Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-003232

BETWEEN:

PATRICIA FRASER

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Jeff Musson

Heard: In person at ADR Chambers on April 28, 2016

Appearances: Mr. Adesina John for Mrs. Patricia Fraser
Ms. Kadey Schultz for RBC General Insurance Company

Issues:

The Applicant, Mrs. Patricia Fraser, was injured in an accident on May 28, 2010 and sought accident benefits from RBC General Insurance Company ("RBC"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mrs. Fraser 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 Preliminary Issue Hearing are:

1. Is Mrs. Fraser entitled to withdraw her application for Income Replacement Benefits pursuant to Rule 70 of the *Code*?[2]
2. Is Mrs. Fraser entitled withdraw her application for Attendant Care Benefits pursuant to Rule 70 of the *Code*?
3. Is Mrs. Fraser entitled withdraw her application for Housekeeping and Home Maintenance Benefits pursuant to Rule 70 of the *Code*?
4. Is either party entitled to their expenses in respect of the Preliminary Issue Hearing?

Result:

1. Mrs. Fraser's request to have her application for Income Replacement Benefits withdrawn is granted.
2. Mrs. Fraser's request to have her application for Attendant Care Benefits withdrawn is granted.
3. Mrs. Fraser's request to have her application for Housekeeping and Home Maintenance Benefits withdrawn is granted.
4. The Insurer is entitled to its expenses of this Preliminary Issue Hearing in the amount of $19,620.36 to be paid within 60 days of this decision. The Applicant's Representative, Mr. Adesina John, shall be personally responsible for $838.96 of the award. The Applicant is responsible for $18,871.40 of the award. Both amounts shall be paid to the Insurer within 60 days of this decision.

EVIDENCE AND ANALYSIS:

BACKGROUND

The Applicant filed an Application for Arbitration on May 19, 2015.[3] The Applicant's current

[2] *Dispute Resolution Practice Code*, 4th Edition.

representative was the representative of record at the time that the Application for Arbitration was filed. The Applicant claimed Income Replacement Benefits in the amount of $400.00 per week from May 28, 2010 to date and ongoing. The Insurer never paid these benefits because requests for proof of income by the Applicant were never complied with before the date of denial. Regardless, the Insurer officially denied the Applicant's entitlement to these benefits based on neurological, orthopedic and psychological reports. The Applicant was notified of the denial by letter on December 9, 2010. The Applicant also applied for Attendant Care Benefits in the amount of $810.31 from December 16, 2010 up to May 28, 2012. In addition, the Applicant claimed Housekeeping and Home Maintenance Benefits from December 16, 2010 up to May 28, 2012. The Insurer raised a preliminary issue pursuant to sections 50 & 51 of the *Schedule*[4] on all issues in dispute, and in turn, initially requested this Preliminary Issue Hearing to address these issues based on a denial letter sent to the Applicant on December 9, 2010.[5]

THE PRELIMINARY ISSUE HEARING

The Applicant did not attend the Hearing—only her representative, Mr. John, was present. Contrary to normal practice, the Applicant's representative instructed his client that her attendance was not required at the Hearing. At the beginning of the Hearing, the Applicant's representative requested that the Application for Arbitration be withdrawn on a no cost basis. The Insurer objected to the withdrawal on a no cost basis but agreed to the withdrawal of the Application for Arbitration, subject to its request for expenses as a result of the withdrawal request coming late in the process.

Based on consent of both parties, I ordered the Application for Arbitration to be withdrawn. Further, I agreed to hear submissions from both parties related to expenses.

EVIDENCE

---

[3] Exhibit 2, Tab 3.
[4] *Ibid*., Tab 4.
[5] Exhibit 2, Tab C13.

Applicant's Position

The Applicant's representative apologized for the late withdrawal request regarding the Applicant's Application for Arbitration. He stated that he has a busy practice and only recently, in the days prior to the Preliminary Issue Hearing, did he turn his attention to the Applicant's file. The Applicant's representative acknowledged that he knows that submitting an Application for Arbitration past the 2 year mark after the denial of benefits is contrary to the *Schedule*; however, he is of the opinion that the Applicant is not bound by the time limitations in the *Schedule* despite submitting no argument or factual evidence to support this position. In terms of settling this file prior to the Hearing, the Applicant's representative acknowledged that he received the Insurer's offer to settle this file which was sent 3 weeks prior to the Preliminary Issue Hearing. The Applicant's representative stated that he only read the email from the Insurer in the days immediately prior to the Hearing because he doesn't have the time or resources to reply to email correspondence. When given the opportunity, the Applicant's representative submitted no evidence in order to defend against the Insurer's request for costs both against himself or the Applicant in this matter.

