



FSCO A14-006552

BETWEEN:

FLORENTINO WRIGHT

Applicant

and

PAFCO INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Kimberly Parish

Heard: By written submissions completed on November 25, 2016 and
in person at ADR Chambers on December 19, 2016

Appearances: Mr. Florentino Wright did not participate
Ms. Jasmine Daya and Mr. Daniel Klein participated for Mr. Florentino
Wright and his Litigation Guardian, Ms. Maxine Wright
Mr. David Murray participated for Pafco Insurance Company

Issues:

The Applicant, Mr. Florentino Wright, was injured in a motor vehicle accident on February 2, 2014 and sought accident benefits from Pafco Insurance Company (“Pafco”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. Wright, through his representative, 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 - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Preliminary Issue Hearing are:

1. Have the issues in dispute for this Arbitration been previously settled?
2. Is either party entitled to its expenses of the Preliminary Issue Hearing?

Result:

1. The issues in dispute for this Arbitration have not been previously settled.
2. The question of expenses related to this Preliminary Issue Hearing is deferred to the Hearing Arbitrator.

EVIDENCE AND ANALYSIS:

Background and Chronology

The Applicant is in a coma. A “Form P” (Representing Minors and Mentally Incapable Persons)² was signed by Ms. Maxine Wright, who is the spouse of Mr. Florentino Wright. A Judgement was issued by Justice Garson of the Ontario Superior Court of Justice on December 16, 2014, which ordered Ms. Maxine Wright as the Litigation Guardian for the property of Mr. Florentino Wright, including the claim for accident benefits arising from the February 2, 2014 motor vehicle accident.³

A Pre-Hearing was held by telephone conference on July 10, 2015 with Arbitrator Gueller. The Applicant, Mr. Wright, was represented by the law firm Singer Kwinter. The parties were unable to resolve the matter at the Pre-Hearing and Hearing dates of May 9-13, 2016 were scheduled. Two further resummptions were scheduled for November 6 and November 24, 2015 with Arbitrator Gueller. The parties were unable to resolve the matter through the resumption of the Pre-Hearings.

² Motion Record of Pafco Insurance Company, Exhibit 1 (Affidavit of Laura Fiorante, Exhibit E).

³ *Ibid.*, (Affidavit of Laura Fiorante, Exhibit G).

On or about May 6, 2016, the parties, through their counsel, settled the issues in dispute for this Arbitration. E-mails from both counsel were sent on May 6, 2016 to ADR Chambers,⁴ advising the issues in dispute for this Arbitration had been settled.

On or about May 11, 2016, Mr. Murray sent a letter to the Applicant's counsel⁵ at Singer Kwinter, which outlined the details of the settlement and included a partial release for the settlement of some past and some future benefits. The agreement was not to resolve any of the benefits on a full and final basis.

On or about May 27, 2016, a letter was sent from newly retained legal counsel, Ms. Jasmine Daya of Fireman Steinmetz Daya,⁶ indicating that she understood that Ms. Maxine Wright had instructed her prior law firm, Singer Kwinter, to reject the offer from Pafco to settle the issues in dispute for this Arbitration. Ms. Daya states through this letter that no settlement documents had been signed and the settlement funds for the partial settlement had been returned to Pafco.

A letter, dated June 23, 2016,⁷ was sent by Ms. Daya to ADR Chambers and copied to Mr. Murray. The letter requested FSCO file number A14-006552 be re-opened as no settlement documents had been signed and funds furnished by the Insurer had been returned.

On July 21, 2016, a Motion to re-open the file was heard by Arbitrator Gueller via telephone conference. Arbitrator Gueller allowed the file to be re-opened and scheduled a Preliminary Issue Hearing to take place via written submissions and a one day oral Hearing.

On or about October 26, 2016, Mr. Murray provided to Ms. Daya a Settlement Disclosure Notice,⁸ which incorporated the terms of settlement of the partial release and the settlement terms outlined in Mr. Murray's May 11, 2016 letter.

⁴ *Ibid.*, (Affidavit of Laura Fiorante, Exhibit L).

⁵ *Ibid.*, (Affidavit of Laura Fiorante, Exhibit M).

⁶ *Ibid.*, (Affidavit of Laura Fiorante, Exhibit N).

⁷ *Ibid.*, (Affidavit of Laura Fiorante, Exhibit O).

⁸ *Ibid.*, (Affidavit of Laura Fiorante, Exhibit Q).

I had reviewed the parties' written submissions prior to the scheduled oral Hearing on December 19, 2016.

The facts of this case are not in dispute. The parties are in dispute over the application of the law in this case surrounding whether the issues for this Arbitration had been previously settled.

Submissions of Insurer

It is the Insurer's position that the Applicant does not have the right to resile from the settlement agreement reached between the Insurer and the Applicant.

