

BETWEEN:

SUNANDA SAINI

Applicant

and

CIBC GENERAL INSURANCE COMPANY LTD.

Insurer

DECISION

Issues:

The Applicant, Sunanda Saini, applied for statutory accident benefits including weekly caregiver benefits of \$350 payable under the *Schedule*¹ with respect to a motor vehicle accident that occurred on April 15, 1996. CIBC General Insurance Company Ltd. (“CIBC”) alleged that the Applicant fraudulently claimed that she was involved in an accident. The parties were unable to resolve their disputes through mediation and Mrs. Saini applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *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 and 781/94.

At the commencement of the hearing, Mrs. Saini sought permission to withdraw her dispute pursuant to Rule 67 of the Dispute Resolution Practice Code. The issues at this hearing therefore were:

1. Should Mrs. Saini be permitted to withdraw her Application for Arbitration, dated October 28th, 1996, pursuant to Rule 67 of the *Dispute Resolution Practice Code*?
2. Is Mrs. Saini liable to pay an amount to CIBC of up to \$2,000, pursuant to subsection 282(11.2) of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, because she commenced an arbitration that is frivolous, vexatious or an abuse of process?
3. Is Mrs. Saini liable to pay CIBC its expenses in respect of the arbitration?

Result:

1. Mrs. Saini is permitted to withdraw her Application for Arbitration dated October 28th, 1996.
2. Mrs. Saini is ordered to pay to the insurer the sum of \$2000 which represents the return of the assessment it was required to pay for the arbitration.
3. CIBC is not entitled to its expenses of this arbitration proceeding.

Hearing:

The hearing was held at the offices of the Ontario Insurance Commission in North York, Ontario, on June 13, 1997 before me, Susan Sapin, Arbitrator.

Present at the Hearing:

Applicant: Sunanda Saini

CIBC's
Representative: David Zarek
Barrister and Solicitor

CIBC's
Officer: Nancy Costello

Witnesses:

Mrs. Saini did not testify and there were no other witnesses.

Exhibits:

Exhibit 1 Police request for copy of information and conviction (Main brief tab 14)

Exhibit 2 Application for accident benefits dated April 19th, 1996

Exhibit 3 Employer's Confirmation of Income form dated April 19th, 1996 (Tab E-10)

Exhibit 4 Health Practitioner's certificate of Dr. Uppal dated May 2nd, 1996 (Tab E-11)

Exhibit 5 Unsworn statement of Mr. Southcote dated April 19th, 1996 (Main brief tab 13)

Exhibit 6 Unsworn statements of Mrs. Saini dated April 19th and 29th, 1996 (Tab E-30)

Exhibit 7 Transcript of examination under oath of Mrs. Saini conducted by D. Zarek dated May 23rd, 1996 (Tab E-33)

Exhibit 8 First page of a letter from law firm of Thomson, Rogers to Nancy Costello, CIBC Accident Benefits Claims Advisor, dated May 27th, 1996 (Tab E-35)

Exhibit 9 Letter from law firm of Longley, Vickar to Nancy Costello dated June 12th, 1996 (Tab E-35)

Exhibit 10 Application for Mediation dated August 16th, 1996 (Tab E-37)

Exhibit 11 Sworn affidavit of Mrs. Saini dated September 9th, 1996 (Tab E-38)

Exhibit 12 Photocopy of certified copy of police information, record of conviction signed by Judge J.D. Wake, and Fine Order against Paramjit Singh dated March 11th, 1997.

Introduction

Mrs. Saini was unrepresented at the hearing. At the commencement of the hearing she stated that she wished to withdraw her application for arbitration. I explained to her that she had the additional options of either proceeding with the hearing or asking for an adjournment in order to obtain counsel. Mr. Zarek did not consent to the withdrawal. I asked Mrs. Saini if she felt she needed the services of an interpreter although she had not requested an interpreter in advance of the arbitration hearing. Mrs. Saini indicated that she would proceed without one. I conversed briefly with Mrs. Saini and was satisfied that her command of English was sufficient to allow her to proceed. Mrs. Saini gave brief submissions but did not testify.

