Financial Services
Commission of Ontario

Commission des
services financiers
de l'Ontario

Appeal P13-00034

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Appellant

and

RUSSELL KORUS

Respondent

BEFORE: David Evans

REPRESENTATIVES: Todd J. McCarthy for State Farm Mutual Automobile Insurance Company
Andrew Eckart for Mr. Russell Korus

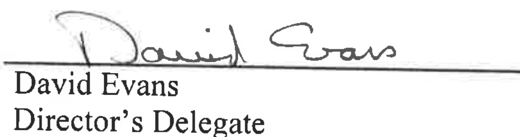
HEARING DATE: December 13, 2013, by written submissions

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Arbitrator's order of October 21, 2013 is confirmed and this appeal is dismissed.

2. If the parties are unable to agree on the legal expenses of this appeal, an expense hearing shall be requested pursuant to the *Dispute Resolution Practice Code* (Fourth Edition, Updated - August 2011), but as set out below and within sixty days of the date of this decision.



David Evans
Director's Delegate

January 10, 2014
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This is an appeal from the letter decision of Arbitrator Bayefsky dated October 21, 2013. The Arbitrator allowed Mr. Korus to withdraw his arbitration proceeding, in which he claimed about $13,500 in medical expenses under the *SABS–1996*[1] arising out of a 2007 accident. The withdrawal request was due to Mr. Korus's wish to include the medical expenses claim in a parallel proceeding at the Superior Court of Justice for income replacement benefits (IRBs) and punitive damages arising out of the same 2007 accident.

II. BACKGROUND

The parties agreed to proceed by way of written submissions on an expedited basis. Due to time constraints, I advised the parties of the result of this appeal on December 16, 2013, with reasons to follow. These are the reasons.

The recital of facts is drawn mostly from State Farm's written submissions.

Mr. Korus was injured in a motor vehicle accident on December 26, 2007. He commenced both an accident benefits arbitration proceeding and a tort action.

After settling that initial FSCO arbitration proceeding in 2010, Mr. Korus commenced a second FSCO arbitration proceeding in 2012 for chiropractic treatments, after a failed mediation. The second FSCO arbitration proceeding was the subject of a pre-hearing on April 24, 2013 before the Arbitrator, who set a hearing for September 18 and 19, 2013.

Additional issues including IRBs were the subject of a Mediator's Report issued on March 13, 2013. Mr. Korus elected to bring another court action, this time to pursue the IRBs and punitive damages. Instead of filing a defence, State Farm served a motion under Rule 21.03(3)(d) of the

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

Rules of Civil Procedure to have the action stayed or dismissed on the ground that it is an abuse of the process of the court. The motion was initially scheduled for October 23, 2013.

State Farm also requested a resumption of the arbitration pre-hearing in order to seek a declaration that there could be only one forum for the accident benefits dispute.

The resumed pre-hearing to consider the request for a declaration occurred on September 9 and 11, 2013. The Arbitrator wrote that State Farm would consent to add the claim for IRBs to the arbitration proceeding, but not the medical benefits claim to the court action except on terms unacceptable to Mr. Korus:

> Mr. McCarthy indicated that State Farm would not consent to adding the medical benefits issue from arbitration to the court action, unless Mr. Korus agreed to withdraw a claim for punitive damages arising from that issue. Mr. Charney indicated that Mr. Korus was not prepared to agree to that. Mr. Charney also indicated that he would be adding the medical benefits issue to the court action, and sought to adjourn the arbitration hearing, pending the outcome of Mr. McCarthy's Rule 21 motion on October 23, 2013…

The Arbitrator was not prepared to make the declaratory order then, but remained seized pending the result of the Rule 21 motion and "adjourned the hearing, on consent, to a date to be determined at a resumption of the pre-hearing on January 10, 2014, at 10:00 a.m., by teleconference." The Rule 21 motion was later set for December 17, 2013.

