Financial Services Commission of Ontario

Ontario

Commission des services financiers de l'Ontario

Appeal P18-00034

OFFICE OF THE DIRECTOR OF ARBITRATIONS

RISTA ALMEDOM

Appellant

and

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

BEFORE:	Maggy Murray
REPRESENTATIVES:	Ryan Naimark for Ms. Almedom Darrell March[1] and Paul Omeziri for Wawanesa
HEARING DATE:	October 29, 2018

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 appeal of the Arbitrator's order dated April 30, 2018 is allowed. Paragraphs 1, 3 and 4 of the decision are rescinded, the matter is returned to arbitration, and a fresh hearing will be held before a different arbitrator for a determination of Ms.

[1] Counsel of record for the insurer. I sometimes refer to the insurer's counsel by name because the names of two counsel appear on this decision.

Almedom's entitlement to income replacement benefits, a special award, interest and expenses.

2. My June 25, 2018 stay[2] of the Arbitrator's Order regarding expenses is lifted.

3. 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 – Fourth Edition* (*Code*).

Maggy Murray Director's Delegate	November 9, 2018 Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Ms. Almedom appeals paragraphs 1, 3 and 4 of Arbitrator Mongeon's ("the Arbitrator") order dated April 30, 2018 ("the order"). A six-day arbitration hearing began on February 7, 2018 and concluded on March 2, 2018. The Arbitrator dismissed Ms. Almedom's claims of entitlement to:

1. Income replacement benefits ("IRBs");
2. A special award; and
3. Interest.

[2] Which was made at the request of and on consent of the parties.

II. BACKGROUND[3]

Ms. Almedom was injured in a motor vehicle accident on August 28, 2015 when a car making a left turn hit her while she was crossing the street. As a result, she sought statutory accident benefits under the *2010 Schedule*[4] from her first-party automobile insurer, Wawanesa.

I made the following orders in my Preliminary Appeal Order dated October 27, 2018:

1. Wawanesa's motion that I recuse myself from this appeal because of alleged bias is dismissed.

2. Wawanesa's motion that the Financial Services Commission of Ontario (FSCO) does not have jurisdiction to consider fresh evidence is dismissed.

3. Wawanesa's request to adjourn Ms. Almedom's motion to introduce fresh evidence on appeal is dismissed.

4. Ms. Almedom's motion that fresh evidence concerning Insurer Examination (IE) reports dated May 22, 2018 be included in the appeal record is allowed.

5. Ms. Almedom's motion that evidence concerning emails and correspondence dealing with the December 2017 IE reports be included in the appeal record is allowed.

6. The appeal hearing will resume on October 29, 2018.

[3] For ease of reference to the reader, much of the information contained in the "Background" portion of this decision is the same as the information in the "Background" information of my October 27, 2018 Preliminary Appeal Order.

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

Ms. Almedom's Post-104 Week IRB Reports

The test for IRB's changes 104 weeks after an accident and is more difficult to meet. In June 2017, Ms. Almedom submitted a treatment plan to Wawanesa for various post-104 week IRB assessments, which, if an insured wants to undergo, need to be completed at least 104 weeks after the accident. Ms. Almedom had to wait until after August 28, 2017 to have any post-104 week assessments since her accident occurred on August 28, 2015. Ms. Almedom's post-104 week IRB assessments were completed and sent to the insurer on October 16, 2017.

Insurer's Motion to Stay Arbitration Hearing Originally Scheduled to Commence on November 15, 2017

Because Ms. Almedom served the insurer with new post-104 week IRB reports, on November 1, 2017, the insurer served and filed a motion to stay Ms. Almedom's claim for IRB's, to adjourn the arbitration hearing that was scheduled to begin November 15, 2017, and an order to exclude Ms. Almedom's post-104 week IRB assessment reports from the arbitration hearing.

An affidavit from the insurer's counsel's office states:

> I do verily believe that if an Arbitration proceeding were to proceed that included reliance on said Report (i.e., Ms. Almedom's post-104 week IRB assessment reports), the (insurer) would be significantly prejudiced in not being able to call evidence of medical experts who would have seen the Applicant during the relevant time period in response to the Treatment and Assessment Plan or post-104 report. The Respondent would therefore be in a position of being unable to properly respond and defend itself in this proceeding.[5]

The parties consented to adjourn the arbitration hearing so that the insurer could obtain responding IE reports to Ms. Almedom's post-104 week IRB assessment reports. Mr. March stated in a letter to ADR Chambers:[6] "… the Arbitration scheduled to commence on November

[5] Affidavit of Ryan Osbourne sworn November 1, 2017, para. 19.

[6] The company FSCO contracted to conduct arbitration hearings.

15th should be adjourned in order for our client to obtain a reply to the Post 104 report served on our office …"[7]

Insurer's Examination (IE) Reports

2016 IE Reports

Dr. Kelly, a psychologist, assessed Ms. Almedom in an IE in January 2016. He also conducted a paper review of her file in April 2016. Dr. Kelly concluded in April 2016 that from a psychological perspective, Ms. Almedom did **not** meet the pre-104 week IRB test and her ability to work full-time was not impaired.[8] The insurer filed both of Dr. Kelly's reports in its arbitration brief.

December 27, 2017 IE Reports

The insurer indicated that it wanted Ms. Almedom to undergo assessments to address whether she met the post-104 week IRB test.[9] Those IE's were not conducted despite Ms. Almedom's counsel pointing out to the insurer's counsel that the insurer requested IE's to respond to Ms. Almedom's transferable skills analysis and psychovocational assessment of October 2017. Instead, the December 2017 IE reports that the insurer obtained addressed whether it was reasonable and necessary for Ms. Almedom to have a transferable skills analysis and a psychovocational assessment, as was recommended in the October 2017 post-104 week assessments Ms. Almedom gave the insurer.