Is the Applicant permitted to withdraw her dispute in accordance with Rule 67 of the Dispute Resolution Practice Code?

Rule 67.1 of the Practice Code provides that “A party may seek permission to withdraw all or part of a dispute....orally ...at a hearing.” The rule goes on to state that, where the other party does not consent, the adjudicator “may permit the withdrawal on such terms and conditions as the adjudicator considers appropriate.” These terms can include an order requiring the applicant to pay to the insurer a sum of up to \$2,000, the amount of the assessment fee the insurer was required to pay to participate in the hearing.

Mrs. Saini stated that she had “been through enough.” She could no longer afford either to pay a lawyer or to pay further expenses related to a hearing and she wished to end the matter.

Mr. Zarek argued that Mrs. Saini’s application for benefits was fraudulent from the outset and that she should not be permitted to withdraw her application for arbitration unless she was prepared to admit at the hearing that she had in fact never been an occupant of the car. He argued

that the alleged fraud amounted to an abuse of process such that she should be liable to reimburse the insurer for the full amount of the assessment and its expenses of the arbitration. He did not ask for her application to be dismissed.

I find that it would be unfair to force an unrepresented applicant to proceed with a hearing which could result in a final determination of all of her rights when she specifically wishes to withdraw her dispute. Arbitrators have held that an applicant is entitled to some control over the process, and I find it would be unfair to allow the insurer to wrest that control from her in this case. The insurer is not prejudiced in its ability to make out a case for the return of its assessment and expenses on the basis of abuse of process if Mrs. Saini is permitted to withdraw from the hearing. For these reasons I allow Mrs. Saini to withdraw her application for arbitration.

Return of all or part of the insurer's assessment

Mr. Zarek made submissions with respect to terms on two grounds; first, that Mrs. Saini should be ordered to pay the insurer \$2,000 on the basis that she commenced an arbitration that was “frivolous, vexatious, or an abuse of process” and, second, that the insurer was entitled to claim its expenses pursuant to section 282(11.2) and Ontario Regulation 464/96 as amended by Bill 59. These two issues will be dealt with separately.

Mr. Zarek submitted that Mrs. Saini should be ordered to pay the insurer the full \$2000 because she was not an occupant of the vehicle at the time of the accident. Her application for accident benefits was therefore fraudulent from the beginning and so constituted a serious abuse of process. He argued that her claim that she was in the car was not merely a “once-off lie” but became a consistent long-term attempt to perpetuate a fraud upon CIBC and the Ontario Insurance Commission.

In support of his assertion of fraud Mr. Zarek submitted documents indicating that both Mr. and Mrs. Saini were charged under the Criminal Code with attempting to defraud the insurance company, that Mr. Saini was convicted and fined \$500 for this offence and, as Mr. Zarek acknowledges, that the charges against Mrs. Saini were withdrawn. There is no evidence that she was convicted of any offence with respect to the motor vehicle accident. There is no evidence before me about the particulars of the case against Mr. Saini or of the nature of the fraud of which he was convicted. No evidence was tendered to show that Mr. Saini's conviction had anything to do with whether Mrs. Saini was a passenger in the vehicle at the time of the accident or her subsequent application for statutory accident benefits..

For these reasons I do not consider the evidence of criminal proceedings to be relevant and I place no weight on this evidence.

Neither can I find that the remaining evidence supports the allegation that Mrs. Saini's claim is a fraudulent one. The only evidence apart from Mrs. Saini's sworn and unsworn statements that deals with the issue of whether Mrs. Saini was in the car, is the unsworn statement of the driver of the other vehicle, who says that she was not. Mrs. Saini did not testify at this hearing and I draw no adverse inference from this. Although her own previous statements, sworn and unsworn, contain inconsistencies and contradictions, I cannot make a finding on a balance of probabilities that she was not an occupant of the car. Considering all of the evidence before me I find that, on the whole, there is insufficient reliable evidence on which to make a determination that Mrs. Saini attempted to advance a fraudulent claim by falsely asserting she was an occupant of the car.

