Financial Services Commission of Ontario

Dispute Resolution Services
Appeals Unit
5160 Yonge Street, 15th Floor
Box 85
Toronto ON M2N 6L9

Enquiries: (416) 250-6714
Fax: (416) 590-7077
Toll Free: 1-800-517-2332
Web Site : www.fsco.gov.on.ca

Commission des services financiers de l'Ontario

Services de règlement des différends
Unité de l'appels
5160, rue Yonge, 15ième étage
Boîte 85
Toronto ON M2N 6L9

Renseignement: (416) 250-6714
Télécopieur: (416) 590-7077
Sans frais: 1-800-517-2332
Site web : www.fsco.gov.on.ca

Ontario

April 15, 2009

Mr. Hassan Fancy
Fancy Barristers
Barristers and Solicitors
5975 Whittle Road, Suite 120
Mississauga ON L4Z 3N1

Mr. Robert Robinson
Beard Winter LLP
Barristers and Solicitors
130 Adelaide Street West, Suite 701
Toronto ON M5H 2K4

Dear Mr. Fancy and Mr. Robinson:

RE: B and RBC General Insurance Company
Commission Appeal File №: P09-00005
Claim №: 01538125200405121

Enclosed please find a copy of the decision of the Director's Delegate, Lawrence Blackman, in the above matter.

Yours truly,

S. McNally

Sandy McNally
Appeals Administrator

Encl.
Copies to:

Mrs. Sonia Bains
4674 Bunker Avenue
Windsor ON N9G 3A8

Ms. Mina Cosolo
Accident Benefits Manager
RBC General Insurance Company
6880 Financial Drive
West Tower, 3rd Floor
Mississauga ON L5N 7Y5

Appeal P09-00005

OFFICE OF THE DIRECTOR OF ARBITRATIONS

B

Appellant

and

RBC GENERAL INSURANCE COMPANY

Respondent

BEFORE: Delegate Lawrence Blackman

REPRESENTATIVES: Mr. Hassan Fancy and Mr. Aman Sekhon for B
Mr. Robert A. Robinson for RBC General Insurance Company

HEARING DATE: April 8, 2009

APPEAL ORDER

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

1. Pursuant to Rule 50.2 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2003), I exercise my discretion to accept this appeal from a preliminary decision.

2. Pursuant to subsection 283(6) of the *Insurance Act*, R.S.O. 1990, c. I.8, I exercise my discretion to stay the arbitration expense hearing.

Lawrence Blackman
Director's Delegate

April 15, 2009
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

The Appellant, B, was injured in May 12, 2004 motor vehicle accident, and applied to RBC General Insurance Company of Canada (the "Respondent") for statutory accident benefits payable under the *Schedule*.[1] The Appellant also applied to the Respondent, pursuant to section 40 of the *Schedule*, for a determination that she had sustained a catastrophic impairment as a result of the accident. The parties were unable to resolve their dispute on the latter at mediation and the Appellant applied for arbitration at the Financial Services Commission of Ontario.

A fifteen-day arbitration hearing was heard before Arbitrator Murray (the "Arbitrator") in 2008. In her January 16, 2009 decision, the Arbitrator found that the Appellant did not sustain a catastrophic impairment within the meaning of clauses 2(1.2)(f) and (g) of the *Schedule*. The Arbitrator further held that if the parties could not agree on entitlement to or the amount of legal expenses, they were to request a determination of same in accordance with Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2009) (the "*Code*").

By Notice of Appeal dated February 13, 2009, the Appellant appealed the Arbitrator's decision on several grounds, with accompanying particulars. The grounds for appeal included that the Arbitrator misapprehended or mischaracterized the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 (the "*Guides*"). The Appellant also argued that there was a reasonable apprehension of bias.

The Appellant requests, in part, that the Arbitrator's decision be revoked and that it be determined that the Appellant has been catastrophically impaired as a result of the accident.

The Notice of Appeal indicated that the appeal was from a preliminary decision. The Appellant sought leave to advance this appeal. She also requested a stay of the arbitration proceeding,

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

including any expense hearing. The Appellant submitted that the preliminary issue hearing was to have been followed by a hearing regarding, amongst other issues, her entitlement to medical, rehabilitation, attendant care and case management expenses.

