this phrase from consideration would be to approach a special award in the same manner as Arbitrator Joachim in *Rocca and AXA Insurance (Canada)*:³¹

I find nothing in section 282(10) of the *Insurance Act* which allows an Insurer to defeat the imposition of a special award by making payment just before the commencement of the hearing. The subsection specifically refers to payments

³⁰Pierre-André Coté *Interpretation of Legislation* 3d edition Carswell 2000

³¹(FSCO A97-000903, March 10, 1999)

which have been “unreasonably withheld or delayed”. In my view, a withholding or delaying of benefits until shortly before the hearing can attract a special award, if the Insurer’s actions are unreasonable.

This has long been the position taken by arbitrators at FSCO simply because it makes sense in the context of the accident benefit scheme, and it is the alternative interpretation most favourable to the insured, as suggested by the court in *Hogan*.³²

While Mr. Shaikh’s entitlement to a special award for delayed payments could be rendered nugatory if the hearing arbitrator strictly followed the spirit of the scheme set up in *Persofsky*, limiting a special award to those benefits actually withheld, and owing at the time of the award, such an approach would run contrary to the jurisprudence at the Commission, including decisions issued by the former Director himself.

Overlooking for the moment the gloss put on special award by the *Persofsky* appeal, even if section 282(10) were to be applied literally, it would still be possible for an arbitrator to make a special award, provided that there is some other benefit owing at the time of the award. Such would be consistent with both the reasoning of Director’s Delegate Naylor in *Jensen v. GAN Canada Insurance Co.*³³ and the literal reading of the provision.

Given that Mr. Shaikh still has some other outstanding claims against Aviva, it is not out of the realm of possibility that a positive special award could be made calculated as a percentage of those claims, provided that an arbitrator accepts them, since those claims could well constitute an amount to which the person was entitled at the time of the award.

While the latter scenario might not be as attractive to Mr. Shaikh as a special award calculated on the delayed income replacement benefits, it would sustain the possibility of a special award and ensure that “if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat” by striking out the special award claim.

³²*Hogan supra*

³³(FSCO P96-00079), March 31, 2009, Appeal

Finally, from the point of view of providing a timely, efficient and cost-effective manner of resolving disputes, striking the issue of special award would not necessarily have the effect envisaged by the Insurer.

The jurisprudence³⁴ is clear that an arbitrator always retains the discretion to raise the issue of a special award, subject only to the rules of natural justice with regard to notice, and the opportunity respond to the issue. Thus whether the Applicant's claim for a special award is struck at his point in the proceedings, it may well re-appear at the instance of the arbitrator should he or she be satisfied that the pre-conditions of such an award exist.

It is always possible that, as disclosure progresses in a matter, an applicant may discover further and possibly different grounds to advance a claim for a special award. Consequently, a decision striking the issue of a special award at this early stage of the process will not necessarily be more efficient.

Conclusion:

While I accept that an arbitrator has the power to dismiss a matter or to strike out an element of a pleading or claim, where the continuance of that claim would be useless and constitute an abuse of process, the threshold for such an order is high.

As the Supreme Court noted in *Hunt*, such an order should be made only in "plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence."³⁵ Such is not the case here.

³⁴ See Directors Delegate Makepeace in *Zurich North America Canada & Stargratt* (FSCO P01-00045), March 31, 2003, Appeal:

It has long been accepted that the issue of a special award may be introduced by an arbitrator though not pleaded by the applicant. The leading case is *Clark and Royal Insurance Company of Canada*, in which Director's Delegate Draper rejected the insurer's contention that the arbitrator could not order a special award because it did not receive notice of that issue before the hearing.

³⁵See *Hunt*, supra

I have found that, given a finding of unreasonable delay or withholding of benefits, it is altogether possible that an arbitrator could order some sort of special award, whether under the traditional jurisprudence (pre-*Persofsky*), or based on a contextual and purposive interpretation of the provisions of section 282(10) of the *Insurance Act*.

Given such a finding it is not “plain and obvious” that the claim for a special award will not succeed. Consequently this motion must be dismissed.

EXPENSES:

Given his success in this matter, it would be normal, in the absence of other factors, to award Mr. Shaikh his expenses incurred in this preliminary issue hearing.

Consequently, counsel for Mr. Shaikh should serve and file a brief summary of expenses as soon as possible. If the parties are unable to reach an agreement as to the disposition of expenses, either party may apply for a determination, provided that such is done within 30 days of the delivery of the costs summary.

John Wilson
Arbitrator

December 30, 2009
Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A09-000013

BETWEEN:

MOHAMMAD IRFAN SHAIKH

Applicant

and

AVIVA CANADA INC.

Insurer

ARBITRATION ORDER

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

1. Mr. Shaikh is not barred from proceeding with his claim for a special award in this matter.

John Wilson
Arbitrator

December 30, 2009

Date