

BETWEEN:

MAGDY SHEHATA

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

PRE-HEARING DECISION ON A MOTION

Before: David Leitch

Heard: May 2, 2003, at the offices of the Financial Services
Commission of Ontario in Toronto.

Appearances: L. Spodek for Mr. Shehata
Ryan M. Naimark for Allstate Insurance Company of Canada

Issues:

The Applicant, Magdy Shehata, was injured in a motor vehicle accident on August 10, 2001. He applied for statutory accident benefits from Allstate Insurance Company of Canada (“Allstate”), payable under the *Schedule*.¹ At the pre-hearing discussion before me on August 22, 2002, the parties identified two issues for arbitration: a claim for medical benefits under section 14 and a claim for the cost of examinations and reports under section 24 of the *Schedule*. Mr. Shehata’s representative at the pre-hearing, Mr. Vladislav Simkhaev, confirmed that Mr. Shehata was also claiming caregiver and

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

housekeeping benefits as a result of the accident but stated that Mr. Shehata would be pursuing those claims through an action in the Small Claims Court. I indicated to the parties that venue-splitting of that kind was strongly discouraged by Commission case law and I referred the parties to a Director's Delegate's decision on that point.² My pre-hearing letter to the parties made the same point.

Notwithstanding my comments, Mr. Shehata commenced an action against Allstate in respect of his claims for caregiver and housekeeping benefits in the Toronto Small Claims Court on December 12, 2002.³ His representative in that action was VBSK & Associates, the agency with which Mr. Simkhaev is associated and which identifies itself on its letterhead as "accident benefits specialists." In its Defence, Allstate denied Mr. Shehata's entitlement to caregiver and housekeeping benefits. It also brought the Court's attention to this Application for Arbitration and alleged that Mr. Shehata's Small Claims Court action constituted venue-splitting and an abuse of process. The action was transferred from Toronto to the Brampton Small Claims Court where, on April 23, 2003, the Court allowed Allstate's motion for dismissal with costs against Mr. Shehata's representative. The relevant part of the presiding judge's endorsement reads as follows:

- (1) Plaintiff's claim against Defendant is dismissed with costs payable by Plaintiff's agent, Vladislav Simkhaev cob VBSK Associates, 2085 Hurontario Street, Suite 300, Mississauga, L5A 4G1 in the sum of \$1,000.00. Reasons for today's decision were based upon counsel's submissions and legal precedents placed before court (in file). Costs were awarded pursuant to section 29 [of the] *CJA* as the court was satisfied that Plaintiff's agent exhibited unreasonable behaviour by commencing claim.⁴

²*Mangat and Non-Marine Underwriters, Mbrs. Of Lloyd's* (FSCO P00-00020, August 1, 2000), Motion Record, Tab 2F.

³Motion Record, Tab 2G.

⁴Exhibit 2.

- (2) Counsel for Defendant has also consented to the inclusion by either party of the Plaintiff's claims for housekeeping and caregiver services (being all of the subject matter of the within claim) with arbitration proceedings before the Financial Services Commission of Ontario, Matter #A02-000465-SWE.

When the matter came before me on May 2, 2003, Mr. Shehata appeared for the first time and was no longer represented by VBSK & Associates. Instead, he was represented Mr. L. Spodek. The parties agreed that all current disputes between them would be mediated, if not already mediated, and included as issues for arbitration in this proceeding.⁵ As a result, the only issue argued before me was:

1. Is Allstate entitled to expenses, in any event of the cause, in relation to its motion in this proceeding?

Result:

1. Allstate is entitled to expenses of \$1,000, in any event of the cause, in relation to its motion in this proceeding.

EVIDENCE AND ANALYSIS:

Allstate's motion in this proceeding was served on January 8, 2003 and was to have been heard on January 24, 2003. Allstate's motion referred to Mr. Shehata's Small Claims Court action. It alleged that his Application for Arbitration was commenced in bad faith and that it constituted venue-splitting and an abuse of process. It further alleged that VBSK & Associates had refused to provide an

⁵I will issue an amended pre-hearing letter reflecting this agreement and lifting the stay referred to below.

acknowledgment in accordance with the decision of the Director's Delegate in *Glinka and Dufferin Mutual Insurance Company*⁶ and that VBSK & Associates had failed to comply with its undertakings at the pre-hearing. Relying upon these grounds, Allstate requested a dismissal or a stay of the proceeding and, if the proceeding was not dismissed, an order excluding VBSK & Associates as Mr. Shehata's representative.

The motion was not heard on January 24, 2003 because, on that date, the parties entered into an agreement that the arbitration proceeding would be stayed, "pending the outcome of a further motion to be brought by Allstate." The "further motion" was, I take it, Allstate's motion for dismissal of the Small Claims Court action heard on April 23, 2003. The parties agreed to adjourn the hearing of the motion in this proceeding to May 2, 2003. However, Arbitrator Muir's letter confirming this agreement specifically noted that it did not resolve the "issue of expenses of the motion today."

It is clear that the success of Allstate's motion for dismissal in the Small Claims Court action effectively eliminated the grounds for the relief claimed in its motion in this proceeding. The judge's order dismissed Mr. Shehata's Small Claims Court action, invited the parties to consolidate Mr. Shehata's claims in this proceeding and last, but by no means least, resulted in Mr. Shehata finding someone other than VBSK & Associates to represent him in this proceeding. Nevertheless, in my opinion, Allstate was entirely justified in raising the issue of venue-splitting in both forums, in the Small Claims Court and in this proceeding, because it could not have known in advance how this issue would ultimately be resolved or whether Mr. Shehata would change representatives.

Mr. Shehata testified before me on May 2, 2003. He denied discussing "strategy" with Mr. Simhkaev or Mr. Mark DeWitt of VBSK & Associates. He stated that he simply accepted their assurances that their methods for advancing his claims were normal. On cross-examination, Mr. Shehata admitted signing a document dated January 23, 2003 in which he acknowledged that Mr. DeWitt of VBSK &

⁶(FSCO P01-00002, March 7, 2001)

Associates was not a lawyer and that he, Mr. Shehata, was potentially liable for Allstate's expenses.⁷ However, he maintained that Mr. DeWitt reassured him that "everyone must sign" this kind of document and that Allstate would never "go after" him for expenses.

I accept Mr. Shehata's testimony. I note that he did not, unfortunately, attend the pre-hearing discussion where I questioned Mr. Simhkaev's tactics. He was, however, sent a copy of my pre-hearing letter and he did sign the document confirming that he was aware that he was potentially liable for Allstate's expenses. There was no suggestion that Mr. Shehata cannot read. He must therefore, remain responsible for the consequences of VBSK & Associates' mishandling of his claims. Unlike the Small Claims Court, I have no authority to order Mr. Simhkaev or VBSK & Associates to pay Allstate's expenses.⁸

In justifying Allstate's claim for expenses, Mr. Naimark stated that he spent at least fifteen hours preparing the motion record, attending on January 24, 2003 and attending on May 2, 2003. I accept this statement and find that Allstate is entitled to an order for expenses in the amount of \$1,000.

David Leitch
Arbitrator

June 4, 2003

Date

⁷Exhibit 1.

⁸*Gik and Zurich Insurance Company* (FSCO A00-001144, October 4, 2001).

FSCO A02-000465

BETWEEN:

MAGDY SHEHATA

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. Allstate is entitled to expenses of \$1,000, in any event of the cause, in relation to its motion in this proceeding.

David Leitch
Arbitrator

June 4, 2003

Date