The Appellant argues that Rule 79 of the *Code* does not allow the Arbitrator to address the issue of legal expenses before all of the issues in dispute have been determined. The Appellant submits that, in addition to other alleged errors, contrary to Rule 79 the Arbitrator has now set a two-day expense hearing.

The Appellant requests leave to bring this appeal for the following reasons:

1. The Appeal raises important and novel legal issues, including (a) whether the possibility of improvement by an insured person from future surgery means that certain impairments should not be rated, and (b) whether certain impairments, such as a sleep disorder, can be combined with emotional and behavioural impairments.

2. There is sufficient strength and merit to the appeal, the reasons for the appeal being "meticulously detailed in eight primary grounds and one hundred and thirty-five particulars," and the "appeal is almost certain to succeed." Further, the evidence and arbitral orders were meticulously documented in the exhibit and transcript evidence.

3. There is urgency to this appeal as the Appellant's rights to medical and rehabilitation benefits are now seriously limited. Accordingly, if the appeal is not accepted at this time, the Appellant will suffer great prejudice, whereas there is no prejudice to the Respondent.

The Appellant requests a stay of the arbitration expense hearing for the following reasons:

1. The appeal is *bona fides*.

2. The appeal raises important and novel legal issues, as set out above.

3. Many of the grounds of the appeal apply equally to the substantive issues of entitlement

to statutory accident benefits.

4. There is no hardship to the Respondent if a stay is granted, but not granting a stay would cause the Appellant undue hardship, as the Respondent is seeking over $70,000 in legal expenses.

Upon being appointed, pursuant to subsection 6(4) of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, as Delegate to exercise the powers and perform the duties of the Director of Arbitrations as necessary in this matter, I wrote the parties setting time lines for the exchange of written submissions regarding the preliminary issues of whether to accept this appeal and, if so, whether to grant the requested stay.

By letter dated February 20, 2009, the Respondent consented "to a stay of the Arbitration pending the results of the Appeal as obviously the entitlement to the benefits [claimed] depend on a CAT finding."

In its Response dated March 17, 2009, the Respondent submitted that the appeal, being from a preliminary issue decision, should be rejected as premature. The Respondent, however, clarified in its oral submissions on April 8, 2009 that it was not objecting to this appeal proceeding, only that the appeal should be held down until the arbitration expense hearing is completed. The Respondent submitted that the Appellant had failed to provide adequate reasons in support of a stay of the expense hearing pending the resolution of the Appeal.

The Respondent submitted, more generally, that the Arbitrator did not err in law or fact, nor was there any bias or reasonable apprehension of bias or breach of procedural fairness by her. Rather, the Respondent submitted that the Arbitrator had carefully and appropriately considered all of the evidence in reaching her decision, the latter being both supported by the evidence and consistent with prior case law.

II. ANALYSIS

Rule 50.2 of the *Code* provides that:

> A party may not appeal a preliminary or interim order of an arbitrator until all of the issues in dispute in the arbitration have been finally decided, unless the Director orders otherwise.

In *Allstate Insurance Company of Canada and Torok*, (FSCO P01-00021, May 29, 2001), Delegate Makepeace set out the following criteria in determining whether to accept an appeal from a preliminary or interim order:

> The purpose of Rule 46.2 is to facilitate the most cost-effective resolution of disputes by minimizing the time and money spent on procedural or collateral matters. The decision whether to hear an appeal of a preliminary order is discretionary. As Delegate Naylor stated in *General Accident and Glynn*, the over-arching principle guiding the exercise of the discretion is that the rule "should be broadly interpreted to produce the quickest, most just and least expensive resolution of the dispute." The criteria to be considered include the apparent strength of the appeal, the importance or novelty of the issue raised, and whether rejecting the appeal or hearing it will prejudice either party . . .

In this case, I exercise my discretion pursuant to Rule 50.2 of the *Code* to accept this appeal from a preliminary order of an arbitrator, for the following reasons:

1. The Respondent has now clarified that it does not oppose this appeal being accepted, subject to its submissions regarding the arbitration expense hearing being completed.

2. Given the Respondent's agreement that the main arbitration proceeding should be stayed pending the results of the Appeal "as obviously the entitlement to the benefits [claimed] depend on a CAT finding," there is no rational reason to reject this appeal at this time as premature.

3. Accordingly, I am persuaded, in accordance with Rule 1.1 of the *Code*, that the most just, expeditious and least expensive resolution of this dispute is to accept this appeal at this time. In addition, it is the result that least prejudices the parties.

