Appeal P17-00023

OFFICE OF THE DIRECTOR OF ARBITRATIONS

PAFCO INSURANCE COMPANY

Appellant

and

FLORENTINO WRIGHT

Respondent

BEFORE: Edward Lee

REPRESENTATIVES: David Murray
Jasmine Daya for Mr. Wright

HEARING DATE: September 15, 2017 by written submissions

APPEAL ORDER

Under section 283 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 Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal is dismissed.

2. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Edward Lee
Director's Delegate

October 3, 2017
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This is an appeal from a preliminary decision of an arbitrator dated February 13, 2017. I have agreed to hear the appeal at this time as the disposition of the appeal could lead to a final decision of the issues in dispute at the arbitration itself.

The parties waived their request for an oral hearing on September 12, 2017. This matter was determined on the record, based on written submissions provided by the parties.

In her preliminary issue decision, the Arbitrator held that the issues in dispute at the Respondent's upcoming arbitration hearing had not been previously settled.

II. BACKGROUND

The Respondent is a "person under disability" pursuant to Rule 10 of the *Dispute Resolution Practice Code* ("*DRPC*"). His spouse has acted as his Litigation Guardian at these proceedings before the Financial Services Commission of Ontario ("FSCO").

An arbitration hearing had been scheduled for the Respondent and Pafco Insurance Company ("Pafco"), pursuant to the *Schedule*.

In May 2016, during the pre-hearing stage of the proceedings, Pafco's counsel and the Respondent's former counsel reached an apparent settlement of the issues in dispute for the upcoming arbitration hearing. This agreement was not a "full and final" resolution of all possible claims or disputes in respect of the Respondent's entitlement to accidents benefits.

Approximately five days after the apparent settlement was reached, Pafco's counsel sent the Respondent's former counsel a letter detailing the settlement and a partial release for some past and future benefits.

Approximately twenty-one days later, the Respondent's current legal counsel sent a letter indicating that she understood the Respondent's Litigation Guardian had instructed the Respondent's former counsel to reject the offer, and that no settlement documents had been signed. The settlement funds were also returned to Pafco.

In October 2016, Pafco sent the Respondent's current legal counsel a copy of the Settlement Disclosure Notice. The Respondent has never signed the Settlement Disclosure Notice or a release.

The Respondent's file was reopened and an arbitration hearing was scheduled for November 2017.

Pafco raised a preliminary issue, seeking an order that the issues in dispute for the arbitration had already been resolved by the agreement reached in May 2016, but the Arbitrator determined the issues in dispute for the November arbitration had not been settled.

The Appellant seeks to reverse that order.

III. ANALYSIS

Pafco argues the Arbitrator erred in law in concluding the issues for arbitration had not been settled. Specifically, it raises the following issues.

1. Did the Arbitrator err in law by determining that Regulation 664 of the *Insurance Act* applies to the settlement agreement reached and a Settlement Disclosure Notice was required?

There was no argument from Pafco that this matter had not proceeded under the statutory accident benefits regime or before an arbitrator at the Financial Services Commission of Ontario.

Nonetheless, Pafco argues the purported agreement reached between the parties did not constitute a settlement pursuant to section 9.1 and following of the Regulation[1] (the "Settlement Regulation"), promulgated as part of the statutory accident benefits regime.

According to Pafco, the agreement lacks the "finality" required to trigger the application of the Settlement Regulation, because the agreement does not "permanently end" the insured's entitlement to benefits, and he may continue to submit treatment and assessment plans for additional medical benefits, rehabilitation benefits, and costs of examinations, as well as expense claims for future attendant care benefits.

Further, because the agreement was not a "settlement" as defined in section 9.1(1) of the Settlement Regulation, the other provisions in the Regulation also did not apply. Thus there was no requirement that the Insured sign a Settlement Disclosure Notice or release.

The Arbitrator rejected this argument and I find no error in law in her decision. Section 9.1(1) of the *Regulation* reads as follows:

> "settlement" means an agreement between an insurer and an insured person that finally disposes of a claim or a dispute in respect of the insured person's entitlement to one or more benefits under the *Statutory Accidents Benefits Schedule*.

It is clear that section 9.1(1) does not require an agreement to finally dispose of *all* the claims or disputes in respect of an insured's entitlement to benefits. The provision only requires "... an agreement ... that finally disposes of *a* claim or *a* dispute in respect of the insured person's entitlement to *one or more* benefits ..." [emphasis mine].

Thus it is irrelevant that the insured may continue to submit treatment plans or costs of examinations or expense claims for other benefits not resolved under the agreement in question. The agreement does not need to finally dispose of *all* claims or disputes in respect of *all* benefits to be considered a settlement" within the meaning of the Settlement Regulation.

