Financial Services Commission

Ontario

Commission des services financiers de l'Ontario

Appeal P99-00009

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ALLSTATE INSURANCE COMPANY OF CANADA

Appellant

and

LAMIA AL-OBAIDI

Respondent

BEFORE: Susan Naylor, Director's Delegate

COUNSEL: Eric K. Grossman (for Allstate Insurance Company)
Altor Shields (for Lamia Al-Obaidi)

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 The arbitrator's order as set out in his prehearing letter dated January 7, 2000, is rescinded. The following order is substituted:

    1. Subject to the agreement of the parties and to paragraph 2, Allstate Insurance Company of Canada shall produce its adjuster's notes, including electronic entries, for the period commencing on the date it first received notice of Lamia Al-Obaidi's claim for payment of an expense specified as in dispute, and ending on May 31, 1999 (inclusive).

    2. Within this period, notes for the period from the commencement of the first mediation until its settlement are not required to be produced.

2. Ms. Al-Obaidi is entitled to her appeal expenses.

May 2, 1999

Susan Naylor
Director's Delegate

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Allstate Insurance Company of Canada challenges a production order made at a prehearing conference, requiring it to produce the adjuster's notes in its file subject to certain limitations.

Because the appeal is from an interim order, leave is required. Although the general thrust of Rule 46.2 of the *Dispute Resolution Practice Code* is to defer such appeals until the arbitration is over, parties have been allowed to go ahead where it makes sense to do so before they are put to the expense and time of a full arbitration hearing. This is a case-by-case determination. Previous appeal decisions reflect a number of considerations including the apparent strength of the appeal, the importance of the issue, whether the ruling represents a departure from the approach taken in previous cases and whether hearing the appeal in the interim would result in significant savings in time and expense or streamline the process in some way. The preference of the parties is an important factor.[1]

Having regard to the circumstances here, including the agreement of the parties, the appeal was allowed to proceed.

II. BACKGROUND

The arbitrator's ruling, with reasons, is contained in his pre-hearing letter dated January 7, 2000. It orders Allstate to produce "the adjuster's notes prior to June 1, 1999, except for those entries from the beginning of the first mediation to its settlement."

[1] See e.g. *Belair Insurance Company and F.S.*, (OIC P96-00039, June 11, 1996); *General Accident Assurance Company and Glynn*, (P96-00085, March 17, 1997); *Tesfay and Allstate Insurance Company of Canada*, (FSCO P99-00023, June 21, 1999); *Sollazo and Zurich Insurance Company*, (FSCO P99-00054, November 9, 1999).

The arbitration relates to an accident on January 20, 1999[2] and involves relatively narrow claims for statutory accident benefits. These claims went to mediation in the summer of 1999 and then to arbitration. The most hotly-contested claim is for the cost of a number of medical reports and assessment expenses. The claim, totalling $6,837.86, involves six reports or invoices, dated between April 13, 1999 and May 26, 1999, from various doctors and facilities.[3] Ms. Al-Obaidi also claims treatment expenses (in total, about $6,000) for psychological counselling and physiotherapy,[4] and $368 for the cost of housekeeping and home maintenance services.[5] In her application for arbitration, Ms. Al-Obaidi also seeks interest on arrears, her arbitration expenses and a special award under s. 282(10) of the *Insurance Act*, R.S.O. 1990, c. I-8, as amended.

A dispute over certain other benefits was mediated earlier (in May 1999) and settled. This is the "first mediation" referred to in the exception in the arbitrator's order.

Allstate objected to production of the log notes on the grounds of privilege and relevance. The arbitrator held that entries made on or after June 1, 1999, when the issues in dispute in this arbitration were first referred to mediation, were protected by litigation privilege. Ms. Al-Obaidi also accepted that privilege attached to notes made while the first mediation proceedings were underway. The parties disagreed over the status of the balance of the notes. The arbitrator rejected Allstate's claim of privilege for these notes, finding there was no reasonable contemplation of litigation during the remainder of the time. In regards to relevance, he ruled:

> Ms. Al-Obaidi has a claim for a special award stemming from the company's blanket denial of her assessment benefits under section 24. It is my opinion that as an insurance consumer she is entitled to view her

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[2] Ms. Al-Obaidi's entitlement therefore is to be determined under the *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, O.Reg. 403/96, as amended (*SABS-1996*).

[3] The claims are made under s. 24 of *SABS-1996*.

[4] treatment recommended in a report dated April 21, 1999.

[5] in respect of services between March 29, 1999 and April 15, 1999.

> company's internal decision making process in respect of her disputed claims as a matter of course unless privileged. Thus, I find that Allstate's records regarding the adjuster's decision is directly relevant to adjudication of her claim.