4. The question of whether, in the context of determining catastrophic impairment, it is inappropriate to rate an insured person's impairment until the completion of future treatment and recovery, is, by itself, an important and novel issue.

Subsection 283(6) of the *Insurance Act* provides that an appeal does not stay the order of an arbitrator, unless the Director decides otherwise. Thus, in *Guardian Insurance Company of Canada and Armstrong*, (FSCO P00-00037, July 20, 2000), Delegate McMahon stated that a "stay is the exception rather than the rule …the drafters of the legislation recognized that the insurer is in a much better position than the insured person to bear the risks inherent in not staying the arbitrator's order."

In *Armstrong*, Delegate McMahon, adopted Delegate Richardson's criteria in *Canadian Home Assurance Company and Scavuzzo*, (OIC P-000626, May 18, 1992 as to whether a stay should be granted, namely:

1. the *bona fides* of the appeal;
2. the substance of the grounds for appeal; and,
3. the hardship to the respective parties if the stay is granted or refused.

In this case, I exercise my discretion pursuant to subsection 283(6) of the *Insurance Act* to stay the arbitration expense hearing, notwithstanding the Respondent's agreement that any expense order by the Arbitrator should be stayed. My reasons for doing so are as follow:

1. I am persuaded that this expense hearing varies from most expense hearings, which are commonly by telephone conference call and take less than an hour, or are completed solely on the basis of written submissions.

   I am advised that two days have been set aside for this expense hearing, in person at the Commission. I acknowledge the Respondent's agreement to have the expense hearing by telephone and to limit its oral submissions to two hours. However, given the Appellant's combined 72 pages of submissions in the Notice of Appeal and her written argument on these preliminary issues, and the tenor, at times, of the oral submissions, I am persuaded that it is unlikely that the expense hearing will be completed in one day.

2. An expense hearing in this arbitration proceeding, at this time, will be far from straightforward. I am persuaded that the Arbitrator, in determining entitlement to and the quantum of legal expenses, will be asked to essentially re-evaluate her decision as well as

address the question of her alleged bias. In advancing a different argument, the Appellant noted, section 286 of the *Insurance Act*. The latter provides that an arbitrator appointed by the Director of Arbitrations cannot vary or revoke an order made by him or her and cannot make a new order to replace an order made by him or her if the order is under appeal. I am persuaded that the Arbitrator is going to be asked, at least indirectly, if not to vary her order, to vary her prior reasons and/or findings.

The Respondent raises an important point that in terms of time and expense it is preferable to complete the outstanding matters relating to a preliminary issue which has been accepted in appeal so as to have all of the issues arising from the preliminary decision addressed at the same time. In this particular case, however, I am persuaded that an arbitration expense hearing will, if it proceeds, in significant measure duplicate this present appeal. I am persuaded that this is not the most optimum expenditure of time, effort and legal costs.

3. Rather, I am persuaded in the specific circumstances of this case that it would be most expeditious, cost efficient and just to determine this appeal, which *prima facie* raises, at a minimum, the important and novel issue noted above. The determination of this appeal should, whatever its result, narrow and hone the issues truly relevant to the arbitration expense hearing and thus, overall, save time, expense and effort.

I wish, however, to note that I am not persuaded that Rule 79 of the *Code* only allows expense hearings once all issues in dispute, except expenses, have been determined.

Firstly, Rule 79 addresses procedure, not jurisdiction. In circumstances where the hearing arbitrator has bifurcated, that is hived off, the issue of legal expenses from all of the other issues in dispute, once the initial arbitration decision is released, a time limit of thirty days from the date of the decision begins to run for either party to request an expense hearing.

Consistent with Rule 79 as addressing procedure is subsection 282(11.1) of the *Insurance Act*. The latter provides that an arbitrator may, "at any time during an arbitration proceeding make an interim award of expense, subject to such terms and conditions as may be established by the

arbitrator." If there is any conflict between the *Insurance Act* and the *Code*, the *Insurance Act* prevails.

III. EXPENSES

Rule 75.2 of the *Code* provides that one criterion in determining entitlement to legal expenses is each party's degree of success in the outcome of the proceeding. I am presently persuaded that it is preferable to defer the legal expenses of this preliminary issue appeal decision to the final determination of this appeal, subject to any further or other order of an adjudicative officer.

Lawrence Blackman
Director's Delegate

April 15, 2009
Date