The IE assessors found that it was reasonable and necessary for Ms. Almedom to undergo a psychovocational and a situational work assessment at a cost of $6,200.00 as a result of the injuries

[7] Written Appeal Submissions of Ms. Almedom at Tab I.

[8] Dr. Kelly's report dated April 5, 2016 at p. 2 in the insurer's arbitration brief at Tab 11, p. 204 of brief.

[9] See Tab I of the Appellant's Appeal Submissions, which refers to the insurer obtaining a "reply to the Post 104 report".

she sustained in the motor vehicle accident on August 28, 2015.[10] Recall that the arbitration hearing was adjourned twice on consent to allow the December 2017 IE's to proceed.

Mr. March reviewed the December 2017 IE reports on December 27, 2017.[11] However, the December 2017 IE reports were not **served** on Ms. Almedom's counsel until January 9, 2018.[12] This means that the December 2017 IE's were served on Ms. Almedom:

i. Thirteen days after they were prepared and reviewed by the insurer's counsel; and
ii. Ms. Almedom received the December 2017 IE's **29 days** before the arbitration hearing.[13]

Mr. Naimark, on behalf of Ms. Almedom, prepared a supplementary arbitration brief. This brief included the December 2017 IE reports that concluded that a psychovocational and a situational work assessment, at a cost of $6,200.00, were reasonable and necessary. At the beginning of the arbitration hearing, the insurer asked the Arbitrator to exclude from being admitted into evidence the supplementary arbitration brief[14] that contained the December 2017 IE reports.[15]

According to the insurer's submissions at the arbitration hearing, it was only aware that Ms. Almedom intended to file the supplementary brief the morning the arbitration hearing began.[16] Ms. Almedom's counsel contested that submission.[17]

---

[10] Pages 121 - 122 of Written Appeal Submissions of Ms. Almedom at Tab R, pp. 1-2 of IE report dated December 27, 2017.

[11] Transcript, February 7, 2018, p. 22 and IE reports dated December 27, 2017.

[12] Transcript, February 7, 2018, pp. 4, 34.

[13] Transcript, February 7, 2018, p. 33.

[14] The supplementary brief also contained Ms. Almedom's accommodation file from George Brown College, but it was the December 2017 IE reports that Ms. Almedom was concerned with admitting into evidence at both the arbitration hearing and on appeal.

[15] Again, I note that the December 2017 IE reports were commissioned by the insurer, and for which the arbitration hearing was adjourned twice, so that the insurer would have the assessments of Ms. Almedom.

[16] Transcript, February 7, 2018, p. 5, lines 10-15.

[17] Transcript, February 7, 2018, p. 34, Ms. Almedom's counsel states: "when my friend says he has no notice until today that I intend to use this report at the hearing, that is not accurate, because I sent a very detailed

Again, recall that:

i. The Arbitration hearing was adjourned twice at the request of the insurer so that the insurer could conduct IRB IE assessments in December 2017; and
ii. Ms. Almedom consented to both of the insurer's adjournment requests.

The insurer objected to the introduction of the December 2017 IE reports it obtained on the basis of Rule 39.1 of the *Dispute Resolution Practice Code* – Fourth Edition (the *Code*) which states that a party must serve the opposing party with any documents to be used at the hearing **at least 30 days** before the hearing.

According to the Arbitrator:

i. If a report is to be relied on, it is incumbent on the party who wishes to put it into evidence to alert the other side to that fact **at least 30 days**[18] before the hearing;
ii. Rule 39.1 of the *Code* is designed to ensure that there is no ambush at a hearing and that all documents to be relied on must be made available to the other side;
iii. The 30 day period allows a party time to prepare. That is, even if the opposing party had possession of a document, it still needs time to prepare knowing that the document will be put in evidence; and
iv. The 30 day notice period ensures that the opposing party can review all documents in appropriate time and prepare or oppose as is appropriate.

Ms. Almedom's counsel submitted to the Arbitrator the Ontario Court of Appeal case of *Reimer et al v. Thivierge*[19] as support for the proposition that if a report originated with the opposing party,

letter to my friend providing the particulars of the special award, dated February 1st (2018), that I have here, that not only did I say I am making use of the report, I even indicated the passages that I am going to be relying on that I said gives rise to the special award."

[18] But, Ms. Almedom received the December 2017 IE reports from the insurer on January 9, 2018, which was 29 days before the arbitration hearing began on February 7, 2018.

[19] (1999), 126 O.A.C. 109, 46 O.R. (3d) 309, 47 M.V.R. (3d) 78, 92 A.C.W.S. (3d) (Ont. C.A.); Transcript, February 7, 2018 at 50.

a notice period need not be enforced. However, the Arbitrator agreed with the insurer's submission that *Reimer* is distinguishable because:

i. It relates to s. 52 of the Ontario *Evidence Act*[20] which provides a 10-day notice period for certain types of reports;
ii. It does not touch on the specific hearing system that has been established under the *Code*; and
iii. It deals with trials, not arbitrations under the *2010 Schedule* and the *Insurance Act*.[21]

Although Ms. Almedom only received the December 2017 IE reports from the insurer 29 day before the arbitration hearing began, according to the Arbitrator, the strongest point that Ms. Almedom made is that the insurer already had the reports that she seeks to put into evidence since they are the insurer's own IE reports.[22]

The Arbitrator made an order that Ms. Almedom's supplementary document brief was excluded from being entered into evidence at the arbitration hearing. He further ordered that if Dr. Kelly, a psychologist who authored one of the December 2017 IE reports and concluded that it was reasonable and necessary for Ms. Almedom to undergo a transferrable skills analysis and psychovocational assessment, was called as a witness, he could not be questioned about the IE reports of December 2017.

