OIC A96–001133

BETWEEN:

VELJKO DUBAJIC

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Issues:

The Applicant, Veljko Dubajic, was involved in a motor vehicle accident on June 23, 1994. He applied for statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.[1] The Insurer paid benefits of $185 per week under section 19 of the *Schedule* (Other Disability Benefits) between June 30, 1994 and September 29, 1994, when benefits were terminated. The Applicant claims benefits of $543.60 per week under section 7 of the *Schedule* (Income Replacement Benefits) from June 30, 1994 and ongoing. The Insurer claims repayment of all benefits paid, and seeks an award of its assessment and expenses against the Applicant.

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[1]The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993, and before November 1, 1996*, called "the *Schedule*" in this decision. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94.

The parties were unable to resolve their disputes through mediation, and Mr. Dubajic applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. The arbitration hearing is scheduled for November 10 and 12, 1997. The Insurer moved for an order that the matter be dismissed or stayed with costs on the ground that the Applicant has failed to comply with pre-hearing production orders.

The issues in this hearing are:

1. Should the Application for Arbitration be dismissed? Alternatively, should it be stayed?

2. Is the Insurer entitled to an award of $2,000 under section 282(11.2) of the *Act*?

Result:

1. The Applicant has abused the Commission's process by failing to comply with pre-hearing production orders, evading the Commission's attempts to communicate with him, and failing to participate in pre-hearing discussions on August 8, 1997 and September 19, 1997. The Applicant shall pay the Insurer the amount of $2,000 by November 5, 1997, whether or not he proceeds with the arbitration.

2. The hearing will proceed on November 10 and 12, 1997 only if the Applicant has complied with the first paragraph. Otherwise, the procee

ding will be deeme d to have been withdr awn.

Hearing:

The hearing was held at the offices of the Ontario Insurance Commission in North York, Ontario, on September 19, 1997, before me, Nancy Makepeace, Arbitrator.

Eric Grossman, Barrister and Solicitor, appeared on behalf of the Insurer. The Applicant did not appear and no one appeared on his behalf. Exhibits are listed in an appendix to the decision.

History of the proceeding:

The first pre-hearing in this matter was heard by Arbitrator Fred Sampliner on October 30, 1996. Notice was sent to the Applicant at the address given on the Application for Appointment of an Arbitrator: 2009 - 55 T. Ave., Toronto, Ontario. The Applicant did not attend the pre-hearing, but he was represented by counsel, Mr. Michael Henry. Mr. Gary Giacinti appeared on behalf of the Insurer, represented by Mr. Michael Horowitz. Counsel agreed to exchange documents on their own, and agreed to a hearing date of April 9 and 10, 1997.

On February 4, 1997, Mr. Henry advised the Applicant that his firm would no longer represent him. The letter - received by the Applicant at 204-32 M. Ave., Toronto, Ontario - was copied to the Commission and Mr. Horowitz the next day.

The Applicant appeared before me without counsel on April 9, 1997. Mr. Horowitz, representing the Insurer, stated at the outset that the Applicant had not yet responded to the Insurer's requests for documents. The Applicant explained that he had been unable to obtain the documents from Mr. Henry, and he requested an adjournment in order to do so. Despite the Insurer's objections, I granted the adjournment, and ordered the parties to exchange certain specified documents by May 9, 1997. I also indicated that either party could request a resumption of the pre-hearing conference if the documents were not produced by that date. The hearing was rescheduled for November 12 and 13, 1997, this date to be tentative for 30 days in order to allow the Applicant to retain counsel.[2] The Applicant has not retained new counsel since Mr. Henry withdrew from the record. None of the documents requested have been produced to the Insurer.

On July 17, 1997, Mr. Grossman requested that the pre-hearing be resumed to deal with the production matters. He moved for an order that the Applicant pay the Insurer's assessment of $2,000 on an interim basis as a precondition to the Applicant's proceeding with the arbitration.

The pre-hearing was scheduled for resumption on August 8, 1997 at 2:00 p.m. by telephone conference. The Applicant did not participate. After satisfying myself that the Applicant had received Notice of Resumption of Pre-hearing Discussion, and after trying unsuccessfully to reach the Applicant at the three telephone numbers on file, I continued with the pre-hearing in his absence. Upon hearing Mr. Grossman's submissions, I made the following order, which was confirmed by letter:

> 1. By September 8, 1997, the Applicant must either pay the Insurer's Assessment of $2,000 or produce the following documents, at the cost of the Insurer:
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> ...
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> 2. This order is subject to any order an arbitrator may make following the hearing of this matter.