[1] R.R.O. 1990, Reg. 664

Further, there is also no error in the Arbitrator's determination that the other provisions of the Settlement Regulation also applied to the purported agreement. Those provisions include the following:

> 9.1(2) The insurer shall give the insured person a written disclosure notice, signed by the insurer, with respect to the settlement.
>
> 9.1(3) The disclosure notice shall be in a form approved by the Superintendent and shall contain the following information:
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> ...
>
> 3. a statement that the insured person may, within two business days after the later of the day the insured person signs the disclosure notice and the day the insured person signs the release, rescind the settlement by delivering a written notice to the office of the insurer or its representative and returning any money received by the insured person as consideration for the settlement.
>
> ...
>
> 6. A statement for signature by the insured person acknowledging that he or she has read the disclosure notice and considered seeking independent legal, financial and medical advice before entering into the settlement.[emphasis mine]

The provisions in the Settlement Regulation create a complete and formal framework for the settling of disputes within the statutory accident benefits regime. These provisions have often been considered in the context of the common law rule of agency. The arbitral jurisprudence has been consistent in its approach and interpretation.

In *Von Steun and Canadian General Insurance Group*,[2] Arbitrator Makepeace considered a similar case. The parties' legal representatives had agreed they had reached a binding settlement and had signed Minutes of Settlement. The insurer faxed the release and a Settlement Disclosure Notice to the insured's legal representative, but the insured himself did not see or review the Settlement Disclosure Notice until (at the earliest) fifteen days after it had been received by the insured's legal representative. The arbitrator held the parties' legal representatives could not

[2](OIC A96-001516, March 18, 1998)

settle the matter because the "... required disclosure notice was not available for the Applicant's review at that time."

Further, she also held the two-day cooling off period of the Settlement Regulation did not commence until the Applicant received and reviewed the disclosure notice. The insurer had to give the Settlement Disclosure Notice *before* the insured person entered into a settlement disposing of his right to commence legal proceedings about the issues in dispute.

Arbitrator Makepeace also endorsed the ruling in *McLennon and Pilot Insurance Company*:[3]

> In my view, the *Settlement Regulation* is a form of consumer protection legislation intended to protect insureds by prescribing certain disclosure and rescission rights. Following proper disclosure by an insurer, an insured has two full days to review the settlement and consider, with sober second thought, whether the bargain struck in the heat of the negotiation remains suitable. The disclosure requirement does not by itself protect the interests of the insureds. To make this right valuable, there must also be time and space to adequately consider what has been disclosed. Disclosure without a period of contemplation and a real right to rescind defeats the intended purpose of the Regulation.

In the present case, the legal representatives reached a purported agreement in May 2016, but no Settlement Disclosure Notice was given to Ms. Wright (the Litigation Guardian) until approximately five months after. Long *before* this time, Ms. Wright, through her new counsel, had notified Pafco in writing she would not accept the purported agreement on behalf of her disabled husband. In addition, neither the Settlement Disclosure Notice nor a release have ever been signed by Ms. Wright on behalf of her husband.

Pafco cites the decision of Arbitrator Alves in *Loewen and Economical Mutual Insurance Company*[4] to support its argument that a Settlement Disclosure Notice is not required to effect a settlement,[5] but *Loewen* is a specific case where the parties consented to the reinstatement of a weekly benefit. As a reinstatement permits an issue in dispute to be revived and re-litigated in

[3](OIC A96-001499, May 8, 1997)

[4](FSCO A10-000413, March 29, 2011)

[5]Paragraph 45 of its written submissions.

the future, it cannot be considered a final disposition of an issue or claim. Accordingly, in that case, the Settlement Regulation was found not to apply.

This largely disposes of the rest of the appeal. None of the cases cited by the Appellant state that the common law rule of agency renders the Settlement Regulation unnecessary or inapplicable. Most are distinguishable on their facts, or were rendered outside the statutory accident benefits regime.[6]

Pafco cites the decision of *Birjasingh and Coseco Insurance Company*,[7] rendered in the context of the statutory accidents benefits regime. This decision of the Superior Court contradicts the *Von Steun* case (and a long line of arbitral jurisprudence), but only so far as to hold that the delivery of the Settlement Disclosure Notice to the insured's legal representative is equivalent to giving the Settlement Disclosure Notice to the insured. The judge specifically recognized the requirements of the Settlement Regulation:

> I wish to make it clear that I am not suggesting there is no need for the insurer to deliver the written notice where the parties are represented. The settlement regulation makes at least that requirement clear.[8]

In addition, *Birjasingh* is different from the present case. In *Birjasingh*, the insured's legal representative did not inform the insurer's legal representative that the insured wished to resile from the settlement until four months *after* the Settlement Disclosure Notice was delivered to the insured's legal representative.