In response to Allstate's argument that it should only have to produce those entries that related to the discrete benefits claimed, the arbitrator stated:

> In effect, Allstate wants to edit the material available to suit its interests. I am not prepared to edit the entries myself or allow a party with interests opposing an applicant to determine the relevancy of the evidence in the file.

The parties agree that Allstate is not required to produce entries relating to setting reserves.

Ms. Al-Obaidi asserts a right to all non-privileged log notes on the basis that she is advancing a claim for a special award. On appeal, as in arbitration, she did not provide a further rationale for her request for production of the log notes, although her concerns appear to relate to the reports and assessment expenses claimed.

III. CONCLUSION

Although Allstate did not abandon its claim of privilege in respect of the log notes, the focus of its appeal is on relevance. In any event, I have no reason to conclude that the arbitrator was wrong in rejecting a claim of privilege for the balance of the notes.

The arbitrator's reasons in relation to non-privileged notes leave me with some concerns. It is not clear whether he turned his mind to the inquiry required of him -- the relevance of the documents in the context of the particular case. His order appears to be premised, at least in part, on his view that access to internal company records is a consumer right available as a matter of course in disputes. Although he viewed the right as pertaining to the company's decision making process in respect of the claims in dispute, he declined to make a limited order relating to those benefits.

The arbitrator did not set out the basis of his viewpoint, nor did he refer to any specific cases or Commission decisions in the course of his reasons. Indeed, his reasoning would appear to be at odds with Commission decisions and practice. Given the above, in my view, the order should not be allowed to stand.

In making pre-hearing orders, an arbitrator is required to turn his mind to the relevance of the documents before him. His authority to make such orders stems from Rule 32.4 of the *Practice Code*, which authorises an arbitrator to order production of any document or the giving of information "that he or she considers relevant to the determination of the issues in the arbitration, on such terms as he or she considers appropriate."[6] These powers are given in furtherance of the Commission's mandate to provide a speedy, accessible and fair process for dealing with disputes over statutory accident benefits and are exercised with these goals in mind.

An arbitrator cannot require a party to produce a document that is privileged.[7] Relevance is a necessary, but not necessarily sufficient, requirement. In exercising the discretion to make an order, relevance and reasonableness are the guiding principles. The degree of relevance is weighed against other factors, such as the sensitivity of the information, the practicalities of compliance and the timing of the request.

Relevance is framed by reference to the issues being arbitrated. Rule 32.4 makes this explicit. There must be a reasonable relationship between the records sought and the dispute being arbitrated.

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[6] *Practice Code*, Rule 32.4; see also Rule 32.1 requiring parties at an early stage to exchange documents that are "reasonably necessary to determine the issues being arbitrated." The *Statutory Powers Procedure Act*, R.S.O 1990, c. S. 22 (*SPPA*), ss. 5.4(1) and (2) allow an adjudicator to make orders for the exchange of documents if the tribunal's rules deal with disclosure, but does not authorize the making of orders requiring disclosure of privileged information. See also s. 15(1) which allows a tribunal to admit as evidence at a hearing any document or thing "relevant to the subject matter of the proceeding," unless it is privileged or otherwise inadmissible under statute.

[7] *SPPA*, s. 5.4(2).

The Commission's Practice Note No. 4, "Exchange of Documents," provides some guidance on the ambit of production in typical cases. It signals, for example, that in disability benefit cases, health records for the year before the accident generally are viewed as relevant. In effect, the guidelines suggest a presumption of relevance, reflecting the central importance of medical records relating to recent history in a determination of the nature of the person's injuries and extent of the disability, while giving primacy in regards to less immediate history to the insured person's interests in privacy. If an insurer seeks disclosure of records over a longer period, or if an insured person wants a more limited order, they will be expected to provide some basis for the request. Likewise, a party requesting other documents, including log notes, (which are not specifically addressed in the Practice Notes[8]), is expected to provide a reasonable explanation as to how they have a bearing on the dispute.

Leitgeb and Allstate Insurance Company of Canada, (P-012407, November 16, 1995) addressed the argument that the assertion of a special award, in and of itself, entitles an insured to production of a company's complete records. The decision focuses both on the nature of a special award under s. 282(10) of the *Insurance Act* and the scope of the order under appeal which covered all internal memoranda over a three-year period.

Leitgeb applies the logic of Commission decisions relating to special awards,[9] extending it to production requests. A principal function of the prehearing process is to focus the hearing. Relying on previous Commission decisions, Director's Delegate Draper ruled that the special award authority does not divert the focus of arbitrations under the *Act* from the benefits claimed. Rather, it is a discrete statutory direction or authority conferred on the arbitrator to make an award where he or she finds (on his or her own initiative or at a party's request) that those

[8] Practice Note No. 4 and Rule 37 of the *Practice Code* deal with "surveillance or investigative evidence" on which a party intends to rely, but it is not suggested these rules have application to the situation here.