The Insurer relies on the case of *Scherer v. Paletta*⁹ which states: "The authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party." The Insurer also relies on *Ogbuke and Kingsway General Insurance Company*¹⁰ in which Arbitrator Wilson states: "It is clear law that a solicitor, properly retained, may bind a client, or compromise proceedings, unless the client has limited the retainer, and the limitations in the retainer are known to the opposing side." It was the Insurer's assumption, when it entered into settlement discussions and reached a settlement agreement, that prior legal counsel had the authority to compromise the claim. The Insurer further submits that the Applicant's previous legal counsel had authority to enter into a binding settlement with Pafco on May 6, 2016. If the prior legal counsel did not have instructions to accept the settlement offer, it does not permit the Applicant to resile from the settlement.

The Insurer takes the position that an agreement was reached on May 6, 2016 to settle the issues in dispute for this Arbitration and the Applicant cannot back out from this agreement. The Insurer further submits the Applicant may not resile from the agreement reached on May 6, 2016 as it

⁹ Book of Authorities of Pafco Insurance Company, Exhibit 3, Tab 1, *Scherer v. Paletta*, [1966] 2 O.R. 524 (ONCA.), p. 3.

¹⁰ *Ibid.*, Tab 3, *Ogbuke and Kingsway General Insurance Company*, (2007), FSCO A06-000125, p. 9.

does not form a “settlement” as defined within Regulation 664 of the *Insurance Act* (“Regulation 664”). Section 9.1(1) of Regulation 664¹¹ states:

“Settlement” means an agreement between an Insurer and an Insured person that finally disposes of a claim or dispute in respect of the insured person’s entitlement to one or more benefits under the *Statutory Accident Benefits Schedule*.

The Insurer further states that the agreement reached on May 6, 2016 settled the issues in dispute for the Arbitration but it did not settle any of the issues on a full and final basis. Therefore, there is no final termination of benefits and Regulation 664 does not apply. The Insurer referred to *Loewen and Economical Mutual Insurance Company*¹² in which the parties settled the issues in dispute, allowing the Applicant, Mr. Loewen, to retain the right to claim ongoing weekly benefits.

The Insurer submits that if it is determined that Regulation 664 is applicable, then the “two business-day” cooling off period, which is contained within the Settlement Disclosure Notice provided by the Insurer, does not apply in this case. The settlement requirements within Regulation 664 are modified in cases where an Applicant has been declared mentally incapable within the meaning of the *Substitute Decisions Act, 1992*¹³ It is a requirement in such cases that the representative of the mentally incapable party comply with the requirements for settlement as outlined in Rule 7.08 of the *Rules of Civil Procedure*.¹⁴ This requires that no settlement of a claim made by a person under a disability “is binding on the person without the approval of a judge.”¹⁵

It is the Insurer’s position that once the parties to a dispute have: “reached an agreement on all of the essential terms, then a settlement of a claim has been reached and remains valid, however, the operation of the agreement is suspended until such time as it approved by a judge.”¹⁶ The Insurer states that the enforceability of a settlement in this case must be determined by a judge. This is in

¹¹ Factum of Pafco Insurance Company, Exhibit 5, para. 36.

¹² *Supra*, note 9, Tab 9, *Loewen and Economical Mutual Insurance Company*, [2011] O.F.S.C.D. No. 36, p. 4.

¹³ *Substitute Decisions Act, 1992*, General, O Reg. 26/95

¹⁴ *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*, Rule 7.08

¹⁵ *Supra*, note 11, para. 41.

¹⁶ *Ibid.*, para. 42.

accordance with Rule 10.7 of the *Dispute Resolution Practice Code* (“DRPC”), which requires that the representative of a person under a disability shall comply with the approval of settlement requirements of Rule 7.08 of the *Rules of Civil Procedure*.

Pafco relies on *Wu Estate v. Zurich Insurance Company*¹⁷ and submits that the agreement reached between the parties on May 6, 2016 is a binding agreement that neither party can disavow until the court makes a determination on the settlement. Until then, a binding settlement exists. The Insurer further submits that the onus is on the Applicant to move for the court to determine if the settlement is valid.

Submissions of the Applicant

The Applicant submits there is no binding settlement between the parties. A Settlement Disclosure Notice was never signed, and the Insured would have had a “two business day cooling period” had the Settlement Disclosure Notice been signed. The Applicant further submits that the wording contained within the Attendant Care Benefit section of the Settlement Disclosure Notice is ambiguous as it relates to the Applicant’s release from a hospital setting.

The actual Settlement Disclosure Notice was not provided to Ms. Daya until on or about October 26, 2016. This is five months after Ms. Daya advised the Insurer’s counsel in the letter, dated May 27, 2016, that the Applicant had instructed her prior legal counsel to reject the settlement and that Ms. Wright had not signed any settlement documents. In this same letter, Ms. Daya inquires why the Insurer has forwarded a cheque for the partial settlement amount.