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[6]*Smoliak v. Smart (Guardian)* [1995] B.C.J. No. 1559: this was not a case within the *SABs* scheme and it did not involve a person under disability; *Oliviera v. Tarjay Investments* [2005] O.J. No. 2638: this was a case where there were Minutes of Settlement signed by the parties themselves or by their legal representatives (in the present case, nothing has ever been signed); *Alston v. Alston* [2016] O.J. No. 4259, a family law case which did not involve persons under disability.

[7][1999] O.J. No. 4546 [2000]

[8]*Ibid.*, at page 10

Finally, I do not find Pafco is aided by the arbitral decision of *Ogbuke and Kingsway General Insurance Company*.[9] In that case, the arbitrator reviewed the common law rule of agency, but the insured had signed the settlement documents presented at the hearing, and the requirements of the Settlement Regulation had been fulfilled.

Thus I find no error in the arbitrator's determination that the Settlement Regulation applied to the purported agreement and a Settlement Disclosure Notice was required. I also find there was no error in the Arbitrator's consideration of the common law principle of agency.

2. Did the Arbitrator err in determining that judicial approval of a settlement is a condition precedent for the formation of a settlement agreement?

This question is also irrelevant. No settlement had been reached between the parties.

3. Did the Arbitrator err when she concluded the court would not likely approve the settlement in question?

Again I find no error on the part of the Arbitrator. The court could not approve of a settlement that did not exist.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Edward Lee
Director's Delegate

October 3, 2017
Date

[9](FSCO A06-000125, December 5, 2007)

APPENDIX

Settlements — Statutory Accident Benefits

9.1 (1) In this section,

"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. O. Reg. 780/93, s. 7.

(2) The insurer shall give the insured person a written disclosure notice, signed by the insurer, with respect to the settlement. O. Reg. 483/01, s. 1.

(3) The disclosure notice shall be in a form approved by the Superintendent and shall contain the following information:

1. The insurer's offer with respect to the settlement.

2. A description of the benefits that may be available to the insured person under the Statutory Accident Benefits Schedule.

3. A statement that the insured person may, within two business days after the later of the day the insured person signs the disclosure notice and the day the insured person signs the release, rescind the settlement by delivering a written notice to the office of the insurer or its representative and returning any money received by the insured person as consideration for the settlement.

4. A description of the consequences of the settlement on the benefits described under paragraph 2 including,

   i. a statement of the restrictions contained in the settlement on the insured person's right to mediate, litigate, arbitrate, appeal or apply to vary an order under sections 280 to 284 of the Act, and

   ii. a statement that the tax implications of the settlement may be different from the tax implications of the benefits described under paragraph 2.

5. A statement advising the insured person to consider seeking independent legal, financial and medical advice before entering into the settlement.

6. A statement for signature by the insured person acknowledging that he or she has read the disclosure notice and considered seeking independent legal, financial and medical advice before entering into the settlement. O. Reg. 483/01, s. 1.

(4) The insured person may rescind the settlement within two business days after the later of the day the insured person signs the disclosure notice and the day the insured person signs the release. O. Reg. 483/01, s. 1.

(5) The insured person may rescind the settlement after the period referred to in subsection (4) if the insurer has not complied with subsections (2) and (3). O. Reg. 483/01, s. 1.

(6) Subsections (4) and (5) do not apply with respect to a settlement that has been approved by a court under Rule 7 of the Rules of Civil Procedure (Parties under Disability). O. Reg. 483/01, s. 1.

(7) The insured person shall rescind a settlement under subsection (4) or (5) by delivering a written notice to the office of the insurer or its representative and returning any money received by the insured person as consideration for the settlement. O. Reg. 483/01, s. 1.

Dispute Resolution Practice Code

10. Party under Disability

10.1 Subject to Rule 10.2, a party to a mediation, settlement discussion, neutral evaluation or proceeding is presumed to have the mental capacity to manage his or her property, appoint and instruct a representative, and conduct his or her own case.

10.2 A minor, or a person who has been declared mentally incapable, within the meaning of Sections 6 or 45 of the Substitute Decisions Act, 1992, (SDA) must commence a mediation or other proceeding through:

(a) the Public Guardian and Trustee or a Court appointed guardian of property under the provisions of the SDA; or

....

10.7 The representative of a person under a disability under Rule 10.2 or the representative of a party who has been found to lack the mental capacity to proceed in the dispute resolution process under Rule 10.5, shall comply with the approval of settlement requirements of Rule 7.08 of the Rules of Civil Procedure.

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