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Ontario

June 27, 2018

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JUN 29 2018

Ms. Philippa Samworth
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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

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

Yours truly,

Melanie Fischer
Case Administrator

Encl.

Copies to:

Ms. Celia Yang
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Appeal P17-00073

OFFICE OF THE DIRECTOR OF ARBITRATIONS

CELIA YANG

Appellant

and

CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent

BEFORE: Edward Lee

REPRESENTATIVES: Joseph Campisi Jr. for Ms. Yang
Philippa Samworth for Co-operators

HEARING DATE: Determined on the record

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The Arbitrator's order of October 2, 2017 is set aside in its entirety.

2. Arbitrator Musson is recused from further involvement in FSCO File No. A13-015345-ET.

3. The motion originally scheduled to be heard by Arbitrator Musson (which included the request for a stay of the hearing pending the insurer's completion of an Insurer's examination catastrophic determination paper review) is sent back to be heard by a different arbitrator.

4. The parties may contact the Commission in regard to expenses of this proceeding in accordance with the *Dispute Resolution Practice Code*.

Edward Lee
Director's Delegate

June 27, 2018

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This matter involves the *SABS–2010.*[1]

This is an appeal of a decision rendered by Arbitrator Musson ("the Arbitrator") on October 2, 2017, wherein he declined to recuse or disqualify himself from further participation in this matter on the grounds that there had been a reasonable apprehension of bias on his part.

Ms. Yang, ("the Appellant") now seeks an order

1. that the Arbitrator's order of October 2, 2017 be set aside;
2. that the issue of whether or not the Appellant must attend further in-person CAT insurance assessments be heard before a different arbitrator;
3. that the Arbitrator be recused from further involvement in FSCO file A13-015345;
4. granting costs of the motion before Arbitrator Musson and costs of the within appeal payable by ADR Chambers and Cooperators General Insurance Company ("Cooperators"), if opposed.

II. BACKGROUND

This appeal arose following a motion that was conducted by the Arbitrator on September 13, 2017 by teleconference. In attendance at the motion were four representatives of the Appellant and one representative of Cooperators.

The original purpose of the teleconference was to hear a motion brought by Cooperators for following relief:

[1] *The Statutory Accident Benefits Schedule — Effective September 1, 2010,* Ontario Regulation 34/10, as amended.

(i) That the Arbitration hearing be stayed pending the insurer's completion of an Insurer's examination catastrophic determination paper review;

(ii) An order limiting and/or restricting the types of contact between the applicant and/her counsel and the insurer's expert witnesses participating in the arbitration hearing;

(iii) An order limiting the number of witnesses to be made available for cross-examination by the applicant and the quashing of the summons served on various witnesses.

Just prior to the commencement of the motion, a representative of the Appellant sent a CAT assessment report to the representative for Cooperators. At the motion, the representative for Cooperators stated that because of the receipt of this CAT report, Cooperators would require the Appellant to submit to two in-person assessments.

This statement led to a discussion between the representatives of the Appellant and the Arbitrator about the proposed in-person assessments. The Arbitrator agreed that Cooperators could request an in-person assessment of the Appellant to determine whether or not her injuries met the CAT threshold. He also agreed to stay the arbitration date to allow Cooperators to complete its catastrophic insurer examination report (the "paper review" rebuttal report sought by Cooperators in its original motion, although it appears the Arbitrator neglected to rule on the other relief that had been sought in that original motion).

The input by the Arbitrator on the question of in-person assessments led the Appellant to then bring a motion that the Arbitrator recuse himself from further involvement in this matter. It was agreed that this motion would be heard in writing. The Appellant filed submissions, two decisions, and two affidavits in support of its motion. Cooperators responded by filing submissions and two decisions.

On October 2, 2017, the Arbitrator issued his order and reasons setting out why he refused to recuse himself from the hearing and other proceedings involving this Appellant, wherein he

determined that the Appellant had failed to prove a reasonable apprehension of bias existed in this case, or that an actual bias had been demonstrated.

The Appellant then filed an appeal of the Arbitrator's decision on or about October 5, 2017, raising the grounds to be discussed herein. On October 6, 2017, the Arbitrator issued a series of email communications to the representatives of the parties. These communications were not disclosed to me until mid-December 2017, after I had acknowledged the Notice of Appeal filed by the Appellant in October 2017.

