Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A13-007793

BETWEEN:

ANNA DABROWSKA

Applicant

and

AVIVA CANADA INC.

Insurer

PRE-HEARING DECISION

Before: Arbitrator John Wilson

Heard: February 27, 2014, in at the offices of the Financial Services Commission of Ontario in Toronto, Ontario.

Appearances: Amanda Ferritto for Ms. Dabrowska
Modupe Egunjobi for Aviva Canada Inc.

Issues:

The Applicant, Anna Dabrowska, was injured in a motor vehicle accident on January 13, 2012. She applied for statutory accident benefits from Aviva Canada Inc. ("Aviva"), payable under the *Schedule*,[1] and subsequently applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

At the pre-hearing discussion of this case held on February 27, 2014, counsel for the parties reached an agreement on what should have been an appropriate if modest resolution of Ms. Dabrowska's accident benefit claims.

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010, Ontario Regulation 34/10, as amended.*

Although both counsel and the representative of Aviva were present, they had no independent authority to approve the proposed settlement. In addition, there was no-one in authority available at Aviva either by telephone or email who could approve any amount without a lengthy delay. Given the quite small amount in issue this was both troubling and unacceptable.

The parties waited a significant time for anyone in authority to respond, to no avail. Consequently, I adjourned the pre-hearing.

The issues are:

1. Was Aviva in breach of section 279(5) of the *Insurance Act* by failing to make someone available who was fully authorized to bind the Insurer?

2. If so, what should be the consequences?

Result:

1. Aviva shall pay to Ms. Dabrowska the amount of $75.19 inclusive of HST as expenses in the adjournment of this pre-hearing forthwith and in any event of the cause.

EVIDENCE AND ANALYSIS:

Section 279(5) of the *Insurance Act* reads as follows:

> If an insurer or an insured is represented in a mediation under section 280, an evaluation under section 280.1, an arbitration under section 282, an appeal under section 283 or a variation proceeding under section 284, the mediator, person performing the evaluation, arbitrator or Director, as the case may be, may adjourn the proceeding, with or without conditions, if the representative is not authorized to bind the party he or she represents.

The non-attendance of one's principal or the sending of a representative without any authority can be an unfair bargaining tactic. Settlement of a case is voluntary. Parties should not be coerced or forced into a settlement. Both the *Dispute Resolution Practice Code* and the *Insurance Act* provide that

parties should be present and should be in a position to have a meaningful and fulsome discussion and be able to respond during the discussion to any new developments or information.[2]

The involvement of one's principal in the pre-hearing discussion facilitates resolution in numerous ways. It serves an educational purpose, acquainting parties with the nature of the arbitration process. Further, it often removes unrealistic expectations or mistaken pre-conceptions and fills in gaps in understanding the other party's position. It also allows for something that could be characterized as an informal examination for discovery.

Since pre-hearings are neither conducted under oath nor transcribed, they allow for the free exchange of relevant information. It is critical especially for a person making the decisions on behalf of the corporate party to be present and aware of this information as it becomes available.

Hence, there is a strong functional argument for the presence of the parties themselves at settlement conferences. In a process where time is of the essence, it is important that the parties to litigation be in a position to make decisions in real time − that is, as information becomes available and as questions are raised in the course of a settlement conference. Otherwise, the opportunity may be missed and the matter will continue to proceed to an arbitration hearing by default.

"Authorized to bind" in the *Act* means that the representative never has to pick up the telephone to get instructions. Binding authority does not exist where the representative merely has authority to say "no" with no room to vary that position should further information be made available.

This pre-hearing was not a surprise to Aviva. It received the appropriate notices. Indeed, it sent an in-house counsel and an experienced representative, neither with any authority to do more than attend the pre-hearing.

The requirements of the *Insurance Act* should not have been a surprise to Aviva either. It has a legal department which appears frequently at FSCO arbitrations and pre-arbitrations, and should

[2] See Practice Note 3, *Dispute Resolution Practice Code*

have been in a position to be aware of its responsibilities under section 279 of the *Act* and the related jurisprudence.[3] Aviva is a sophisticated player and should have known better.

Consequently, knowingly refusing to provide representatives with requisite authority could well have constituted an abuse of process as envisaged in section 23(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, and I so find.

I agree with Master Beaudoin in *Magalhaes* that even "the fact that counsel attends with access to someone in authority does not constitute attendance by a party."[4] In this case, it is even more egregious with no-one present with authority and no-one available to provide authorization.

A possible consequence for a finding of abuse of process is an order of expenses pursuant to Rule 75 of the *Dispute Resolution Practice Code*. Expenses, while usually viewed as compensatory, also have a punitive aspect. This is clear from the various criteria under Rule 75 for the ordering of expenses.

Rule 75.2(d) provides for the award of expenses to a party based on "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."

Clearly, the necessary adjournment of this matter because the representative had no authority would not only prolong this process, but also hinder its progress.

While an expense order in a matter like this is unlikely to have much effect on the finances of a large corporation such as Aviva, it remains one of the few tools available to an arbitrator in such a situation.

[3] *See Premananda & RBC* A05-001236, February 21, 2006.
[4] *Magalhaes v. Lusitania Portugese Recreation Club*, [1999] O.J. 3754

Indeed, since FSCO expense orders are based on the legal aid tariff, and the tariff for a non-lawyer appearing on a matter is $27.96 per hour, an award of costs thrown away would be less than a pinprick.

Still it must be done. Aviva is not a first offender in this regard. Indeed, it would seem possible that it has created a corporate decision-making structure that makes compliance with section 279 unlikely. In this present situation, the meagre amount in question made the complete lack of authority particularly and immediately evident.

Without reflecting at all on the sincerity and the intentions of those from Aviva who actually attended this pre-hearing, the failure of those with authority who did not attend cries out for some response.

Consequently, at the pre-hearing I ordered that Aviva pay forthwith, and in any event of the cause, the equivalent of two hours' time for the representing paralegal and the actual travel expenses for Ms. Dabrowska who travelled by bus from Mississauga to attend the pre-hearing.

I also ordered that the pre-hearing be adjourned to a later date to allow Aviva to endow its representative with the appropriate authority.

While the expense award will not inflict much pain on a company the size of Aviva, it, with some luck, will at least attract its attention and perhaps encourage it to make its internal practices more congruent with its obligations under the *Insurance Act*.

EXPENSES:

Aviva shall forthwith, in any event of the cause, pay to Ms. Dabrowska $75.19 including HST for her costs and disbursements thrown away in this adjourned pre-hearing.

March 4, 2014

John Wilson
Arbitrator

Date

FSCO A13-007793

BETWEEN:

ANNA DABROWSKA

Applicant

and

AVIVA CANADA INC.

Insurer

ARBITRATION ORDER

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

1. Aviva shall forthwith, in any event of the cause, pay to Ms. Dabrowska $75.19 including HST for her costs and disbursements thrown away in this adjourned pre-hearing.

March 4, 2014

John Wilson
Arbitrator

Date