May 22, 2018 IE Reports

The insurer conducted a third round of IE's in April-May 2018. This subsequent set of IE reports dated May 22, 2018[23] was addressed to Ms. Sophie Eng at Wawanesa and were received by the

[20] R.S.O. 1990, c. E.23.

[21] R.S.O. 1990, c. I.8.

[22] Transcript, February 7, 2018 at 113. The December 2017 IE reports were commissioned by the insurer and for which the arbitration hearing was adjourned twice so that the insurer could obtain.

[23] Which I determined were "fresh evidence," as outlined in my Preliminary Appeal Order dated October 27, 2018. The IE reports dated May 22, 2018 assessed whether Ms. Almedom meets the post-104 week IRB test. The IE by Dr. Kelly, psychologist, concluded that Ms. Almedom met the post-104 week IRB test, as outlined in the report at Tab A of the Affidavit of Megan Sheard, law clerk with Ms. Almedom's counsel's office.

insurer on May 22, 2018.[24] They were prepared less than one month **after** the Arbitrator released his decision dated April 30, 2018. In the May 22, 2018 IE's, Dr. Kelly, the same psychologist who assessed Ms. Almedom in 2017 and 2016, concluded that Ms. Almedom **met** the post-104 week IRB test.[25] Ms. Almedom filed a motion to admit into evidence on this appeal fresh evidence in respect of the May 22, 2018 IE's.

Emails and Letters

Emails and letters were exchanged between counsel and between counsel and ADR Chambers[26] regarding the two adjournments to allow the insurer to obtain the December 2017 IE reports. Copies of those emails and letters were included in Ms. Almedom's written submissions on appeal. The Arbitrator initially ruled that the documents would be marked as an exhibit. The Arbitrator then changed his mind and refused to admit them into evidence because the insurer objected to them being admitted into evidence. Ms. Almedom's counsel then suggested that the emails and letters be marked for "identification purposes."[27] The Arbitrator stated that he would "mark them."[28] Once again, the insurer objected and the Arbitrator changed his mind and subsequently refused to have the emails and correspondence marked for identification purposes.[29]

Ms. Almedom brought a motion to admit the e-mails and correspondence as fresh evidence on appeal. I gave the parties my oral ruling on October 17, 2018 and my written ruling on October

---

[24] Ms. Eng is indicated on the report as the "referral source" at p. 7 of Tab A of the Affidavit of Megan Sheard, law clerk with Ms. Almedom's counsel's office.

[25] Which means that she met the test set out in s.5(2) of the *Schedule* and Ms. Almedom had a complete inability to engage in any employment for which he or she is reasonably suited by **education, training or experience** (emphasis added).

[26] Again, ADR Chambers is the company FSCO contracted to conduct arbitration hearings.

[27] Transcript, February 7, 2018 at pp. 115-116 and 155. A document that is marked for "identification purposes" refers to a document presented during a trial before testimony confirms its authenticity or relevancy.

[28] Transcript, February 7, 2018 at p. 116.

[29] Transcript, February 7, 2018 at pp. 116-118.

27, 2018 and advised that I would provide more fulsome reasons in writing. Those reasons were outlined in my Preliminary Appeal Order dated October 27, 2018 in which I found that:

i. The emails and correspondence were relevant and provided the context for why Ms. Almedom thought that the December 2017 IE reports were going to be relied upon by the insurer at the arbitration hearing;
ii. Whether the emails and correspondence can remain part of the appeal record is not properly characterized as a question of whether "fresh evidence" ought to be admitted on appeal;
iii. The emails and correspondence were "evidence that is relevant to Ms. Almedom's allegation that she was denied a fair hearing"[30]

And, in the event that I was mistaken regarding my conclusion set out above regarding the emails and correspondence, I found that they met the test set out in *Palmer v. R.*,[31] the leading Supreme Court of Canada case on fresh evidence, for the admission of fresh evidence on appeal. That is, the emails and letters were:

i. Relevant to the issue on appeal;
ii. Could not with due diligence have been introduced a the hearing;
iii. Credible in the sense that they are reasonably capable of belief because many are email chains and answer questions and address issues raised by opposing counsel;
iv. Evidence that could affect the result of the appeal because the December 2017 IE's are discussed in the correspondence and emails between the parties, and the parties and ADR Chambers, and address one of the issues that the Arbitrator was asked to decide, namely, whether Ms. Almedom meets the post-104 week IRB test.

[30] *State Farm Mutual Automobile Insurance Co. v. Waldock*, Westlaw at para. 24 (FSCO, P15-00068, July 27, 2016).

[31] (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.).

III. ANALYSIS

Insurer's Submission That I Recuse Myself Because of the Disclosure of Settlement Offers

When we resumed this appeal hearing on October 29, 2018, Wawanesa submitted that I should recuse myself from this appeal hearing because I was privy to settlement discussions between the parties.

On October 12, 2018, Mr. Omeziri emailed both myself and Mr. Naimark advising that the insurer "consent(ed)" to setting aside paragraphs 1, 3 and 4 of the Arbitrator's order and would pay Ms. Almedom $10,000 for her appeal expenses.