Mr. Zarek also argued that Exhibits 2, 3, 4, 8, 9 & 10 show that Mrs. Saini continued to make fraudulent assertions in support of her claim for accident benefits in different ways, and to several people, for several months after the accident. Mr Zarek argued that Mrs. Saini had several opportunities along the way to "come clean," change her story and tell the truth but she did not.

She thereby put the insurance company to the continued expense of investigating and defending the claim up to and including arbitration. As stated above I cannot make a finding that the claim was fraudulent from the outset, and therefore I do not consider the rest of the evidence to be relevant.

The question that remains, then, is whether there was an abuse of process such as to entitle the insurer to a return of all or part of the assessment fee. I note from the pre-hearing letter dated April 29th, 1997 that neither Mrs. Saini nor her representative at the time attended or participated in the pre-hearing. The pre-hearing arbitrator was satisfied that Mrs. Saini and her representative had been notified of the pre-hearing discussion. The pre-hearing arbitrator noted also that the arbitration file contained neither a request for an adjournment of the pre-hearing nor a request to withdraw the arbitration. The arbitrator also requested in the prehearing letter that the Applicant and her counsel inform both Mr. Zarek and the Commission in writing of Mrs. Saini's intentions with respect to this arbitration. There is no indication that this request was ever complied with.

A Notice of Hearing was sent via registered mail to Mrs. Saini and she received it on May 17th, 1997. Mrs. Saini provided no notice either to the Commission, Mr. Zarek or the insurer that she intended to withdraw her dispute until the day of the hearing.

I find that Mrs. Saini's inaction after filing her application for arbitration and lack of notice to the insurer about her intentions left the insurer no choice but to continue to incur additional expenses for preparing and attending the prehearing and the hearing. It was not until the day of the hearing that Mrs. Saini announced her intention to withdraw her application. The reasons offered are not sufficient excuse for the expense and inconvenience to which the insurer was put. I find that this amounts to an abuse of process entitling the insurer to an award in the full amount of its assessment of \$2,000 and I find Mrs. Saini liable to pay this amount.

I heard no evidence or submissions about whether the payment of the \$2,000 should be a term or condition of the withdrawal. The application is withdrawn without conditions. However, should Mrs. Saini wish to reapply for arbitration of any of the issues related to this application she must first pay to the insurer a further \$2000.

Is the insurer entitled to its expenses incurred in the arbitration pursuant to section 282(11) of the *Insurance Act*, R.S.O. 1990, Chapter I.8, as amended?

Prior to November 1st, 1996, section 282(11) of the *Insurance Act* did not permit the insurer to claim its arbitration expenses. This right to claim expenses was added to the section by the amendments contained in Bill 59 and in Ontario Regulation 464/96. Recent cases at the OIC (notably *Paulo Pinto and General Accident Insurance Company of Canada* (April 10, 1997), OIC A96-001246) have held that the new expense provisions are prospective and so do not apply to applications for arbitration which were filed before November 1st, 1996. Mrs. Saini's application for arbitration was filed on October 28th, 1996, prior to the amendments. Although Mr. Zarek agreed in principle with the *Pinto* case he urged me to depart from it on the basis that an exception ought to be made from the general rule in the case of a fraudulent claim. As I do not find Mr. Zarek has established that the claim is fraudulent, I cannot find that the insurance company is entitled to its expenses on the basis of this argument.

Order:

1. Permission to withdraw the the Application for Arbitration dated October 28th, 1997 is granted and this application is hereby withdrawn without terms.
2. Mrs. Saini is ordered to pay to the insurer the sum of \$2,000.
3. Mrs. Saini may not reapply for arbitration of any of the issues related to this arbitration unless she first pays to the insurer \$2000.
4. The insurer is not entitled to its expenses in respect of the arbitration.

Susan Sapin
Arbitrator

July 8, 1997

Date