[2]The hearing was subsequently rescheduled to November 10 and 12, 1997.

3. The Insurer has given notice that if the Applicant fails to comply with paragraph 1, the Insurer will move for dismissal of the proceeding with costs.

4. A further resumption of the pre-hearing discussion in this case is scheduled for Friday, September 19, 1997, at 3:00 p.m.

A Notice of Resumption of Pre-hearing Discussion was sent to the Applicant at 606-55 T. Ave., Toronto, where the Commission's enquiries indicated he was staying after moving out of the M. Avenue address in spring or early summer of 1997.

At 3:00 p.m. on September 19, 1997, I attempted to reach the Applicant at the most recent telephone number on file. I spoke to the same woman I had spoken to on August 8, 1997, who had then identified herself as one M.P. (she now refused to identify herself.) On both occasions, she told me that the Applicant was not there, she did not know where he was, but he dropped in occasionally to pick up mail and could be reached at that address (606-55 T. Ave., Toronto). I find that the Applicant can be reached at that telephone number and address and that he has chosen not to make himself available.

After speaking to Ms. P. on September 19, 1997, I tried the two other telephone numbers on file for the Applicant, but both were out of service. At no time has the Applicant contacted the Commission to advise us of any other address and telephone number.

Accordingly, I proceeded with the pre-hearing conference pursuant to paragraph 34.5 of the Dispute Resolution Practice Code (April 15, 1997), which says:

> Where notice of hearing has been sent to a party and a party does not attend at an oral or electronic hearing, or participate in a written hearing, the arbitrator may proceed with the hearing in the party's absence or without the party's participation, as the case may be, and the party is not entitled to any further notice of the proceeding.

Dismissal:

On behalf of the Insurer, Mr. Grossman submitted that I should dismiss the application and order the Applicant to pay the Insurer $2,000, being the cost of its arbitration assessment. He relied on three previous decisions in which an arbitrator dismissed an Application for Arbitration and ordered the applicant to pay the Insurer's assessment because of an applicant's failure to comply with pre-hearing production undertakings and orders and failure to appear at the hearing.[3]

In this case, the effect of dismissing the application is to preclude the Applicant from ever bringing his claim for benefits before an Arbitrator (or a judge), because more than two years has now passed since the date of the accident.[4] Such an order would obliterate the Applicant's right to refer his dispute with the Insurer to mediation and arbitration, as he is otherwise entitled to do pursuant to sections 280 and 281 of the *Act*. Arbitrators have frequently noted the remedial character of the dispute resolution scheme established under the *Act*.[5] It was intended to provide insured persons with quick, inexpensive and non-technical resolution of their disputes with insurers about statutory accident benefits. For this reason, the arbitration process "does not have the broad discovery and disclosure processes of the court system."[6] In view of the remedial character of the dispute resolution scheme, I do not find it appropriate to dismiss this application

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[3] *Polus and Royal Insurance Co.*, (August 18, 1995), OIC A-002392; *Yusuf and Progressive Casualty Insurance Company and State Farm Mutual Automobile Insurance Company*, (November 24, 1995), OIC A-008914 and OIC A-014071; and *Bilusack and Co-Operators General Insurance Company* (February 13, 1996), OIC A-006369.

[4] Section 72 of the *Schedule* and subsection 281(5) of the *Act*.

[5] See, for example, subsection 279(2) of the *Act* (no opting out), section 279(4.1) (interim orders), subsection 281(1) (insured person's right to commence arbitration, private arbitration or court proceeding), subsection 281(3) (payment in accordance with last offer), subsection 281(4) of the *Act* and subsections 36(4) and 40(7) of the *Schedule* (payment of certain benefits pending dispute resolution), subsection 282(10) (special award), subsection 282(11) (discretion with regard to expense orders), subsection 282(11.1) (interim expense orders), section 287 (protection of benefits), and section 288 (unfair business practices).

[6] Practice Note 4, "Exchange of Documents" (April 15, 1997)

without a full hearing of the matter, on the sole basis of the Applicant's failure to comply with pre-hearing production orders.

