

12-0016 JC

**Financial Services
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of Ontario**

Dispute Resolution Services
Arbitration Unit
5160 Yonge Street, 14th Floor
Box 85
Toronto ON M2N 6L9

Enquiries: (416) 250-6714
Fax: (416) 590-8462
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 d'arbitrage
5160, rue Yonge, 14ième étage
Boîte 85
Toronto ON M2N 6L9

Renseignement: (416) 250-6714
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Sans frais: 1-800-517-2332
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June 30, 2017

Ms. Anne Olszewski
Barrister & Solicitor
Dutton Brock LLP
438 University Avenue, Suite 1700
Toronto ON M5G 2L9

Dear Ms. Olszewski:

**Re: Ms. Celia Yang and Co-operators General Insurance Company
MVA: December 29, 2011
Commission File No: A13-015345-ASH
File No: 12-0016 (Applicant) and 2890-2105 (Insurer)
Claim No: 000404658**

Enclosed please find a Decision on a Motion to this matter, to be served upon the Third Party to this proceeding.

Yours truly,

A handwritten signature in black ink, appearing to read "Anita Idemudia".

Anita Idemudia
Arbitrator

Copies to:

Ms. Celia Yang
c/o Ms. Li Zhong Huang
415 Willowdale Avenue
Unit 1907
Toronto ON M2N 5B4

Ms. Janice Hedington
National AB Manager
Co-operators General Insurance Company
130 MacDonell Street
P.O. Box 3608
Guelph ON N1H 6P8

Ms. Sylvia Guirguis.
Barrister & Solicitor
Campisi LLP Personal Injury Lawyers
7050 Weston Road, Unit 101
Vaughan ON L4L 8G7



FSCO A13-015345

BETWEEN:

MS. Y.

Applicant

and

CO-OPERATORS GENERAL INSURANCE COMPANY

Insurer

DECISION ON A MOTION

Before: Anita Idemudia

Heard: March 10, 2017, at the offices of the Financial Services Commission of Ontario in Toronto

Appearances: Sylvia Guirguis for Ms. Y.
Anne Olszewski for Co-operators General Insurance Company

Issues:

The Applicant, Ms. Y. (a minor), was injured in a motor vehicle accident on December 29, 2011. She applied for and received statutory accident benefits from Co-operators General Insurance Company ("Co-operators"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Ms. Y. applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

A motion was brought in this case by Co-operators, for an order to compel productions from Dr. Melody Ashworth, Psychologist,² and Ms. Y's counsel to produce certain documents that Co-operators believes to be relevant to the issues in this arbitration.

The issues are:

1. Is Co-operators entitled to production of the complete clinical notes and records relating to Ms. Y.?
2. Is Co-operators entitled to production of the Children's Aid Society records with respect to their visit with Ms. Y. in February of 2015?

Result:

1. Co-operators is entitled to production of the complete clinical notes and records pertaining to Ms. Y. from Dr. Melody Ashworth.
2. Co-operators is entitled to production of the Children's Aid Society records from the February 20, 2015 meeting with Ms. Y.

Background

Ms. Y. claims entitlement to statutory accident benefits including medical benefits, cost of examinations, a determination of catastrophic impairment (based on mental and behavioural impairment), expenses and interest.

It appears that the majority of Ms. Y.'s on-going claims relate to her psychological impairment.

²Ms. Ashworth is a non-party to this proceeding.

Children's Aid Records

By letter dated February 24, 2015, Betty Chan, occupational therapist, informed Co-operators that the Children's Aid Society has scheduled a visit with Ms. Y., in response to an episode in which Ms. Y. demonstrated suicidal ideation in February 2015. Co-operators has requested that Ms. Y's counsel provide the records of the Children's Aid visit with Ms. Y. in February 2015. Co-operators submits that while Ms. Y. alleges that the psychological harm is directly and causally related to the 2014 accident, it believes that the presence of the Children's Aid Society worker alludes to the determination that there may be concurrent family issues that are contributing to Ms. Y.'s mental distress. Co-operators further submits that the visit was scheduled following a particularly serious emotional incident in which various parties expressed concerns about the mental distress of Ms. Y. and that as such, the records of the 2015 visit are directly related to the causality of the issues as well as the psychological issues of Ms. Y.