Insurer's Position

The Insurer submitted that it had properly adjusted the Applicant's accident benefits file since the date of loss. It also submitted evidence that it was fully compliant with the *Schedule*. As part of its request for costs based on this Application being frivolous and vexatious, the Insurer gave evidence in support of its position that the Applicant is not entitled to submit an Application for Arbitration because the Applicant missed the filing deadline by approximately 29 months. The Applicant failed to provide an explanation as to why she was late filing her Application for Arbitration. The Insurer submitted evidence to substantiate its position, namely the denial letters,[6] dated December 9, 2010, that were sent to the Applicant and the date

[6] *Ibid.*

on which the Applicant filed the Application.[7] The Insurer's benefit terminations were completed as per the rules in the *Schedule*. In addition, the Insurer put forward the position that it has handled this claim in a professional, honest manner. It also submitted evidence and called a witness to establish that the Applicant did not afford the Insurer similar courtesy, thereby causing unnecessary costs and expenses in regards to this Application. As an example, the Insurer submitted evidence showing that the Applicant had submitted false bank statements as part of her claim for Income Replacement Benefits. The Insurer had summoned a representative from the Applicant's bank to testify to the validity of the Applicant's submitted bank account statements.

Testimony of Adam Collins – TD Bank

The representative summoned was Mr. Collins. He is a banker employed by TD Bank. He is an account manager and is responsible at TD Bank to oversee the Applicant's bank account. As an account manager, he was called to testify as to the authenticity of the bank statements that the Applicant submitted to the Insurer. Mr. Collins confirmed that the Applicant only had one bank account at TD Bank and that the bank account statements in question were related to this account. He also confirmed that the bank account in question was a joint account between the Applicant and her recently deceased husband.

Mr. Collins testified that the bank statements submitted by the Applicant to the Insurer were deliberately altered by the Applicant. Mr. Collins provided a copy of the Applicant's original bank statements and those statements were completely different from the bank statements that the Applicant submitted to the Insurer as part of her claim for benefits.[8]

The Insurer submits, and I find that the Applicant attempted with the altered statements to show, deposits in the amount of $525.00 as paycheque deposits in order to claim Income Replacement Benefits. When compared to the original statements, however, no such paycheque deposits had occurred in either the amount of $525.00 or on the transaction dates

[7] *Ibid*., Tab 3.
[8] Exhibit 6.

that the altered statements showed. Mr. Collins testified that the bank statements presented by him were in fact the authentic statements, as opposed to the copy that the Applicant submitted as bank statements.

ANALYSIS

The Applicant had been given the opportunity to appear at this Hearing to defend herself, however, she chose not to appear. After analyzing the evidence presented, in my opinion, there was a willful misrepresentation of documents submitted by the Applicant. This willful misrepresentation directly caused the Insurer to incur unnecessary expenses as a result of this frivolous claim for accident benefits being advanced to a Hearing by the Applicant.

The Applicant through her representative never submitted an explanation or provided evidence at the Hearing to explain the discrepancy in the original bank statements when compared to the bank statements that she submitted as part of her claim. The Applicant knew that the Insurer was going to call her TD Bank Account Manager to testify to the authenticity of the Applicant's statements. I am drawing an inference that this factored into the Applicant's decision not to attend the Preliminary Issue Hearing.

I find based on the evidence presented and the testimony of Mr. Collins that the Applicant did in fact try to willfully misrepresent facts to the Insurer and the Commission by submitting falsified bank statements.

The Applicant was in receipt of a valid denial letter, dated December 9, 2010.[9] There was no evidence presented at the Hearing showing that the denial of benefits was not valid. Based on these facts, the Applicant's representative, a licensed paralegal in the Province of Ontario, knew that the Applicant's Application for Arbitration was time limited; however, he still proceeded to file the claim on her behalf. This was the first step in a multitude of steps which added costs. After the Pre-Hearing and up until the Preliminary Issue Hearing, the Applicant

[9] Exhibit 2, Tab C13.

failed to produce any documents that the Insurer requested as part of its production requests. There were numerous correspondence sent by the Insurer which were never answered by the Applicant's representative.

In preparing for this Preliminary Issue Hearing, the Applicant's representative merely photocopied the Insurer's brief which he received prior to the Hearing date. He then modified the order of documents, added in a few extra pages and then submitted the entire package as the Applicant's own brief. There was no Joint Arbitration Brief agreed to or filed on behalf of the parties. The Applicant only regurgitated the Insurer's material and submitted it as her own. The Applicant was given every opportunity to settle this case prior to this Preliminary Issue Hearing, but chose not to. She not only didn't settle this case, but she never forwarded a counter proposal after receiving the Insurer's offer.

