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BY SAME DAY COURIER

November 5, 1998

Mr. Paul J. Bates

Mr. Eric Grossman

Dear Mr. Bates and Mr. Grossman:

Re: Max Elkaim and State Farm Mutual Insurance Company
Commission Appeal File No.: P98-00006
Motion by Dr. Harold Becker

It was my intent to give full written reasons for my decision on the motion made by Dr. Becker for standing to appeal or apply for a variation or revocation of Arbitrator Miller's order in the above noted case. However several matters intervened to delay the provision of those reasons.

Your clients are entitled to a present determination of this issue. Reasons disposing of the motion are set out in this letter which will be issued in decision format in due course.

The background facts are not in dispute. Max Elkaim claimed statutory accident benefits from State Farm Mutual Insurance Company ("State Farm"). A disagreement over those benefits ensued and Mr. Elkaim initiated arbitration proceedings against State Farm. A hearing subsequently took place before Arbitrator Miller in September 1997. Dr. Harold Becker was a witness testifying on Mr. Elkaim's behalf. On November 17, 1997, the arbitrator released her decision dismissing Mr. Elkaim's claims and ordering a repayment of benefits. Mr. Elkaim has not appealed or otherwise challenged the decision.

In her reasons, the arbitrator commented on Dr. Becker's oral testimony and the written reports entered into evidence. Dr. Becker objects not only to the content of those statements, but the jurisdiction of the arbitrator to make findings akin to 'findings of misconduct' which he submits

only his professional governing body has the ability to do. In addition, Dr. Becker submits the arbitrator erred in law by relying on statements made by State Farm's counsel about his evidence during argument, rather than objective evidence and in any event, he was entitled to notice of the allegations against him.

The motion brought by Dr. Becker is for standing to appeal, vary or revoke the arbitration order within the Commission's dispute resolution process based on the above objections and his contention that he is a party to the proceedings by the operation of the *Insurance Act*; sections 3, 5 and 11 of the *Statutory Powers Procedure Act*; the *Dispute Resolution Practice Code* or a combination of their provisions and natural justice. Dr. Becker does not seek to overturn the outcome of the substantive decision as between Mr. Elkaim and State Farm; rather he wishes to appeal the findings relating to his evidence.

I find, notwithstanding the able arguments of Dr. Becker's counsel, that the *Insurance Act* does not provide the avenue of appeal he seeks. Although section 283 uses the term 'party' in relation to who may appeal an arbitration order, while other sections (i.e. s. 282 and 284) refer to the 'insured person' and the 'insurer', the scheme of the dispute resolution process, when viewed as a coherent whole, contemplates only two parties to both the mediation and adjudication functions. Section 283 relates back to s. 282, which refers to the insured person. The only possible respondent is the insurer. Here, the parties under s. 283 were Mr. Elkaim and State Farm. Section 284 permitting variation and revocation of orders names the insured and the insurer as the only applicants: that process is unavailable to Dr. Becker.
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This might end the matter but for the *Statutory Powers Procedure Act* ("*SPPA*") which applies to the Commission's arbitration and appeal processes. Section 5 defines parties to include those named by statute as above and, if unspecified, to "persons entitled by law to be parties to the proceeding". The issue boils down to whether Dr. Becker is one those persons so entitled. In support of his position, Dr. Becker says the *Insurance Act* has a gap to be filled by section 5 of the *SPPA* affording him the opportunity to respond to the allegations against him as a party who has a 'substantial and direct interest' in the arbitration would: by retaining counsel, having notice of any claims against him and calling evidence. This argument is buttressed by reliance on the decision at first instance in *Hurd v. Hewitt* (1991), 13 Admin. L. R. (2d) 223 (Ont. Ct. Gen. Div.), (1994), 20 O.R. (3d) 639 (C.A.). Dr. Becker states his interest in the arbitration proceeding and decision is greater than that of the general public, as it involves him personally (not merely the evidence adduced through him), as a "target" and potentially affects his professional reputation and standing. He submits that the discussion in the *Hurd* decision, while not directly on point, provides the parameters for standing to be granted to persons who are not the primary litigants in a proceeding.

Findings about the credibility of witnesses and reliability of documents tendered in a hearing may of necessity include adverse comments in the reasons for decision. They relate to whether the litigants have proved or defended their positions effectively. Witnesses, even those qualified as experts, may not strictly speaking be 'neutral' in that they are usually called on to support the

position of one or other side to a dispute. Their evidence may not be believed, or may be accepted in part only when taken with all the evidence proffered. As long as a witness was dealt with fairly during the process, such conclusions are within the arbitrator's jurisdiction.

From the transcript provided, it appears the arbitrator allowed counsel for the insured and insurer significant latitude in their questioning of Dr. Becker. Coupled with what she heard from Mr. Elkaim and the other witness, the arbitrator clearly believed Dr. Becker's reports and testimony were coloured by his views of the appropriate doctor-patient relationship with Mr. Elkaim, and not clinically dispassionate. Mr. Elkaim and Dr. Becker knew well before the hearing that State Farm relied on the medical reports and did not accept their conclusions. There was no surprise as to the approach taken by the insurer during cross-examination, nor of what it had to prove to resist Mr. Elkaim's benefit claims. I agree with Dr. Becker that the hearing counsels' closing submissions are not evidence, however there is no indication in the decision that the arbitrator took them as such. She was entitled to weigh the evidence as she did and draw conclusions about Dr. Becker's views and approaches with which he disagrees. However, that does not provide him with standing to appeal the order.

Accordingly, the motion by Dr. Becker for standing to appeal the arbitrator's order is dismissed. There is no jurisdiction to make an expense award in relation to this motion. The formal order reflecting this disposition is enclosed.

Yours very truly,

Elisabeth Sachs
Director of Arbitrations

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