Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A05-000498

BETWEEN:

SERGIY ZAPISNOY

Applicant

and

CERTAS DIRECT INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

Before: Denise Ashby

Heard: February 16, 2007, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Dimple Verma and Alon Rooz appearing for Alon Rooz, personally and the firm of Mazin & Rooz
No one appearing for Mr. Zapisnoy
Ryan M. Naimark for Certas Direct Insurance Company

Issues:

The Applicant, Sergiy Zapisnoy, claimed entitlement to a medical benefit and an examination expense as a consequence of having been injured in a motor vehicle accident on March 10, 2003, pursuant to the *Schedule.*[1] Certas denied the claim on the basis that Mr. Zapisnoy had not been involved in an "accident" within the meaning of subsection 2(1) of the *Schedule.*[2] The issues were not resolved at mediation.

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

[2] Exhibit 1, Motion Record of the Respondent, Tab 2"D," entered at the motion hearing April 25, 2006

On March 14, 2005, an Application for Arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, purporting to be on Mr. Zapisnoy's behalf, was filed by Mr. Alon Rooz.[3]

On December 2, 2005, Arbitrator Renahan ordered that the firm of Mazin & Rooz be removed as solicitors of record on the basis that it had lost contact with Mr. Zapisnoy. In a decision dated May 10, 2006, I held Mr. Zapisnoy's claim to be withdrawn and that Certas was entitled to its expenses of this arbitration proceeding. I further ordered that an expense hearing be held and a copy of the decision be provided to Mr. Rooz.

The issues in this further hearing are:

1. What is the quantum of the expenses to which Certas is entitled pursuant to subsection 282(11) of the *Insurance Act*?

2. Who is liable to pay the expenses to which Certas is entitled, pursuant to subsection 282(11) of the *Insurance Act*?

3. Is Certas liable to pay Mr. Rooz his expenses in respect of the expense hearing, pursuant to subsection 282(11) of the *Insurance Act*?

Result:

1. Certas is entitled to its expenses in the amount of $4,621.17 pursuant to subsection 282(11) of the *Insurance Act*.

2. Mr. Alon Rooz, barrister and solicitor, is liable to pay Certas its assessed expenses of the arbitration hearing of $4,621.17 forthwith, pursuant to subsection 282(11.2)(a) and (c) of the *Insurance Act*.

3. Certas is not liable to pay Mr. Alon Rooz's expenses in respect of the expense hearing, pursuant to subsection 282(11) of the *Insurance Act*.

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[3] Exhibit 2

PROCEDURAL MOTIONS:

Apprehension of Bias:

Mr. Rooz brought a motion to remove me as the expense hearing arbitrator on the basis that there was an apprehension of bias. He submitted that as I had heard Certas' motion to dismiss there was an apprehension of bias. Certas objected to the motion on the basis that it had no notice. Further, it submitted that having heard the motion I was in the best position to assess expenses.

Subsection 282(3) of the *Insurance Act* provides that the appointed arbitrator "shall determine all issues." As a consequence, expense hearings are routinely dealt with by the hearing arbitrator. It is the hearing arbitrator who can best assess and apply the criteria set out in the Expense Regulation. As well, Mr. Rooz failed to comply with subsection 282(12) of the *Act*. Therefore, the motion was denied.

Motion to Dismiss Without Hearing:

Mr. Rooz moved to dismiss the expense hearing, as against himself, without a hearing on the basis that it was improperly brought. He revived the motion when he attended personally to make final submissions. Certas submitted that Mr. Rooz had been provided with a copy of the decision dated May 10, 2006 and it had given Mr. Rooz notice of its intention to seek an order that he personally pay its expenses in its letter dated May 23, 2006.[4]

I found that Mr. Rooz had notice of Certas' intention to seek an award of expenses against him personally and the expense hearing. Further, the date of the expense hearing was set following consultation with Mr. Rooz's office. On the basis of the foregoing, I found that the expense hearing should proceed.

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[4] Exhibit 1, entered at the Expense Hearing

EVIDENCE AND ANALYSIS:

Certas claimed that its expenses should be paid by Mr. Rooz personally pursuant to subsection 282(11.2) of the *Insurance Act*. It submitted Mr. Zapisnoy had been living with his parents in the Ukraine since June 2003. Therefore, it was improbable that Mr. Rooz had viable instructions to commence an arbitration when he filed the Application for Arbitration in March 2005. Mr. Rooz denied that he was liable for the expenses, claiming that he was acting in the usual course of the practice of law.

