Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A12-003006

BETWEEN:

DIANNA ASUMING

Applicant

and

BELAIR INSURANCE COMPANY INC.

Insurer

REASONS FOR DECISION

Before: Arbitrator John Wilson

Heard: October 15, 2013

Appearances: Ms. Asuming was unrepresented and was not present.
Marni Miller for Belair Insurance Company Inc.

Issues:

The Applicant, Dianna Asuming, was injured in a motor vehicle accident on January 21, 2010. She applied for and received statutory accident benefits from Belair Insurance Company Inc. ("Belair"), payable under the *Schedule*.[1]

Disputes arose concerning the Applicant's entitlement to certain accident benefits. The parties were unable to resolve their disputes through mediation and Ms. Asuming applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

[1] *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

The issues in this hearing are:

1. Is Ms. Asuming entitled to the accident benefits outlined in her Application for Arbitration? (Ms. Asuming claimed *inter alia* caregiver benefits, attendant care benefits, housekeeping, various costs of assessments and a variety of medical expenses).

Result:

1. All of Ms. Asuming's accident benefit claims against Belair are dismissed.

EVIDENCE AND ANALYSIS:

The dismissal of an arbitration without a full hearing in the arbitration system is becoming an increasingly ordinary event. Perhaps because of past delays in getting the mediation and arbitration process under way, or an over-enthusiastic representation that brings claims forward that might not stand the test of a hearing, applicants often lose interest and become detached from the process.

In the case of Ms. Asuming, I can only speculate as to the *bona fides* of her claim since she decided for unknown reasons not to turn up for her arbitration hearing, after first parting ways with the law firm that filed her Application for Arbitration.

While the *Rules of Civil Procedure* provide a virtually complete code of practice for the courts, and indeed the court rules deal with all manner of dismissals, the *Dispute Resolution Practice Code* (the "*Code*") which applies to arbitration is not as comprehensive. Indeed, it contains no clear provision for summary dismissal on the motion of a party. Consequently, the tendency has been, as in this case, to let matters proceed to an ultimate hearing which often ends up to be defaulted by the non-appearance of the unrepresented party.

As noted earlier, Ms. Asuming parted ways with her original counsel, Allan S. Blott Q.C. The reason for the breakdown was apparently a realization by counsel that she was not responding to requests for contact and indeed did not appear for her pre-hearing on April 23, 2013.

It is of note that section 279(5) of the *Insurance Act*, as it read at the time, encouraged the presence and participation of the principals to the dispute and not just counsel. Indeed, the practice at the Commission has been for arbitrators to require their presence, especially at pre-hearings.

Consequently, the absence of Ms. Asuming from her pre-hearing was a serious matter. Likewise the failure to communicate to her counsel or to respond to his communications should have raised and did raise serious doubt about Ms. Asuming's commitment to the arbitration process that she had initiated.

While there is precedent for merely adjourning Ms. Asuming's hearing to allow her to obtain counsel, or to allow her to prepare her case as an unrepresented litigant, there is no such request from either her or her former counsel on her behalf.

The only evidence on the record that relates to Ms. Asuming's intention can be inferred from the affidavit filed by Mr. Blott in support of his motion to be removed from the record. That affidavit as mentioned outlines the serial attempts to contact Ms. Assuming and her lack of response thereto. If the affidavit is to be believed (and there is nothing before me to cast doubt on its veracity), then Ms. Asuming's actions speak loudly to the fact that she does not care to proceed with this arbitration.

Still, she has not made any attempt to withdraw her claims or to take any positive steps to have it resolved. As a consequence, Belair had to take steps to prepare for an arbitration hearing, that turned out to be unnecessary, as once again Ms. Asuming chose not to attend either in person or by means of a representative. By any analysis such an approach by her to the arbitration process can be seen as both irresponsible and abusive.

Although arbitrators are statutory tribunals and not judges with a full panoply of inherent powers, the *Insurance Act* and the *Statutory Powers Procedure Act* ("*SPPA*") endow arbitrators with considerable direct and implied jurisdiction over the issues and parties in dispute. Specifically, section 23(1) of the *SPPA* provides a separate and wide-ranging power to deal with an abuse of process. That section reads as follows:

> A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

Even if an abuse had not been made out, precisely because Ms. Asuming was given notice of this proceeding, I would be entitled to dismiss the arbitration on the basis of a single non-attendance as outlined in section 4.7 of the *SPPA*.

> Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party.

In this matter I have no hesitation in finding that notice of all the various stages of this arbitration was sent to the address provided by Ms. Asuming.

It should also be remembered that Ms. Asuming, as the Applicant/claimant in this matter, bears the burden of proving her entitlement to benefits. Consequently, her failure to attend and to call evidence would mean almost certain dismissal, since no evidence was tendered on her behalf.

Given her failure to participate at any stage in this proceeding, I did not have any assurance that Ms. Asuming actually intended to pursue her claim further or that she stood any chance of success in obtaining an order against Belair, even if a further adjournment were to be granted.

Therefore, at the request of Belair, I dismiss all of Ms. Asuming's claims in this arbitration on the basis that to continue would permit an abuse of process and that Ms. Asuming has not met her burden of proving her entitlement on a balance of probabilities.

EXPENSES:

Patently, Belair is entitled to its expenses against Ms. Asuming, who began this process but could not be bothered either to carry through with the arbitration or to make any attempt to withdraw her claim. As such, she caused Belair and indeed the Commission to expend resources in respectively defending this claim and holding further hearings to deal with the inevitable denouement of the claim.

Counsel for Belair has filed an expense outline in which Belair claims a total of $1,089.51 in expenses, inclusive of HST. Given the multiple appearances I find this to be reasonable.

While normally a further expense hearing might be scheduled to give Ms. Asuming the opportunity to speak to the issue of expenses, she had notice of Belair's claim for expenses against her. By failing to attend the scheduled hearing Ms. Asuming waived any right to participate further in the process and I am not inclined to extend this process further.

Consequently, Ms. Asuming shall forthwith pay to Belair $1,089.51, inclusive of HST, as its expenses in this matter.

John Wilson Arbitrator	August 15, 2014 Date

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ARBITRATION ORDER

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

1. This Application for Arbitration is dismissed.

2. Ms. Dianna Asuming shall pay Belair's expenses in the amount of $1,089.51, inclusive of HST.

August 15, 2014

John Wilson
Arbitrator

Date