On behalf of the Insurer, Mr. Grossman submitted that in any event, the application should be dismissed on its merits. First, he noted that the Applicant's Application for Accident Benefits, dated October 25, 1994, indicated that he earned $25,500 as a construction worker/handyman between December 1, 1993 and June 23, 1994 and earned $10,000 through self-employment between January 1, 1993 and December 1, 1993. The Applicant signed an Employer's Confirmation of Income form the next day, in which he claimed to have earned a gross salary of $3,500 in the four weeks before the accident. On November 28, 1994, the Applicant filed another Employer's Confirmation of Income form setting out the same information. This one was signed by one Peter Pauser, who was identified as the Applicant's supervisor. Mr. Grossman submitted that Mr. Pauser's name[7] has been raised in at least one other arbitration proceeding where the Insurer has questioned the veracity of the applicant's claims with respect to his pre-accident employment.

Mr. Grossman also filed an investigation report which indicated that the Applicant was observed while apparently working at the Mopaba Restaurant on October 11, 13, 14 and 17, 1994. The investigator was told that the Applicant and his wife own the restaurant and work there every day. A further investigation by another firm indicated that the Applicant declared himself the owner of the restaurant on his signed rental application dated January 31, 1994.

The Insurer's evidence certainly suggests that the Applicant has some tough questions to answer. However, the Applicant has not had an opportunity to answer those questions, as the principles of natural justice require. Though my letter of August 8, 1997 warned that the Insurer would move for dismissal of the application if the Applicant did not comply with my order of that date, the Applicant has received no notice that the Insurer would attempt to lead evidence and request an

[7] It appears he is also known as Panta Pauser.

Arbitrator to make findings at any time before the scheduled hearing in November 1997. Accordingly, I make no findings based on the evidence filed by the Insurer.

Constructive withdrawal:

Rule 67.3 of the Commission's Dispute Resolution Practice Code (April 15, 1997) provides that where an insured person moves to withdraw his application for arbitration, and the insurer does not consent to the withdrawal, the Arbitrator may permit the withdrawal on such terms and conditions as the Arbitrator considers appropriate, deny the insured person his arbitration expenses, or order the insured person to pay the insurer's arbitration expenses. If the Arbitrator decides there has been an abuse of process, or finds that the proceeding was frivolous or vexatious, the Arbitrator may order the insured person to pay the insurer's arbitration assessment. In some cases, the Arbitrator has allowed the insured person to withdraw on condition that he pay the insurer's arbitration assessment, or ordered that once he withdraws his application, he cannot reapply, even if he would still have time to do so.

In this case, the Applicant has not asked to withdraw his application. The Insurer submitted that the Applicant's failure to comply with pre-hearing production orders and his failure to participate on August 8 and September 19, 1997 amounts to "constructive withdrawal" as described by Arbitrator Seife in *Quattrocchi and State Farm Mutual Automobile Insurance Company* (June 11, 1996), OIC A-006854:

> In my view, for an application to be considered withdrawn, it is not necessary that the applicant expressly make a request to that effect. An application may be "constructively" withdrawn when the applicant has abandoned the claim through lack of due diligence or interest in pursuing his/her application.

In that case, Arbitrator Seife found that the applicant "had abandoned, and, in effect, withdrawn her claim" and that her counsel's failure to comply with the Commission's practices and to respond to the Commission's enquiries constituted an abuse of process. The Arbitrator did not

dismiss the application, which the applicant had subsequently revived, but ordered the applicant to pay the insurer's arbitration assessment prior to the hearing date and in any event.

In my view, Arbitrator Seife's approach was a fair one which properly balanced both parties' interests. I adopt the same approach in this case. I find that the Applicant has abused the Commission's process by failing to comply with pre-hearing production orders, evading the Commission's attempts to reach him by telephone, and failing to participate on August 8, 1997 and September 19, 1997. The Applicant is ordered to pay the Insurer's assessment of $2,000 by November 5, 1997 as a precondition of continuing with the proceeding, and even if he does not proceed with the arbitration. If he fails to do so by November 5, 1997, he will be deemed to have withdrawn his Application for Appointment of an Arbitrator.

Order:

1. The Applicant shall pay the Insurer the amount of $2,000 by November 5, 1997, whether or not he proceeds with the arbitration.

2. The hearing will proceed only if the Applicant has complied with the first paragraph of this Order. Otherwise, the matter will be deemed withdrawn.

October 21, 1997

Nancy Makepeace
Arbitrator

Date

APPENDIX

Exhibits:

Exhibit 1 Application for Accident Benefits, October 25, 1994

Exhibit 2 Report of Joseph Maxwell, private investigator, Scope Investigations Ltd., October 26, 1994

Exhibit 3 Report of Domenic Sturino, private investigator, Equifax Canada, November 24, 1994

Exhibit 4 Report of Joseph Maxwell, January 25, 1995