Subsection 282(11.2) provides:

> An arbitrator may make an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that,
>
> (a) in respect of a representative of an insured person, the representative commenced or conducted the proceeding without authority from the insured person or did not advise the insured person that he or she could be liable to pay all or part of the expenses of the proceeding;
>
> (b) in respect of a representative of an insured person, the representative caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person; or
>
> (c) the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default.

A lawyer "acting in the usual course of the practice of law," is exempted from the provisions of subsection 282(11.2)(a) pursuant to subsection 282(11.3). Subsection 282(11.4) requires that a representative be afforded an opportunity to make representations to the arbitrator prior to the arbitrator ordering the representative to personally pay all or part of the opposing party's expenses.

Mr. Oleksandr Zhylko, Mr. Zapisnoy's uncle, testified on behalf of Certas. He was a thoughtful and impressive witness.

Mr. Zhylko testified that Mr. Zapisnoy moved to the Ukraine on June 25, 2003 to reside with his parents and has not returned to Canada. For the two years preceding his departure, Mr. Zapisnoy lived with Mr. Zhylko and his wife while attending Seneca College. His wife made Mr. Zapisnoy's meals and he slept at their house. Mr. Zapisnoy did not pay room or board while living with them. Occasionally, Mr. Zapisnoy may have stayed over night with friends. However, to Mr. Zhylko's knowledge Mr. Zapisnoy had no other address during the period he lived in the Zhylko home. Mr. Zhylko testified he was unaware that Mr. Zapisnoy had been involved in an accident in March 2003.

I accept Mr. Zhylko's evidence that Mr. Zapisnoy resided with Mr. Zhylko and his wife for the two years prior to his departure from Canada on June 25, 2003. I find that Mr. Zapisnoy has not returned to Canada since. Therefore, Mr. Zapisnoy was not available to participate in the mediation held July 15, 2003. Further, Mr. Zapisnoy had not been living in Ontario for over 18 months when Mr. Rooz filed the Application for Arbitration.[5] I also accept that Mr. Zhylko was unaware that Mr. Zapisnoy was alleged to have been involved in an accident in March 2003.

The Collision Reporting Centres Supplementary Information Form indicates that Mr. Zapisnoy provided Mr. Zhylko's address.[6] This report is referred to in the Application for Benefits[7] signed by Mr. Rooz. The Application for Benefits provides another address for Mr. Zapisnoy which is found on both the Report of Mediator and Application for Arbitration.[8] I find that Mr. Rooz had knowledge of the two addresses provided by Mr. Zapisnoy.

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[5] Exhibit 2

[6] Exhibit 4

[7] Exhibit 1, Motion Record of the Respondent, Tab 2"A," entered at the motion hearing April 25, 2006

[8] Exhibits 5 and 2

Subsection 282(11.2)(a) requires that a representative have the client's authority to commence a proceeding and advise of the exposure to pay all or part of the opposing party's expenses. Failure to comply may result in an order that the representative personally pay the ordered expenses.

Mr. Zapisnoy claimed $11,572.88 for treatment received between March 10, 2003 to June 2003. His total claim was for $13,686.63 plus interest. Mr. Zhylko testified that his nephew lived rent free while a student and did not have a job. As Mr. Zapisnoy had no obvious source of income, I find that his claim represented a debt he owed to the service providers.

Certas denied the claim on the basis that Mr. Zapisnoy had not been involved in an "accident" within the meaning of subsection 2(1) of the *Schedule*. In order to be successful at arbitration Mr. Zapisnoy would be required to prove on a balance of probabilities: that he was involved in an accident; sustained an impairment as a result of the accident; the treatment services were reasonable and necessary for the treatment of the impairment and the examination expense met the requirements of section 24 of the *Schedule*.

Mr. Zhylko was unaware that Mr. Zapisnoy had been involved in an accident and made no reference to observing injuries or mobility restrictions in the months prior to his nephew's departure that would necessitate treatment totalling approximately $11,000.00. Mr. Zapisnoy's potential liability for arbitration expenses significantly increased his exposure from his debt of $13,686.63.