The Applicant argues *Ogbuke* is not applicable to Mr. Wright’s case as there was a signed Settlement Disclosure Notice in *Ogbuke*, which was not the case here. The Applicant also states that the case of *Loewen* should not be relied upon as this case addressed the reinstatement of an Income Replacement Benefit and not the settlement of the issues in dispute.

¹⁷ *Supra*, note 9, Tab 10, *Wu Estate v. Zurich Insurance Company*, [2006] O.J. No. 1939 (ONCA), para. 9.

The Applicant relies on the decision of *Wu Estate*,¹⁸ which states at paragraph 23:

It is significant that rule 7.08 (1) provides that agreement is not binding on the party under disability unless the court approves the agreement, but says nothing to limit the binding effect of the agreement on the other party. This reflects the unilateral and protective purpose of court approval that is related to fairness of the agreement itself...

It is maintained by Ms. Daya that the onus is on the Applicant's counsel to obtain court approval on a settlement agreement for Mr. Wright. Ms. Daya also states she is required to report to her client. Ms. Daya stated that paragraph 8 of the Court Order issued by the Ontario Superior Court of Justice on December 16, 2014 appoints Ms. Maxine Wright as the full guardian for Mr. Florentino Wright. If the unsigned Settlement Disclosure Notice were to be brought to the court, Ms. Wright as the Litigation Guardian of Mr. Wright would oppose it as it would not be in the best interest of her husband. Ms. Daya further submits that if the Litigation Guardian and their legal counsel do not support the settlement agreement, it is unlikely that the court will approve the settlement agreement.

Analysis and Decision

The issue before me is to determine whether the issues in this Application for Arbitration have been previously settled. The Insurer relies on the authority of previous counsel to act on behalf of the client through the retainer agreement, and the settlement, which was reached on May 6, 2016, is binding on the Applicant. I do not support this view. Ms. Wright, the Litigation Guardian for the Applicant, maintains that no instructions were provided to the prior legal counsel to accept the partial settlement. Ms. Wright subsequently retained new counsel. Ms. Daya advised the Insurer on or about May 27, 2016 that she had been retained as counsel by Ms. Wright and that Ms. Wright had previously advised the law firm Singer Kwinter to reject the settlement. No settlement documents had ever been signed. This timeframe represents 21 days from when the previous legal counsel and the Insurer's counsel agreed on a partial settlement. It remains unclear why the

¹⁸ Book of Authorities of Responding Applicant, Exhibit 4, Tab 5, *Wu Estate v. Zurich Insurance Company*, [2006] O.J. No. 1939 (ONCA), para. 23.

Insurer provided the Applicant's counsel, Ms. Daya, with a Settlement Disclosure Notice in late October 2016. A Preliminary Issue Hearing had already been scheduled along with the timelines for written submissions. It should have been clear at this point that Ms. Wright would not be signing the Settlement Disclosure Notice.

There is no dispute the Applicant is a person under a disability as defined under Rule 10.2 of the *DRPC* nor that Ms. Wright has been appointed as his full guardian by the Ontario Superior Court and as such, she is able to make decisions on her husband's behalf.

Rule 7.08 of the *Rules of Civil Procedure* requires that any settlement which is reached with a person under a disability must be approved by the Court. In this case, there is no signed Settlement Disclosure Notice which can be presented to the Court. The Insurer maintains that a binding settlement exists between the parties and the onus is on the Applicant to bring it before the court and the court will then determine the enforceability of the settlement. I disagree with this argument. The Applicant to date does not accept the settlement; the Applicant maintains that previous legal counsel operated without instruction in accepting the settlement. It therefore does not seem logical that the Applicant bring the "unsigned" settlement before the court. I agree with the Applicant's conclusion that the court would likely not approve it.

I rely on the decision of *Wu Estate* in that Rule 7.08(1) of the *Rules of Civil Procedure* provides that the agreement is not binding on the party under a disability until the court approves the agreement. This rule does not address the binding effect of the agreement on the other party.

I find no cogent evidence which supports that the issues in dispute for this Arbitration have been settled. There has been no binding agreement reached between the parties.

EXPENSES:

The question of expenses related to this Preliminary Issue Hearing is deferred to the Hearing Arbitrator.



Kimberly Parish
Arbitrator

February 13, 2017

Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A14-006552

BETWEEN:

FLORENTINO WRIGHT

Applicant

and

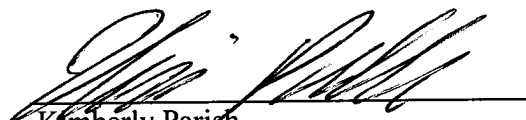
PAFCO INSURANCE COMPANY

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. The issues in dispute for this Arbitration have not been previously settled.
2. The question of expenses related to this Preliminary Issue Hearing is deferred to the Hearing Arbitrator.



Kimberly Parish
Arbitrator

February 13, 2017

Date