Based on the evidence submitted, the Applicant's representative bears significant responsibility by allowing this Application for Arbitration to proceed to a Hearing. The Applicant's representative knew, and if not, should have known, that the Applicant was time limited in filing the Application for Arbitration and provided no reasons otherwise. The Applicant's representative continued his unprofessional conduct by not responding to the Insurer's request for document productions and continued this conduct by not responding to emails, phone messages and other correspondence from Insurer's counsel. As a result, the Insurer had to bear the cost of preparing for the Hearing, summonsing Mr. Collins to testify and the costs of engaging the services of a court reporter, all of which would have been unnecessary if the Applicant's representative properly discharged his duties in a professional manner. The Insurer notified and produced evidence prior to the Preliminary Issue Hearing to the Applicant's representative that the bank account statements that the Applicant had submitted were doctored. The Applicant's representative had a responsibility to act on this information and if the Applicant was not prepared to withdraw her claim, the Applicant's representative could have requested that he be removed from the record. He chose not to do so and instead, the Insurer continued to incur costs associated with this file. Based on the evidence presented, I am of the opinion that this Application for Arbitration can best be described as frivolous. This Application should have never been filed, and once filed, promptly withdrawn.

The Insurer as part of its submission filed account of expenses as per Rule 75 of the *Dispute Resolution Practice Code* ("*DRPC*"), as follows. The Insurer's counsel fees were $16,620.59 which is the amount adjusted to the Legal Aid Rate. The HST on the amount is $2,160.81. The total disbursements were $838.96. The Applicant's representative did not dispute these costs or provide evidence that any of these costs are not reasonable or necessary.

EXPENSES:

Rule 75 of the *DRPC* provides in detail the criteria that an Arbitrator must consider when awarding expenses. In *Truong and Coachman Insurance Company*,[10] Arbitrator Muir stated:

> There can be no more serious misconduct by an insured person than to commence an arbitration based on misrepresentation of a fact or circumstance, which is fundamental to the merits of the arbitration.

I agree that the same threshold should apply to the case heard before me. The Applicant knew that she was misrepresenting her claim and yet chose to still pursue the claim all the way to a Preliminary Issue Hearing. By failing to attend the Hearing, in my opinion, the Applicant showed a complete disrespect towards the participants who did attend. Under Section 282 (11.2) of the *Insurance Act*, it defines the criteria which an Arbitrator may award costs.[11]

There has been precedent set in awarding costs against an Applicant's representative. In *Lee and State Farm Mutual Automobile Insurance Company*,[12] Arbitrator Shapiro recently stated that "filing and continuing to pursue a wholly time-barred Application could qualify as advancing a frivolous or vexatious claim on behalf of the insured person." I agree that the same threshold should apply to the Applicant's representative in the case heard before me, and in my opinion, RBC not only provided sufficient but irrefutable proof that Mrs. Fraser's claim

[10] Exhibit 7, Tab 12.
[11] *Insurance Act*.
[12] Exhibit 7, Tab 4.

was time-barred.

Therefore, as part of awarding expenses, I am awarding costs of $838.96 against the Applicant's representative. This amount includes costs associated with the Insurer's disbursements since the Applicant's representative took it upon himself to resubmit the Insurer's brief as his own with only superficial modifications. This award against the Applicant's representative is also due to the frivolous and vexatious nature of this claim which could have been addressed well before this Preliminary Issue Hearing.

I am awarding the remaining expenses of $18,781.40 against the Applicant for submitting a misleading – indeed falsified – document in addition to filing a frivolous and vexatious claim which resulted in a Preliminary Issue Hearing having to be commenced.

July 4, 2016

Jeff Musson
Arbitrator

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-003232

BETWEEN:

PATRICIA FRASER

Applicant

and

RBC 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. Mrs. Fraser's request to have her application for Income Replacement Benefits withdrawn is granted.
2. Mrs. Fraser's request to have her application for Attendant Care Benefits withdrawn is granted.
3. Mrs. Fraser's request to have her application for Housekeeping and Home Maintenance Benefits withdrawn is granted.
4. The Insurer is entitled to its expenses of this Preliminary Issue Hearing in the amount of $19,620.36 to be paid within 60 days of this decision. The Applicant's Representative, Mr. Adesina John, shall be personally responsible for $838.96 of the award. The Applicant is responsible for $18,871.40 of the award. Both amounts shall be paid to the Insurer within 60 days of this decision.

July 4, 2016

Jeff Musson
Arbitrator

Date