The circumstances of this claim are suspect. Mr. Zapisnoy provided an address other than his residential address. He did not inform his uncle that he had been involved in an accident. He did not inform his uncle that he was receiving extensive treatment for injuries sustained in the accident. It would be logical to expect that a nephew who had lived with an uncle for two years might share this information. It may be that Mr. Zapisnoy has a reasonable explanation for not disclosing. However, I am satisfied that Mr. Zapisnoy had no intention of proceeding past the mediation. In the circumstances, it was reasonable not to pursue this matter beyond mediation.

There is no evidence that Mr. Rooz or his firm contacted Mr. Zapisnoy at either of his two addresses following the mediation. I conclude that Mr. Rooz did not confirm his retainer and therefore did not have an insured person as a client at the time he filed the Application for Arbitration. As he had no client, Mr. Rooz had no authority to commence and conduct an arbitration proceeding as required by subsection 282(11.2)(a) of the *Insurance Act*.

Not being able to meet the burden of proof does not equate with a frivolous or vexatious claim. Therefore, I find that Mr. Rooz did not advance such a claim on behalf of Mr. Zapisnoy as defined in subsection 282(11.2)(b).

This arbitration ought not to have been commenced. Therefore, I find that Mr. Rooz caused Certas to incur the expenses of the arbitration proceeding without reasonable cause pursuant to subsection 282(11.2)(c).

Having found that Mr. Rooz attracted potential liability for Certas' expenses because he acted without the authority of an insured person, pursuant to subsection 282(11.2)(a), I will now consider whether he is exempt from liability by operation of subsection 282(11.3).

Mr. Zapisnoy had a choice to make following the mediation. To abandon his claim or proceed further. If he chose to proceed he must then choose the forum. Subsection 281(1) of the *Insurance Act* provides for private arbitration, arbitration at the Commission or commencing an action in the courts. Mr. Rooz had a professional obligation to advise Mr. Zapisnoy of the implications of the choices available following the mediation and to take Mr. Zapisnoy's informed instructions. Mr. Rooz provided no explanation for his submission of the Application for Arbitration in March 2005. He provided no evidence of a retainer. Mr. Rooz relied on Rule 2 of the *Rules of Professional Conduct*[9] as the basis for not releasing any information about his client.

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[9] Law Society of Upper Canada, November 2000, Consolidated with Amendments February 2007

Rule 2.3 (1) provides:

> A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

The generality of the Rule is tempered by the justified or permitted disclosure provisions of sub-rules 2.3 (2), (3), (4) and (5). The sub-rules relevant to this matter are:

> (2) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required...
>
> (4) Where it is alleged that a lawyer or the lawyer's associates or employees are:
>
> (a)...
>
> (b) civilly liable with respect to a matter involving a client's affairs, or
>
> (c)...

Mr. Rooz submitted that he could not provide an explanation without an order of the tribunal. When asked whether he was seeking such an order he submitted that it was for Certas to seek the order. In the alternative, the tribunal should require his evidence. He made repeated submissions that he was not hiding from being required to testify. I find his submissions incongruous. Mr. Rooz seeks to rely on the defence that he was "acting in the usual course of the practice of law." There is no obligation for the opposing party or the tribunal to provide him with the tools to assert the defence. He is bound by his decision not to seek an order.

As well, Mr. Rooz chose not to rely on sub-rule 2.3(4)(b) respecting civil liability. Subsection 282(11.2) legislates a lawyer's potential civil liability for the expenses of his or her client. The *Insurance Act* also provides a defence to subsection 282(11.2)(a) of "acting in the usual course of the practice of law."

Mr. Rooz's firm represented Mr. Zapisnoy at the mediation. Usually, a lawyer would contact the client following the mediation to discuss next steps. In the event the client failed to respond, the usual practice would be to send a letter to all addresses on the file setting a date by which the client must contact the lawyer otherwise the file would be closed. In the circumstances of this matter, such a letter might reasonably be expected to refer to the unsuccessful mediation, the position taken by Certas, the options for continuing the claim, advice regarding any limitation periods and the consequences of not proceeding prior to the lapse of the limitation. The file would then be closed with no further action after the passing of the date for a response.

Mr. Rooz filed the Application for Arbitration on March 14, 2005. Certas terminated benefits on May 6, 2003.[10] Arguably the limitation period was approaching. Lawyers may commence proceedings on behalf of a client, with whom the lawyer has lost contact, both to preserve the client's rights and avoid a negligence claim. In such circumstances, the lawyer will usually bring a contemporaneous motion to be removed from the record. In this case, Mr. Rooz fulfilled the preservation of Mr. Zapisnoy's rights by representing him at the mediation. Mr. Zapisnoy was facing a significant evidentiary burden to establish a claim on behalf of the service providers. By filing the Application for Arbitration, Mr. Rooz exposed Mr. Zapisnoy to greater liability than the debt he owed.

