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Date: Wednesday, December 13, 2017 11:46:48 AM

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MESSAGE:

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December 13, 2017

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Dear Mr. Campisi Jr. and Ms. Samworth:

RE: Celia Yang and Co-operators General Insurance Company
Commission Appeal File №: P17-00073
Claim №: 000404658

Ms. Yang has filed a *Notice of Appeal* from the arbitration order dated October 2, 2017, along with a *Statement of Service* on Co-operators General Insurance Company, and a cheque for $250.00.

The Director of Arbitrations has appointed me to hear and decide this appeal, as allowed by s. 6(4) of the *Insurance Act.*

Before the appeal proceeds any further, I must decide whether to acknowledge it or reject it as premature pursuant to Rule 51.2(c) of the *Dispute Resolution Practice Code.*

On October 18, 2017, I wrote to the parties directing them to provide comments in regard to allowing the appeal of this preliminary order to proceed further. I have received comments from Mr. Campisi Jr. and his reply. Ms. Samworth has also provided comments.

I. BACKGROUND

The Appellant appeals a preliminary order rendered by Arbitrator Musson on September 13, 2017. On that date, the Arbitrator heard a motion brought by the Respondent to reschedule the upcoming arbitration to a later date. The Arbitrator determined the Appellant had served a new

CAT report immediately prior to the hearing of the motion. He noted the new findings in that report, and stayed the arbitration hearing to allow the Insurer to provide a rebuttal report.

At the same motion, the Arbitrator "... agreed that the Insurer can request an in-person assessment of the Applicant to determine whether or not the Applicant's injuries meet the threshold of being CAT."

The Appellant then took issue with the proceedings and brought a motion that the Arbitrator recuse himself from this matter, arguing that the Arbitrator had demonstrated a closed mind, and that there was a reasonable apprehension of bias with respect to the issues in dispute. A motion to determine whether this reasonable apprehension of bias existed was then heard in writing.

The Arbitrator reviewed the written materials submitted and concluded the Appellant had failed to meet the test to demonstrate that a reasonable apprehension of bias existed in the present case, or that he had demonstrated an actual bias. Accordingly, the Arbitrator refused to recuse himself from the hearing.

II. NATURE OF THE APPEAL

The issue is whether Ms. Yang should be allowed to appeal the Arbitrator's preliminary order. Ms. Yang seeks the following orders:

-an order setting aside the Arbitrator's decision of October 2, 2017 for reasons given

-an order setting aside the order staying the arbitration date for the purpose of providing a rebuttal report

-an order setting aside the order of Arbitrator Musson allowing the respondent to request an in-person assessment of the Appellant for the purpose of determining whether or not the Appellant meets the CAT threshold

-an order that Arbitrator Musson recuse himself from further involvement in this file

-an order that the issue of whether or not the Appellant must attend any further in-person CAT insurer assessments be heard before a different arbitrator at FSCO.

III. ANALYSIS

This is an appeal of a several preliminary issue decisions rendered by the Arbitrator. The relevant law in this matter is found at Rule 50.2 of the *Dispute Resolution Practice Code* which reads as follows:

> 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.

The rationale for this rule was considered in the decision of *Allstate Insurance Company of Canada and Torok* (FSCO P01-00021, May 29, 2001). In that decision, Delegate Makepeace made the following comments in regard to Rule 50.2, which at that time was Rule 46.2:

> The purpose of Rule 46. 2 is to facilitate the most cost-effective resolution of disputes by minimizing the time and money spent to 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 criterion 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. (at page 5)

In her Notice of Appeal and comments, Ms. Yang argues: (1) the Arbitrator misapprehended and misapplied the test for determining whether a reasonable apprehension of bias exists; (2) made errors in misapprehending the facts in regard to the recusal; (3) failed to provide intelligible reasons with respect to staying the arbitration date; (4) failed to provide intelligible reasons with respect to allowing the respondent to request an in-person assessment; (5) failed to provide intelligible reasons with respect to his statement that comments by him "were taken beyond the context" and; (6) and exceeded his jurisdiction by rendering a decision without a hearing arguments from either party when his role was to create a timetable for parties' responding motions.

Based on my perusal of the preliminary order and without making any final decision at this time, I find the arguments raised by Ms. Yang are of sufficient apparent strength to allow the appeal of this preliminary order to proceed.

In its materials, the Respondent set out the grounds and relief sought in the motion it brought before the Arbitrator on September 13, 2017:

(1) That the arbitration hearing be stayed pending the insurer's completion of an IE CAT determination *paper review* by Dr. Hines; [emphasis mine]

(2) An order limiting and/or restricting the type of contact between the Applicant and/or her counsel and the insurers' expert witnesses participating in the Arbitration hearing;

(3) An order limiting the number of witnesses to be made available for cross-examination by the Applicant and quashing the Summons to Witness served on Mr. Wessling, CEO of the insurer, Dr. Schwartz, Dr. Mayer, Dr. Eisen, Ms. Romas, Mr. Livadas and Dr. Somerville.

The Arbitrator ultimately issued an order not only staying the arbitration, but also ruled that the Insurer could request an *in-person assessment* of the Applicant to "... determine whether or not the Applicant's injuries meet the threshold of being CAT." He based his decision on the fact that

the Insurer had sought to re-assess the Appellant due to the passage of time since the initial exam and the new information in the Appellant's recent CAT report.

Nevertheless, these were not the grounds or relief sought in the motion that was *actually* before him. That motion makes no mention of an in-person insurer's examination or the CAT report that was served immediately before the hearing of the motion. Nor does it appear that the Arbitrator addressed himself to section 44(5) of the *SABS*, which requires the Insurer to first provide a notice and reasons for such an insurer's examination. It is also unclear why the Arbitrator thought it would be "helpful" to the parties to "cooperatively" agree to dates for this in-person assessment before any notice had been sent, and when the Appellant opposed attending at this insurer's examination.

In making these decisions, the Arbitrator may have exceeded his jurisdiction and denied the Appellant natural justice or may have created a reasonable apprehension of bias. Accordingly, I am allowing the appeal of the preliminary order to proceed. I am also staying the arbitration proceeding in this matter, pending the disposition of this appeal.

IV. ACKNOWLEDGMENT

I acknowledge receipt of Celia Yang's Notice of Appeal along with a Statement of Service on Co-operators General Insurance Company in this matter, and her filing fee of $250.00.

Your attention is directed to Rules 50 through 60 and Rule 75 of the *Dispute Resolution Practice Code*. The *Dispute Resolution Practice Code*, Fourth Edition, updated October 2003, is available for review on our web site, www.fsco.gov.on.ca, at page 89.

Upon receipt of this letter, the Respondent has 20 days to complete and file a Response to Appeal pursuant to Rule 53 of the *Code*. However, I prefer to set timelines, which I propose as follows:

Response to Appeal: January 22, 2018
Written Submissions, Appellant: February 26, 2018
Written Submissions, Respondent: March 19, 2018
Reply, Appellant: march 26, 2018

If you require any additional information, please call Ms. Clare Fernandes at (416) 226–7830, or toll free at 1–800–517–2332, extension 7222.

Yours truly,

Edward Lee
Director's Delegate

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