On October 15, 2018, Mr. Naimark emailed both myself and the insurer's counsel and stated:

> ...
>
> ***with respect to costs of $10,000 that was only for legal fees (not disbursements****) and Mr. Omeziri previously rejected the $10,000 in writing. Yesterday I sent him an email indicating that we would accept $7500 plus hst for costs plus disbursements. I had mentioned that the disbursements were high because* ***the transcripts alone were $9488****. Only today does he now want to accept an offer on costs that he previously rejected in writing that is no longer open for acceptance (emphasis added).*

Following the lunch break on October 16, 2018, which was the first day of this appeal hearing, Mr. Naimark advised, over the insurer's objections, that during the lunch break, the insurer withdrew its settlement proposal contained in its email of October 15, 2018. When the parties appeared before me on October 29, 2018, Mr. Naimark advised that on the evening of October 16, 2018, the insurer emailed him and withdrew its settlement offer contained in its email of October 15, 2018.

Wawanesa did not provide any authority to support its submission that I should recuse myself from this appeal hearing. Its request:

> (R)aises 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 fairly. 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 the strong presumption of judicial impartiality. The inquiry is highly fact specific. (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at paras. 111 and. 109); *Roberts v. R.*, [2003] 2 S.C.R. 259 (S.C.C.) at paras. 52 and 65) [32]

And,

> (A) reasonable apprehension that the decision-maker may not act impartially is grounds for a recusal.[33]

I carefully considered the insurer's submissions and found that there was no reasonable apprehension that I would not act impartially. I am providing the parties with more fulsome reasons herein which led to my decision.

The disclosure of the settlement information in the circumstances described above does not raise a reasonable apprehension of bias. It was the insurer who put its letter of October 12, 2018 regarding settlement before me and the insurer that disclosed the existence of a settlement offer to me. A reasonable person would not disclose an alleged settlement if they believed that doing so would bias the decision-maker. Further, a party having disclosed its settlement offer to the decision-maker cannot then turn and say that decision-maker is prejudiced. If that were the case, then any party who wants a decision-maker recused from a proceeding would disclose to the decision-maker its settlement offer, which would lead to adjudicator-shopping and is something that a tribunal should not encourage.

---

[32] *Allstate Insurance Co. of Canada v. Sharma* (2009), 184 A.C.W.S. (3d) 296, 256 O.A.C. 305, Westlaw at para. 43 (Ont. Div. Ct).

[33] *Ghirardosi v. British Columbia (Minister of Highways)*, [1966] S.C.R. 367 at 370 (S.C.C.) as cited in *Allstate Insurance Co. of Canada v. Sharma* (2009), 184 A.C.W.S. (3d) 296, 256 O.A.C. 305, Westlaw at para. 44 (Ont. Div. Ct).

FSCO's Jurisdiction to Hear This Appeal and Settlement of the Issues in Ms. Almedom's Notice of Appeal

On both October 16 and 29, 2018, the insurer raised an objection to proceeding with the appeal because according to it, the appeal was resolved. Mr. Naimark emailed both myself and the insurer's counsel on October 15, 2018 and indicated that the appeal was not resolved.

On both October 16 and 29, 2018, Mr. Naimark indicated that not all of the issues in the Notice of Appeal were "settled." The insurer did not provide me with any minutes of settlement or other documentation evidencing that the parties settled the issues set out in Ms. Almedom's Notice of Appeal. Consequently, I proceeded with the Preliminary Appeal Hearing on October 16, 2018 and heard the merits of the appeal on October 29, 2018.[34]

Insurer's Request for an Adjournment to Review My Preliminary Appeal Order dated October 27, 2018

At one of the two telephone conferences I conducted with the parties on October 17, 2018, I advised them that I would provide my written reasons arising out of the Preliminary Appeal Hearing on October 16, 2018 within 10 days. The 10th day was October 27, 2018, which was a Saturday. I emailed the parties my Preliminary Appeal Order on Saturday October 27, 2018 at 11:01 a.m.

On October 29, 2018, the insurer requested an adjournment of the appeal hearing so that it could review my decision dated October 27, 2018 and confer with its client, for which the insurer estimated it required at least five days.

The insurer submitted that because they received my decision on a Saturday, the appeal hearing should be adjourned. As I explained to the parties, I provided them with my written decision within 10 days of October 17, 2018, which is what I said I would do during the telephone

[34] See *Fitzgerald v. Scandrett*, [1999] O.J. No. 4157, 92 A.C.W.S. (3d) 219, para. 6 (Ont. S.C.J.), where a mid-trial settlement motion was dismissed on the basis that the parties were under different impressions about whether the settlement figure included two advance payments. Hermiston J. noted: "All negotiations ... were verbal, and no minutes of settlement or other documentation evidencing the settlement was prepared."

conference on October 17, 2018. Consequently, I dismissed the insurer's request for an adjournment on this basis.[35]

Ms. Almedom's Appeal[36]

Appeals from an Arbitrator's order are restricted to questions of law.[37] According to Wawanesa, Ms. Almedom's appeal "lacks merit"[38] and raises questions of fact, not law. I disagree. As the Divisional Court stated in *Kalin v. Ontario College of Teachers*[39] "Decisions which do not comply with the rules of procedural fairness and natural justice cannot stand." The Arbitrator made errors of law and his decision did not comply with the rules of procedural fairness and natural justice. The Arbitrator's decision cannot stand.