If in commencing and conducting the arbitration Mr. Rooz was attempting to avoid a negligence action then he was preferring his own interest to that of Mr. Zapisnoy. Such conduct is beyond the usual practice of law. In commencing the arbitration, Mr. Rooz abandoned his role as advocate and donned the mantle of litigant. In so doing, he ceased to be "acting in the usual course of the practice of law" and is liable for Certas' expenses.

Mr. Zapisnoy having taken no positive steps to commence the arbitration is not liable for its expenses.

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[10] Exhibit 1, Motion Record of the Respondent, Tab 2"D," entered at the motion hearing April 25, 2006

In determining the amount of the expenses under subsection 282(11) of the *Insurance Act,* the arbitrator is required to consider the criteria set out in the Expense Regulation, Section F of the *Dispute Resolution Practice Code* (4th Edition, updated October 2003). The criteria are:

1. Each party's degree of success in the outcome of the proceeding.

2. Any written offers to settle that were made in accordance with the rules of practice and procedure applicable to the proceeding after the conclusion of mediation and before the conclusion of the arbitration.

3. Whether novel issues are raised in the proceeding.

4. The conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders.

5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.

6. Whether the insured person refused or failed to submit to an examination as required under s. 42 of the Schedule or refused or failed to provide any material required to be provided by s. 42 (10). Section 42 sets out what examinations and information the insurer is entitled to ask for.

Certas' expenses are detailed in its Bill of Costs.[11] I find that the hourly rate of $83.10 is consistent with the provisions of the *Legal Aid Services Act, 1998* for a lawyer having 8 years experience. A review of Counsel's dockets indicates that 22.7 hours were billed from receipt of the file on March 28, 2005 to December 2, 2005, when Mr. Rooz was removed as a representative. A further 25.6 hours was billed for preparing for and attending on the motion to dismiss. Mr. Rooz made no submissions with respect to the reasonableness of the expenses set out in either the Bill of Costs or the dockets. Therefore, I find that Mr. Rooz accepted that those expenses were reasonable.

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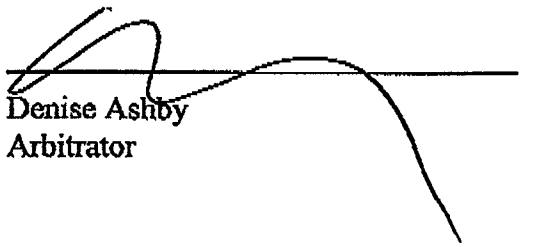
[11] Exhibit 1

Mr. Rooz, a lawyer, recklessly commenced an arbitration proceeding which should not have been commenced. He acted without the authority of an insured person in filing the Application for Arbitration and thereby caused Certas to incur expenses without reasonable cause, pursuant to subsection 282(11.2)(a) and (c) of the *Insurance Act.* Mr. Rooz was not exempted from paying those expenses pursuant to subsection 282(11.3). Therefore, I find that Certas is entitled to all of its permissible expenses as set out in Section F of the *Code.*

I find that all the expenses incurred by Certas and the disbursements charged by Certas are reasonable and in compliance with the expenses permitted pursuant to the Expense Regulation save for the July 14, 2005 telephone call and letter to another insurance company in respect of the appointment of an arbitrator. Therefore, I have reduced the counsel fee by $41.55 and award Certas its expenses in the amount of $4,621.17 payable by Mr. Rooz forthwith.

Mr. Rooz, in his final submissions, sought his expenses in respect of the expense hearing. I deny his request.



Denise Ashby
Arbitrator

April 25, 2007
Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A05–000498

BETWEEN:

SERGIY ZAPISNOY

Applicant

and

CERTAS DIRECT INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Certas is entitled to its expenses in the amount of $4,621.17 pursuant to subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8.

2. Mr. Alon Rooz, barrister and solicitor, is liable to pay Certas its assessed expenses of $4,621.17 forthwith, pursuant to subsection 282(11.2)(a) and (c) of the *Insurance Act*.

3. Certas is not liable to pay Mr. Alon Rooz's expenses in respect of the expense hearing, pursuant to subsection 282(11) of the *Insurance Act*.

Denise Ashby
Arbitrator

April 25, 2007
Date