[9] See e.g. *Anizor and Royal Insurance Company of Canada*, (January 24, 1995, OIC File No. A-003702). See also subsequent cases, such as *Quarrington and Jevco Insurance Company* (OIC A-010804, July 17, 1995)*; Royal Insurance Company of Canada and Clark* (OIC P97-00008, Sep. 26, 1997); *State Farm Mutual Automobile Insurance Company and Lopez* (FSCO P98-00031, Sept 20, 1999), *Tagarin and Simcoe & Erie General Insurance Company*, (February 26, 1996, OIC P-004660),

benefits have been unreasonably withheld or delayed. He reasoned that the authority to make such an award does not expand the scope of the hearing to a generalised inquiry into the insurer's conduct nor does it create an entirely separate basis for production of itself. Delegate Draper concluded that, to justify an order, an applicant must demonstrate "some reasonable basis" for the relevance of the records to the issues being arbitrated. He held that, in the absence of any explanation for the request, the order had "no foundation, particularly given its scope."[10]

The significance of the breadth of the scope of the order in *Leitgeb* is reflected in a later decision, *Belair Insurance Company and Candido*, (FSCO P99-00055, November 9, 1999). Belair sought leave to appeal an order requiring it to produce internal notes and other documents specifically relating to its decision to deny a particular benefit.[11] Delegate Draper denied the insurer leave to proceed, distinguishing the limited scope of the order from the situation in *Leitgeb*.

As *Leitgeb* and other decisions indicate, the authority to grant a special award does not give rise to a stand-alone claim. However, it adds a dimension to the claims advanced because it brings within the ambit of the hearing the information and reasons behind the insurer's decision not to pay, or to terminate, those benefits. Whether all or part of the company's log notes and other internal documentation is relevant in the context of that added dimension must be evaluated on a case-by-case basis. I agree with *Leitgeb* that a bald assertion of a special award does not, in and of itself, entitle an insured to access the company's complete file. That would amount to little more than conferring on insured persons a generalised right of access to internal company records in disputes (as suggested by the arbitrator), an option more appropriate for rule makers to decide on.

[10] He cautioned, however, that his order should not be taken as detracting from the ultimate authority of the hearing arbitrator to make decisions concerning the admission of evidence or to make orders. The same applies in this case.

[11] Unlike in *Leitgeb*, Rule 46.2, restricting appeals of interlocutory orders, was in effect.

Ms. Al-Obaidi relies on the decision of the Court of Appeal in *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d) 321. However, I do not view anything in that decision, which deals with privilege, as inconsistent with *Leitgeb* or the above reasoning.

The arbitrator rejected Allstate's argument that its obligation should be limited to log notes relating to the particular benefits in issue. In so doing, he implicitly rejected the form of the order in *Candido.* His reluctance to make such an order stemmed from his objection to an opposing party having a role in deciding what entries should be disclosed. He also rejected the suggestion that he vet the records to determine relevance.

Lawyers are routinely called on to make judgement calls on what is and is not producible, whether on the basis of privilege or relevance. Although arbitration does not involve affidavits of documents or discovery, the adjudication process, whether in this forum or in court, is, to a large extent, premised on a general assumption that lawyers will act in accordance with their professional obligations.

Arbitrators have considerable options as to the form disclosure should take. In appropriate circumstances, this may involve a selective order, as in *Candido,* limited to entries related to specified benefits, and giving that party's lawyer the opportunity to decide which entries meet the criteria. However, this should always be subject to the ultimate discretion of the arbitrator to rule on aspects in relation to which there may be uncertainty, disagreement or concern.

Turning to the case at hand, it involves a narrow dispute over discrete benefits and a short time frame. It concerns what appears to have been a blanket denial of the benefits in issue under s. 24. In the circumstances, I am satisfied that there is a sufficient connection between the log notes and the parameters of the dispute to warrant a production order. However, the broader the reach of the request, the more tenuous the relationship.

I am not satisfied that Ms. Al-Obaidi has shown the relevance of entries for the period before Allstate had notice of a claim in respect of any of the expenses in dispute. Therefore the order is

limited to entries made in the period between then and the date mediation proceedings were commenced (excluding the period of the first mediation). Given the short time frame covered, it is reasonable to proceed on the basis that, notwithstanding the limited scope of the dispute, the log notes for this period, in their entirety, may well have some bearing on it. The arbitrator's order is rescinded and a new order substituted in the above terms.

IV. EXPENSES

Ms. Al-Obaidi responded to an appeal raising issues of some significance. Having regard to the criteria set out in s. 12 of the regulations, R.R.O 1990, Reg. 664, as amended, she should receive her appeal expenses.

_____ May 2, 2000

Susan Naylor
Director's Delegate