The crux of this case is whether the Arbitrator should have admitted into evidence the December 2017 IE reports that were obtained by the insurer about six weeks before the hearing, and for which the hearing was adjourned twice, and served on Ms. Almedom less than 30 days before

---

[35] Pursuant to Rule 8 of the *Code*, I could have given the parties my Preliminary Appeal Order dated October 27, 2018 on Monday October 29, 2018 because Rule 8 of the *Code* states:

> 8.1 To calculate time under these Rules or an order:
>
> …
>
> (b) where the time for doing an act under these Rules ends on a Saturday, Sunday, or a statutory holiday, **the act may be done on the next day that is not a Saturday, Sunday, or a statutory holiday**; …

[36] The morning of October 29, 2018 was spent addressing the insurer's various objections and we began hearing the merits of Ms. Almedom's appeal at 12:10 p.m.

[37] Subsection 283(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 and Rule 50.1 of the *Dispute Resolution Practice Code* – Fourth Edition.

[38] Wawanesa's written submissions, para. 4.

[39] (2005), 139 A.C.W.S. (3d) 682, 198 O.A.C. 201, 254 D.L.R. (4th) 503, 30 Admin. L.R. (4th) 289, 75 O.R. (3d) 52379 O.R. (3d) 523, Westlaw at para. 9 as discussed in *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), [1999] 2 S.C.R. 817, [1999] F.C.J. No. 39, [1999] S.C.J. No. 39, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777, (S.C.C.); *Gismondi v. Ontario (Human Rights Commission)*, [2003] O.J. No. 419 (Ont. Div. Ct.).

the hearing, although the insurer received and reviewed them about five weeks before the hearing.

The general timeline for "documents, reports (including experts' reports) and assessments to be introduced at a hearing by either party" is set out in Rule 39.1 of the *Code*, which requires these to be "served on the other party at least 30 days before the first day of the hearing." Rule 39 of the *Code*[40] states:

> 39.1 Subject to **Rule 39.2**, all documents, reports (including experts' reports) and assessments to be introduced at a hearing by either party must be served on the other party at least **30 days** before the first day of the hearing.
>
> 39.2 In **extraordinary circumstances** a party may seek an arbitrator's permission to serve a document, report or assessment on the other party for use at a hearing less than **30 days** before the first day of hearing (emphasis added),
>
> 39.3 The hearing arbitrator will determine the relevance, materiality, and admissibility of evidence submitted at the hearing, but will not admit evidence at a hearing that:
>
> (a) would not be admissible in a court by reason of any privilege under the law of evidence; or
>
> (b) is not admissible under the *Insurance Act*; or
>
> (c) was not served on the opposing party in accordance with **Rules 39.1 and 39.2**, **unless the hearing arbitrator is satisfied that extraordinary circumstances exist to justify an exception** (emphasis added).

Based on the above:

i. Rule 39.2 provides that "in extraordinary circumstances" a party may seek an Arbitrator's permission to serve a document, assessment or report on the other party less than 30 days before the hearing; and
ii. Rule 39.3(c) provides that evidence not served at least 30 days before the hearing may nonetheless be admitted if "extraordinary circumstances exist to justify an exception."

[40] Emphasis in original unless otherwise stated.

As well, Rule 81 of the *Code*, allows an Arbitrator to waive the time requirements set out in Rule 39 or waive the application of Rule 39 altogether.

An Arbitrator has a wide discretion to ensure a fair hearing. The *Code* cannot interfere with that overarching responsibility. As the Divisional Court stated, "Fundamental to any administrative process, is the requirement that it be fair. At its most basic, procedural fairness requires that a party have an opportunity to be heard and that it be able to respond to the position taken against it."[41]

The purpose of Rule 39 of the *Code* is to ensure that hearings are conducted fairly and that no party is surprised or ambushed by the late introduction of documents. The Arbitrator failed to:

1. Consider whether there were "extraordinary circumstances"[42] as set out in Rules 39.2 and 39.3(c);
2. Consider the prejudice to either party of admitting the December 2017 IE reports.

The above (1) and (2) were errors in law.

The arbitrator also expected Ms. Almedom to re-serve the December 2017 IE report on the insurer after she received it from the insurer, which is also an error of law.

The **insurer** requested an adjournment of the arbitration hearing twice, as well as a waiver of the 30 day period in Rule 39 for service of the December 2017 IE reports on Ms. Almedom so that it could obtain the December 2017 IE reports. Ms. Almedom consented to:

1. The insurer's two adjournment requests;

[41] *Certas Direct Insurance Co. v. Gonsalves* (2011), 100 C.C.L.I. (4th) 187, I.L.R. I-5178, Westlaw at para. 8 (Ont. Div. Ct.). The insurer provided a copy of the *Gonsalves* decision from the FSCO (P09-00036, March 31, 2011) in its written submissions and relied on portions of that decision both in its written and oral submissions at the appeal hearing on October 29, 2018. However, the Divisional Court allowed the judicial review from the FSCO *Gonsalves* (P09-00036, March 31, 2011) decision.

[42] Transcript, February 7, 2017 at 111. The Arbitrator recited Rule 39.2 of the *Code* but did not analyze it either during the hearing or in his written decision dated April 30, 2018.

2. Waiving the requirement of Rule 39 of the *Code* that all documents be served on her at least 30 days before the first day of hearing;
3. Being served with the December 2017 IE reports at least three weeks before the hearing.