Dr. Melody Ashworth

Co-operators submits that Dr. Ashworth has been Ms. Y.'s treating psychologist since October 2014 and was also present at the meeting involving Ms. Y. and the Children's Aid Society. Co-operators also submits that it has made various requests to Applicant's counsel for Dr. Ashworth's records relating to the February 20, 2015 meeting with Ms. Y. and subsequently, a request for the complete clinical notes and records.³ As well, Applicant's counsel has made requests to Dr. Ashworth for her clinical notes and records.⁴ In response to the requests, Dr. Ashworth forwarded a summary of her notes, claiming that she could not release her complete notes as releasing these "would result in a deterioration of trust in their relationship and it would result in a setback in her treatment."⁵

³Motion Record of the Insurer - Exhibit 'Q', 'R' and 'T'

⁴*Ibid.*, Exhibit 'S' *supra*.

⁵*Ibid.*

EVIDENCE AND ANALYSIS:

The Law

Rule 32.2 of the *Dispute Resolution Practice Code* sets out the obligation of the parties to ensure the prompt and complete exchange of documents that are reasonably necessary to determine the issues in the arbitration.

Rule 32.3 empowers an arbitrator to order the production of documents relevant to the determination of the issues in dispute.

With respect to an order sought against a non-party to the arbitration, Rule 67.7 of the *Code* sets out the requirements for obtaining a production order. In order to do so, the arbitrator must be satisfied of the following:

- (a) the parties have made reasonable efforts to obtain the documents sought;
- (b) the document sought is in the possession, control or power of the third party;
- (c) the third party has had a reasonable opportunity to respond; and
- (d) the document is reasonably required to ensure a just and fair hearing.

I will now deal with each request in turn.

Dr. Melody Ashworth's Clinical Notes and Records

Co-operators has indicated that the majority of Ms. Y.'s on-going claims relate to her psychological impairment. Accordingly, the psychological condition of Ms. Y. is in question and as Dr. Ashworth is Ms. Y.'s treating psychologist, her clinical notes and records are *prima facie* relevant.

I note Dr. Ashworth's concerns over releasing her notes and records that "it would result in a deterioration of trust in their relationship and would result in a setback in her treatment."

However, given the nature of the issues involved in this hearing, I find that the probative value of the documents sought outweighs the possibility that the production of the document will prejudice the insured.

I am satisfied that Dr. Ashworth has been properly served with the Motion Record and has chosen not to respond.

I am also satisfied that the requirements of Rule 67.7 have been met and accordingly I order Dr. Ashworth to produce the clinical notes and records relating to Ms. Y.

Children's Aid Society

I have reviewed the report of the February 20, 2015 meeting with Ms. Y. and a worker from the Children's Aid Society (the report has been redacted in line with CAS' privacy policy).

It appears that the school authorities had involved CAS following concerns relating to an assignment Ms. Y. had submitted at school about a girl being bullied that had suicidal ideation.

Co-operators has made numerous requests to Ms. Y's counsel to provide a copy of this report, but Ms. Y's counsel has refused to produce it, on the basis that it is not relevant to the subject litigation.

Co-operators, having become aware of the concerns of the Children's Aid Society at the February 2015 meeting, has submitted that there may be "concurrent issues that stem from a biological pre-disposition exacerbated by difficult family dynamics."⁶ Therefore, it submits that the records of the CAS meeting are directly relevant as they would presumably address Ms. Y.'s mental state at the time and the involvement of the CAS brings into question whether there are concurrent issues that are negatively impacting Ms. Y.'s psychological health.

⁶Paragraph 18 of the Insured's Factum.

As such, if other there are other existing factors that may have caused or contributed to her psychological state, then in my view, these factors are relevant to the issues, and not just a “fishing expedition” as Ms. Y. has submitted. The Insurer therefore ought not to be precluded from exploring them.

I am satisfied that the document sought is relevant to the issues in this arbitration and I order applicant’s counsel to produce the Children’s Aid Society notes relating to the February 20, 2015 meeting.

EXPENSES:

The expenses of this motion are left to the discretion of the hearing Arbitrator.



Anita Idemudia
Arbitrator

June 30, 2017

Date



FSCO A13-015345

BETWEEN:

MS. Y.

Applicant

and

CO-OPERATORS GENERAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 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 *Ontario Regulation 664*, as amended, it is ordered that:

1. Dr. Melody Ashworth produce her clinical notes and records pertaining to Ms. Y.
2. Ms. Y. produce the records pertaining to the February 20, 2015 meeting with the Children's Aid Society.

A handwritten signature in cursive script, appearing to read "Anita Idemudia".

Anita Idemudia
Arbitrator

June 30, 2017

Date