Mr. Korus next amended the Statement of Claim to include the medical benefits claimed in the adjourned FSCO arbitration proceeding. He then sought a resumption of the arbitration pre-hearing in order to withdraw his FSCO claims in advance of a court motion to combine the tort and accident benefit court actions.

In his pre-hearing letter of October 21, 2013, the Arbitrator found that Rule 70 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated - August 2011) allowed Mr. Korus to seek to withdraw his claims at any time. He also found that his earlier adjournment order did not require Mr. Korus to proceed with either the pre-hearing resumption or the hearing. The Arbitrator was prepared to allow Mr. Korus to withdraw his arbitration, without expenses, because

> Mr. Korus wishes to simplify these proceedings and to protect his more substantial Court action for IRBs and other damages. While State Farm has insisted that Mr. Korus cannot proceed with different issues in more than one forum, as also set out in my September 11th letter State Farm was only prepared to consent to Mr. Korus shifting the medical expense issue to court if he agreed to abandon his related claim for punitive damages (a condition Mr. Korus was not prepared to accept). Mr. McCarthy has also now argued that Mr. Korus may be jeopardizing his claim for medical benefits if the Court does not permit him to have all of the issues addressed in that forum. In my view, in the absence of any particular prejudice to State Farm of his proceeding in this way (which prejudice State Farm has not established), that is a risk Mr. Korus is entitled to take. I see no basis on which to force Mr. Korus to proceed with his claim for medical benefits at the Commission. Nor do I see any basis upon which to conclude that he is abusing the Commission's process, particularly in light of State Farm's position that Mr. Korus can only proceed with his claims in a single forum.

The three main points I see arising from this letter are whether

- the issues should be heard in one forum
- a condition for withdrawal can include a requirement to abandon a punitive damages claim
- an arbitrator can force an applicant to proceed with a claim here, regardless of the strategy chosen by counsel

To conclude the recital of facts, on October 23, 2013 Mr. Korus successfully moved before Master Muir to have the accident benefits court action tried together with the tort action over the objection of the tort defendants. The combined proceedings are scheduled for a six-week trial before a jury, commencing February 10, 2014.

III. ANALYSIS

State Farm submits that Mr. Korus's attempt to change fora is too late in the process. It submits that, while Mr. Korus does not face impediments by way of limitation period defences in either forum, the tort defendants object to the combined action and the trial may be delayed. State Farm submits that Mr. Korus should add the IRBs to the FSCO proceeding and replace his claim for punitive damages with one for a special award.

However, I find no error of law in the Arbitrator's decision. The issues can all proceed now in one forum, so State Farm has achieved the first point set out above – except that it is open to a punitive damages claim in the court action instead of a special awards claim here.

I find that State Farm is inappropriately seeking to apply principles pertinent to the situation when a claim is sought to be added to a FSCO arbitration to this situation, namely, when a claim is sought to be withdrawn. However, the situations are different.

As the Arbitrator noted, R. 70.1(c) allows a party to seek permission to withdraw all or part of a dispute by making an oral request during a pre-hearing discussion. Rule 70.3(a) goes on to provide that "Where a party does not agree to the withdrawal, an adjudicator may … permit the withdrawal on such terms and conditions as he or she considers just."

Mr. Korus submits that applicants have been permitted to withdraw from the arbitration process in favour of a court proceeding, even at a very late stage. He refers to the following passage from *Richard and Lombard General Insurance Company of Canada*, (OIC A97-001526, April 29, 1998):

> In reaching the conclusion that permitting the withdrawal is appropriate, I start by noting that an insured person has a choice of forums. After participating in mediation, the insured person may elect to pursue the matter by way of an action in the General Division, or alternatively, may file for arbitration. As stated by Director's Delegate Draper in *Catlos and Jevco Insurance Company* (September 26, 1997), OIC P97-00013, the election, once made, is not irrevocable. In the *Catlos* case, the Director's Delegate upheld the arbitrator's decision to allow the applicant to withdraw approximately a month before the hearing date. Counsel indicated that he intended to pursue the matter in the General Division. In *Long and Zurich Insurance Company* (June 25, 1997), OIC A96-001561, counsel was permitted to withdraw the application at the pre-hearing, to advance a claim in the General Division. Counsel indicated to the arbitrator that he believed he had a better chance of defeating the insurer's limitation defence in front of a judge. In *Sacco and Wawanesa Mutual Insurance Company* (October 1, 1996), OIC A95-000349, the applicant was allowed to withdraw at the commencement of the hearing. Counsel indicated that he intended to proceed in the General Division where he believed he would obtain a more favourable interpretation of the word "accident."