The insurer's counsel:

1. Emailed Ms. Almedom's counsel on December 12, 2017 and stated: "… the reports were to address the post 104 IRB … Since the entire reason for the adjournment was so we can get the responding reports … my understanding is you had agreed to waive the thirty (30) day timeline for service."[43]
2. Faxed a letter to Ms. Almedom's counsel on December 13, 2017 and requested that Ms. Almedom's counsel: "confirm the acceptance of our client's (IE) reports after the 30 day deadline for **serving documents for use at arbitration**. As you are aware, the arbitration originally scheduled for November 15th was adjourned so that we may obtain a new section 44 report (emphasis added)."[44]
3. Emailed ADR Chambers on December 15, 2017 and stated: "Please be advised that the arbitration in this matter was adjourned from November, 2017 to January 15, 2018. **The basis of the adjournment was to allow the insurer to serve and file assessment reports to address the IRB claim** (emphasis added)."[45]

Notwithstanding the above correspondence, the transcript of the arbitration hearing indicates that Mr. March, on behalf of the insurer, objected at the arbitration hearing to Ms. Almedom filing the supplementary brief that included the December 2017 IE reports on the following grounds:

1. Ms. Almedom "has not filed (the supplementary brief) pursuant to the *Dispute Resolution Code* (sic) … if, indeed the claimant wished to actually include it in their

[43] Appeal submissions of the appellant, Tab N.

[44] Appeal submissions of the appellant, Tab O.

[45] E-mail of December 15, 2017 from the insurer's counsel to ADR Chambers and carbon copied to the Applicant's counsel, ADR Chambers file and Appeal submissions of the Appellant, Tab P.

materials, they had an obligation pursuant to the *Dispute Resolution Code* (sic) to advise us, and they have not."[46]

However, Ms. Almedom was not required **to re-serve** the December 2017 IE's on the insurer which she received from the insurer and for which:

i. The insurer indicated it required two adjournments of the arbitration hearing in order to obtain; and
ii. Which the insurer indicated before the arbitration hearing began on February 7, 2018 were relevant; and
iii. The insurer said **it** would serve and file for use at the arbitration hearing.

2. "It has not been served 30 days in advance."[47]
3. "(T)he rule is with regard to ensuring that this process … is done fairly, meaning that both sides know exactly what documents are intended to be relied upon by the other party for the purposes of the hearing."[48]
4. "(T)he word discretion … is only in extraordinary circumstances."[49]
5. The case law has defined that "extraordinary circumstances" are a factor when "a document potentially (does) not exist. So, something that has actually just been created, or has been lost, or something that...there was absolutely no way in which someone could not actually get it within 30 days or shortly hereafter."[50]

[46] Transcript, February 7, 2018, pp. 5-6.

[47] Transcript, February 7, 2018, p. 9, lines 13-14.

[48] Transcript, February 7, 2018, p. 9, lines 20-25.

[49] Transcript, February 7, 2018, p. 11, lines 6-16.

[50] Transcript, February 7, 2018, p. 11, lines 22-25; p. 12, lines 1-2.

This is not what the case law says regarding extraordinary circumstances. See, for example, the discussion of *Nickle v. RBC General Insurance Co.*[51] and *Tam v. Wawanesa Mutual Insurance Co.*[52] below.

6. "(T)he Rule is in place to ensure a fair hearing. … it is with regard to an evidentiary issue that the exchange must take place. And the exchange must take place to ensure that both sides know what documents that they intend to rely on."[53]
7. "That decision had to be made 30 days in advance of the arbitration;"[54]
8. The December 2017 IE "report is immaterial, and we had not intended on including it";[55]
9. "There is an admission that (Ms. Almedom's counsel) received a (*sic*) (IE) report. There is an admission with respect to having the report."[56]
10. The "foundation of that Rule 39, is fairness, to ensure there is a fair exchange of documentation and information that … between the parties, before we appear before you on day one of the arbitration"[57]
11. The purpose of Rule 39 "is to ensure and maintain the prospect of a fair exchange of documentation, and a fair understanding of what case to meet."[58]

Whether Rule 39 of the Code is Draconian

The Arbitrator stated in his decision that:[59]

[51] (FSCO, A06-000756, January 31, 2008), Applicant's Appeal Submissions at Tab GG.

[52] (FSCO, A07-002163, January 30, 2009), Applicant's Appeal Submissions at Tab DD.

[53] Transcript, February 7, 2018, p. 13, lines 21-22, 24-25; p. 14, lines 1-3.

[54] Transcript, February 7, 2018, p. 14, lines 11-12. Note, however, that Ms. Almedom's counsel received the December 2017 IE reports on January 9, 2018, which is 29 days before the arbitration hearing began.

[55] Transcript, February 7, 2018, p. 16, lines 19-20.

[56] Transcript, February 7, 2018, p. 23, lines 1-3.

[57] Transcript, February 7, 2018, p. 23, lines 16-20.

[58] Transcript, February 7, 2018, p. 97, lines 13-15.

[59] *Almedom*, Westlaw at para. 9.

> **The arbitral decisions that the Insurer's representative has referred to** make it clear that the implementation of the rule might be draconian at times.

Nickle v. RBC General Insurance Co.[60]

At the appeal hearing, Mr. Naimark relied on *Nickle v. RBC General Insurance Co.*, which was a case in which Mr. March represented RBC. Neither party brought *Nickle* to the attention of the arbitrator conducting the *Almedom* arbitration hearing. *Nickle* makes it clear that Rule 39 of the *Code* is not draconian. In *Nickle*, the Applicant filed her arbitration brief and two days later, RBC filed its arbitration brief. RBC omitted from its brief "three significant (IE) reports which RBC had commissioned." At the beginning of the hearing, Ms. Nickle's representative sought leave to file these three IE reports in a Supplementary Brief. The Supplementary Brief was served on RBC four days before the arbitration began. RBC objected to the admission of the Supplementary Brief on the basis that, pursuant to Rule 39.1 of the *Code*, the Ms. Nickle ought to have delivered to RBC any documents upon which she intended to rely at least 30 days before the beginning of the arbitration hearing.