The Arbitrator's emails included the following statement:

> Mr. Murray,
>
> There should be no ambiguity. The motion which you put forward was only related to my recusal from the hearing and is there a reasonable apprehension of bias. I was not asked to rule on in-person assessments, therefore I did not render a decision on that matter.
>
> This was my decision on your motion.
>
> *"After reviewing the submission from both parties and reviewing the case law I find the Applicant has failed to meet the test to demonstrate that a reasonable apprehension of bias exists in the present case. Further, the Applicant has also failed to prove that I demonstrated an actual bias. As a result, I will not recuse myself from hearing and the Applicant's motion is denied. In addition, the issue of costs related to this motion will be addressed at the hearing."*

In February 2018, I convened a discussion between the parties at the request of Cooperators' counsel to address concerns she had set out in her letter of December 15, 2017, which included a copy of the email communication excerpted above. As a result of that discussion, I excluded the affidavit of S. Guiguis, dated November 6, 2017, from the appeal hearing.

I made no other rulings as a result of that discussion, and I noted that counsel agreed that based on the Arbitrator's email communication, his order of October 2, 2017 did not constitute a ruling on the question of in-person insurer's examinations. In fact, the Arbitrator had made no order in regard to in-person insurer's examinations.

Written submissions were then submitted to me for the appeal of the October 2, 2017 decision. In its submissions, Cooperators argued that as result of the February 2018 discussion, the Appellant would only proceed in one issue: "whether Arbitrator Musson erred in law by declining to recuse himself from hearing further motions and/or prehearings on the grounds of bias?"

In fact, I did not note that as a result of the February 2018 discussion that the Appellant had agreed to withdraw the other grounds or issues in her appeal.

Accordingly, I find the following issues remain to be decided in the appeal of the Arbitrator's order of October 2, 2017;

(a) Did the Arbitrator err in law by misapprehending and misapplying the test for showing that a reasonable apprehension of bias exists?

(b) Did the Arbitrator make overriding and palpable errors in misapprehending the facts to the issue of the recusal and ignoring affidavit evidence provided by the Appellant?

(c) Did the Arbitrator fail to provide intelligible reasons with respect to his statement that comments by him on the file "were taken beyond the context of the discussions," without saying more?

III. ANALYSIS

(i) Did the Arbitrator err in law by misapprehending and misapplying the test for showing that a reasonable apprehension of bias exists?

The legal tests for determining whether a reasonable apprehension of or an actual bias exists were set out in the jurisprudence presented to the Arbitrator by the parties. In the Supreme Court of Canada decision of *Wewaykum Indian Band v Canada,* the judges set out the test as follows:

> The test is "reasonable apprehension of bias." Actual bias need not be proven; all that is required is that based on all of the facts, there is a reasonable apprehension that bias exists. There is no need to prove that an adjudicator is not acting in good faith, as the

> adjudicator may have been unconsciously biased. The question that needs to be asked is whether a reasonably informed person would apprehend that there was conscious or unconscious bias in the part of the arbitrator. Would a responsible person see justice as being done?[2] [Emphasis mine]

In *Allstate Insurance Co. of Canada and Sharma and the Financial Services Commission of Ontario ("Allstate and Sharma")*[3], the Divisional Court held the following:

> Allstate's submission raises the question whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide faintly. Actual bias need not be established. The matter has to be determined on the probabilities based on the circumstances of the decision. The apprehension of bias must rest on serious grounds in light of a strong presumption of judicial impartiality. The inquiry is highly fact specific.[4] [Emphasis mine]

Arbitrator Musson did indeed cite the ruling from *Allstate and Sharma*, but it is trite to say that he must do more than merely cite a ruling. He must also have applied it in his determination as to whether or not to recuse himself.

I find the Arbitrator erred in law in misapplying and misapprehending the test for showing a reasonable apprehension of bias exists. First, he erred when he rationalized his actions in his decision in the follow manner:

> In the ensuing discussion with both parties, I believed that it would be helpful if both parties were able to cooperatively agree to dates where the Applicant would be available for an insurer's assessment due to the well-known upcoming FSCO deadline for the completion of the hearing.[5]

In this statement, the Arbitrator justified the words he used in his discussion with the parties. Specifically he stated he "believed it would be helpful if both parties were able to cooperatively agree to dates." Here, he misapprehended the test set out by the Supreme Court in *Wewaykum*. It was an error of law for the Arbitrator to rationalize his words because he "believed" it would be "helpful" to the parties.

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[2] *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259
[3] 2009 CanLII 71001 (ON SCDC)
[4] Page 6 of decision
[5] Page 3 of decision

As set out in *Wewaykum*, the good faith of the decision maker is irrelevant to the determination as to whether a reasonable apprehension of bias was demonstrated. In fact, as stated by the Supreme Court, "the arbitrator may be unconsciously biased". Therefore the Arbitrator's defense of his words based on his own belief in seeking the parties to cooperate constituted an error in law.

Further, by suggesting that the parties could have "cooperatively agree[d]", a reasonable and informed person could determine the Arbitrator was in fact adopting what would be the Insurer's position on in-person assessments.