Mr. Korus further submits that withdrawals have been allowed even if they are only tactical: *Rano and Commercial Union Assurance Company*, (FSCO A97-001057, July 30, 1999).

I find that the Arbitrator was acting within his discretion in allowing Mr. Korus to withdraw his claims. I find that the Arbitrator had no power to require Mr. Korus to withdraw his punitive damages claim in court as a condition of allowing the withdrawal from arbitration. I find he also had no power to force Mr. Korus to continue his arbitration here, supposedly in his best interests.

Conversely, I find that the cases State Farm relies on are not relevant to a withdrawal application. The cases deal with whether to stay an arbitration proceeding sought to be added to the arbitration process, not whether to allow a withdrawal from it. In *Non-Marine Underwriters, Mbrs. of Lloyd's and Mangat*, (FSCO P00-00020, August 1, 2000), a court action was started before an application for arbitration, and the insurer moved that the arbitration proceeding should be dismissed and moved to the courts. In the result, it was held on appeal that the arbitration proceeding should be stayed, giving Mr. Mangat an opportunity to withdraw it without penalty. I note that among the grounds for staying the arbitration were the fact that the court action included a claim for punitive damages and a claim for ongoing weekly IRBs. If *Mangat* is relevant, then the similar facts here lend even more strength to the steps taken by Mr. Korus and to the decision made by the Arbitrator. But in any event, the forum to decide whether or not the entire matter should proceed in the courts is the court itself.

As for *Gordyukova v. Certas Direct Insurance Company*, 2012 ONCA 563, it does not stand for the proposition that there can only be one forum for deciding accident benefits but rather, depending on the circumstances, the opposite. In that case, the Arbitrator had required a court proceeding and an arbitration proceeding to be consolidated without considering the effect of a limitation period. The court held that the claimant could and should pursue her catastrophic claim in the Superior Court action where it had been originally commenced, as otherwise her claim would be precluded in arbitration. Nonetheless, State Farm submits that the

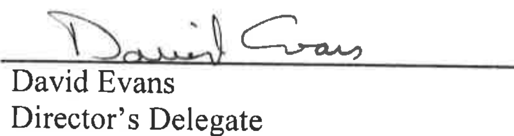
> Court of Appeal noted that changing fora should be discouraged, emphasizing that to allow otherwise would result in the scenario whereby "nothing would prevent a claimant from deciding on the eve of trial to change fora and seek to have the matter heard by an Arbitrator."

However, the Court's comment has to be seen in the context of the limitation problem at issue, since the court went on to say that "An insured is also at liberty to seek to have some issues determined by the court and other issues determined by arbitration. What an insured cannot do is change forums after the expiry of the limitation period." Thus, the Court was seeking to prevent forum switching unlimited in time and not forum switching in general. There is no limitation issue here, and again, if there is a problem with bringing the entire accident benefit claim to the courts, that is for the courts to decide.

Accordingly, there was no error, and the Arbitrator's order of October 21, 2013 is confirmed and this appeal is dismissed.

IV. EXPENSES

If the parties are unable to agree on the legal expenses of this appeal, applying the procedure set out in Rule 79.2 of the *Dispute Resolution Practice Code*, an expense hearing shall be requested, within sixty days of the date of this decision. The request shall be accompanied by a Bill of Costs describing the expenses claimed, the services received and the costs, as well as written submissions regarding entitlement to and/or the quantum of legal expenses, as are in dispute.



David Evans
Director's Delegate

January 10, 2014
Date