In *Nickle*, RBC objected to the admission of these documents because of a technical breach of the Rule 39.1 of the *Code*. The Arbitrator in *Nickle* found that the reports in the Supplementary Brief were relevant to the arbitration. He stated:

> Pursuant to Rule 39.2 of the *Code*, I can admit these documents if I find that there are extraordinary circumstances that warrant their admission. Pursuant to Rule 81 of the *Code*, I can also waive the usual time requirements set out in Rule 39 or waive the application of Rule 39 altogether.
>
> … It is understandable that the Applicant's representative assumed that these reports would be contained in the Insurer's Brief and that their omission was not noted until shortly before the hearing. In a situation such as this, where the reports may be material to the outcome of the proceeding ... I found it reasonable to waive the normal time requirements. I admitted the Applicant's Supplementary Brief....[61]

---

[60] (FSCO, A06-000756, January 31, 2008).

[61] *Nickle v. RBC*, Westlaw at para.'s 8 and 9 (FSCO, A06-000756, January 31, 2008), Applicant's Appeal Submissions at Tab GG.

The facts in Ms. Almedom's case are stronger than in *Nickle* because Ms. Almedom's arbitration hearing was adjourned twice so that Wawanesa could get the December 2017 IE reports.

Tam v. Wawanesa Mutual Insurance Co.[62]

Mr. Naimark also relied upon *Tam v. Wawanesa Mutual Insurance Co*. at the appeal hearing. *Tam* was also another case in which Mr. March represented the insurer. In *Tam*, the insurer objected to the admission into evidence of the Applicant's Arbitration Brief because it was served on the insurer 14 days prior to the first day of the hearing, instead of at least 30 days in advance as required by Rule 39.1 of the *Code*.[63]

The Arbitrator in *Tam* exercised his discretion under Rule 81.1 of the *Code* and waived the usual time requirements in Rule 39 of the *Code* because:

i. Many, or all, of the documents were likely in the possession of the insurer for more than 30 days;
ii. The insurer could not show any specific prejudice that would flow from allowing those documents into evidence; and
iii. The harm to the Applicant in excluding his supporting documents outweighed the prejudice to the insurer having received them 14 days instead of 30 days before the beginning of the hearing.[64]

Had the *Nickle* and *Tam* cases been brought to the arbitrator's attention in Ms. Almedom's case, the arbitrator might not have incorrectly instructed himself on the law by finding that Rule 39.2 of the *Code* contemplates draconian outcomes.

---

[62] (FSCO, A07-002163, January 30, 2009), Applicant's Appeal Submissions at Tab DD.

[63] *Tam v. Wawanesa*, at p. 3 (FSCO, A07-002163, January 30, 2009), Applicant's Appeal Submissions at Tab DD.

[64] *Tam v. Wawanesa*, at p. 3 (FSCO, A07-002163, January 30, 2009), Applicant's Appeal Submissions at Tab DD.

Compliance with Rule 39 of the Code

It was impossible for Mrs. Almedom to comply with Rule 39.1 of the *Code* because she did not have the December 2017 IE reports 30 or more days before the hearing. She only received the December 2017 IE reports, that were obtained at the insurer's request and for which the arbitration hearing was adjourned twice, on January 9, 2018, which was 29 days before the hearing began on February 7, 2018. Nor did the Arbitrator review the correspondence and emails exchanged between counsel and between counsel and ADR Chambers that indicated that the **insurer** would serve and file the December 27, 2017 IE reports for use at the arbitration hearing.

In this case, Ms. Almedom provided a reasonable explanation for why the reports in question were not contained in her brief. It is understandable that Ms. Almedom's counsel was taken by "surprise"[65] as he stated at the arbitration hearing. Based on the correspondence exchanged between the insurer's counsel and Mr. Naimark, and between all counsel and ADR Chambers, Mr. Naimark, understandably, thought that the December 2017 IE reports would be relied upon at the arbitration hearing. In a situation such as this, where the December 2017 IE reports, that were obtained at the insurer's request, may be material to the outcome of the proceeding and where the insurer had agreed to "serve and file" them for the arbitration hearing, they should have been admitted into evidence at the arbitration hearing.

Section 15 of the *Statutory Powers Procedure Act*[66] states:

> (1) Subject to subsections (2) and (3), **a tribunal may admit as evidence at a hearing**, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> a) any oral testimony; and
>
> b) any document or other thing, **relevant to the subject-matter of the proceeding** and may act on such evidence, but the tribunal may exclude anything unduly repetitious (emphasis added).

[65] Transcript, February 7, 2018, p. 54, lines 4-5.

[66] R.S.O. 1990, c. S.22.

Admitting the December 2017 IE reports would not have resulted in any procedural unfairness or in an unfair hearing. Rather, the reports were relevant to the issues at the hearing. It was not prejudicial to Wawanesa to admit the December 2017 IE reports into evidence since the insurer was the party that obtained the reports.

Regarding the arbitrator's comments that *Reimer et al v. Thivierge*[67] is distinguishable because it dealt with the Ontario *Evidence Act* and not the FSCO process, which is an administrative tribunal, as Arbitrator Wilson stated:

> It is trite law that, as an arbitrator working in an alternative, legislatively derived system, I am bound by the decisions of the superior courts (section 96 courts) which have a supervisory function over all **administrative tribunals** in Ontario. In the absence of competing, contradictory jurisprudence from the superior courts, an arbitrator should at the very least be guided by the jurisprudence emanating from the superior courts of the province.[68]

In addition, the Arbitrator refused to allow Ms. Almedom to ask Dr. Kelly, a psychologist, any questions about the December 2017 IE report he wrote, in which he concluded that it was reasonable and necessary for Ms. Almedom to undergo a transferrable skills analysis and psychovocational assessment. As the Supreme Court of Canada stated in *R. v. Lyttle*:

> The right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value.[69]

[67] (1999), 46 O.R (3d) 309 (Ont. C.A.); Transcript, February 7, 2018 at 50.