The Arbitrator repeated this error when he went on to say the following in his decision.

> The applicant stated I was combatant in manner. I disagree. As an arbitrator it is imperative to guide the process so that the hearing can take place in an orderly and efficient manner. Further, I deny and there is no proof that I made submission on behalf of either party and to suggest so is factually not true.

Once more, whether or not the arbitrator was trying to "guide the process" was not the examination he was required to make under *Wewaykum*. These were errors of law where the Arbitrator misapplied the test as to whether a reasonable apprehension of bias existed.

(ii) Did the Arbitrator fail to provide intelligible reasons with respect to his statement that comments by him on the file were "taken beyond the context of the discussions" without saying more?

Cooperators argues that there was no requirement for the Arbitrator to provide reasons for his decision because the motion for recusal was but an interim decision or order,[6] and cites section 16.1(3) of the *Statutory Powers and Procedures Act* (the *"SPPA"),* and *Barlett v. RBC General Insurance Company*[7] as authority for this proposition.

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[6] Page 8 of Responding Factum of Cooperators
[7] FSCO A10-000013 (August 31, 2011)

Nonetheless, section 16.1(3) of the *SPPA* reads as follows:

> (3) an interim decision or order need not be accompanied by reasons [emphasis mine].

This provision only indicates that an interim order need not be accompanied by reasons. It does not say that if reasons were issued, they are impervious to appellate scrutiny or judicial review.

In the present case, the Arbitrator provided written reasons for his decision. Many interim decisions issued by arbitrators at FSCO are accompanied by reasons, and such reasons have very often been the subject of appeal or judicial review before the Courts. The mere fact that these reasons stem from interim proceedings does not insulate them from appeal or review. Further, the decision of *Barlett* is of no help to Cooperators, because in that case, the arbitrator explicitly issued his decision "without reasons."[8]

The reasons given by the Arbitrator about his "comments" were as follows:

> From a review of the motion materials, it is clear the Applicant took issue with what they have determined as being comments made by me on the file when in fact, my comments were taken beyond the context of the discussion.[9] [Emphasis mine]

I agree that the Arbitrator failed to give intelligible reasons when he simply stated that his comments were "taken out of context."

Further in his decision, the Arbitrator stated the following:

> The applicant stated in their materials that I was combatant in manner. I disagree. As Arbitrator it is imperative to guide the process so that the hearing can take place in an orderly and efficient manner. Further, I deny and there is no proof that I made submissions on behalf of either party and to suggest so is factually untrue.[10] [Emphasis mine]

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[8] Ibid
[9] Page 8 of decision
[10] Ibid

Here, the Arbitrator erred in law by again attempting to justify his actions, but he also compounded this error by not addressing the evidence of the uncontested affidavits of S. Guiguis and C. Champagne.

Both affidavits referenced Arbitrator Musson making submissions to the parties about the issue in dispute. In her affidavit, C. Champagne stated the following (at paragraph 14):

> Arbitrator Musson "submit[ed]" that the insurer is entitled to complete Insurer examinations; and Mr. Murray responded only as part of the adjustment process and when reasonable and necessary for the legitimate process.[11] [Emphasis mine]

S. Guiguis stated the following (at paragraph 4):

> At this point, I recall Arbitrator Musson defending the reasonableness and necessity of the respondent's proposed in-person insurance examinations, beginning his declaration with, "I submit …"[12] [Emphasis mine]

The Arbitrator then gave his own evidence by denying what was in the affidavits. In *Authorson v. Attorney General of Canada*, the Divisional Court held that this course of action should be limited to very specific circumstances:

> We are of the view that this subject has to be dealt with sensibly. If a transcript is available or if counsel on both sides are in agreement as to what was said by the judge then it would not appear to us that a judge should rely at all on his memory. [Emphasis mine][13]

In the present case, there were uncontested affidavits. It was an error of law for the Arbitrator to merely apply his own memory without addressing those affidavits, and to merely "reason" that his comments had been "taken out of context."

Each of the errors of law committed would lead me to quash the October 2, 2017 decision of the Arbitrator, and I find it unnecessary to address the Appellant's last argument.

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[11] Book of Documents of Appellant at Tab 2
[12] Ibid at Tab 3
[13] Supplemental Book of Authorities of Appellant Tab 3

The motion originally before Arbitrator Musson is thus sent back to be determined by a different arbitrator. I also order that Arbitrator Musson shall be recused from any further involvement in FSCO file A13-015345.

Finally, I have no jurisdiction to grant costs for the motion which took place before Arbitrator Musson against ADR Chambers or Co-operators.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Edward Lee
Director's Delegate

June 27, 2018