[68] *Sharma v. Allstate Insurance Co. of Canada*, Westlaw at para. 25 (FSCO, A07-001223, June 18, 2008).

[69] *R. v. Lyttle*, [2004] SCC 5, [2004] 1 S.C.R. 193, [2004] S.C.J. No. 8, 115 C.R.R. (2d) 172, 17 C.R. (6th) 1, 180 C.C.C. (3d) 476, 184 O.A.C. 1, 235 D.L.R. (4th) 244, 316 N.R. 52, 60 W.C.B. (2d) 74, 70 O.R. (3d) 256 (note), Westlaw at para. 44 . See *R. v. Meddoui*, [1991] 3 S.C.R. 320 (S.C.C.); *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.); *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (Ont. C.A.).

Ms. Almedom's inability to cross-examine Dr. Kelly about his December 2017 IE report interfered with her ability to address an issue that the Arbitrator was deciding. That was an error of law.

Expenses of the Arbitration Hearing

Ms. Almedom's Notice of Appeal indicates that she is seeking both her costs of the appeal and of the arbitration hearing conducted in February - March, 2018.[70] Ms. Almedom sought an order regarding entitlement, not quantum, of arbitration expenses. In the alternative, Mrs. Almedom sought an order that the consent stay in my letter of June 25, 2018 be lifted.

At the appeal hearing, Ms. Almedom requested that I exercise my jurisdiction and find that she is entitled to her expenses of the arbitration hearing because:

(i) The insurer twice requested an adjournment of the arbitration hearing so that it could obtain the December 2017 IE reports to rely upon at the arbitration hearing and then objected to those IE reports being admitted into evidence when Ms. Almedom tried to enter them as an exhibit at the arbitration hearing;

(ii) The insurer's counsel misrepresented the law when making submissions on Rule 39 of the *Code* at the arbitration hearing, which led to the Arbitrator's conclusion that:

> Rule 39.1 of the *DRPC* is in practice designed to ensure that there is no ambush at the Hearing. All documents to be relied on must be made available to the other side. **The arbitral decisions that the Insurer's representative has referred to make it clear that the implementation of the rule might be draconian at times**. It is designed to ensure that parties are not surprised by anything at the Hearing (emphasis added).[71]

[70] Schedule A of the Notice of Appeal, at para. 3.

[71] *Almedom*, Westlaw at para. 8.

Rule 4.1 of *Code* defines adjudicator as a Director or someone appointed by a Director. Rule 65.1 of *Code* allows an adjudicator to make orders that he/she considers **just**. According to Ms. Almedom, this is unique set of circumstances arose because of Wawanesa ‘s conduct.

The parties advised in writing on June 25, 2018 that they consented to stay the expense hearing arising from the arbitration pending the outcome of this appeal. On June 25, 2018, I ordered that “On consent of the parties, the expense hearing is stayed pending the outcome of the appeal.”

Ms. Almedom’s submissions on costs were thoughtful and novel. However, I find that it is not appropriate for me to order expenses of the arbitration hearing to Ms. Almedom because that may fetter the discretion of the arbitrator who conducts the arbitration hearing. However, I lift my June 25, 2018 stay of paragraph 5 of the Arbitrator's April 30, 2018 order.

Conclusion:

Ms. Almedom acted fairly. She agreed:

i. To attend the December 2017 IE assessments;
ii. Short service (i.e., less than 30 days as required by Rule 39.1 of the *Code*) of the December 2017 IE reports;
iii. Two adjournments of the arbitration hearing so that the insurer could obtain the December 2017 IE reports.

Ms. Almedom was denied the right to a fair hearing and to fully respond to the case against her when the Arbitrator:

i. Excluded from the evidence at the arbitration hearing the December 2017 IE reports, that were commissioned at the insurer’s request and for which the insurer requested that the hearing be adjourned twice;
ii. Ruled that she could not cross-examine Dr. Kelly about his December 2017 IE report.

The above i. and ii. were errors of law and a denial of natural justice and procedural fairness.

In the alternative, if I am wrong in my finding that Arbitrator made an error of law in refusing to admit the December 2017 IE reports, the subsequent May 22, 2018 IE reports,[72] which I admitted as fresh evidence on appeal pursuant to my order of October 27, 2018, are relevant and necessary to deal fairly with the issues on this appeal. Not admitting the IE reports could lead to a substantial injustice.

The appeal is therefore allowed and the matter returned to arbitration for a fresh hearing before a different Arbitrator.

IV. EXPENSES

I wrote to the parties on September 24 and October 10, 2018 and asked that they speak amongst themselves to and try to reach an agreement regarding the quantum of expenses that the successful party will receive for the appeal. However, the parties advised at the hearing on October 29, 2018 that they had not reached an agreement regarding 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*.

Maggy Murray Director's Delegate	November 9, 2018 Date

[72] Which concluded that Ms. Almedom meets the post-104 week IRB test. I allowed the filing of the subsequent May 22, 2018 IE reports as fresh evidence because I was satisfied that this evidence met the *Palmer* criterion, namely that the evidence was relevant, could not with due diligence have been introduced at the hearing, was credible and could reasonably be expected to have affected the result.