Financial Services Commission

Commission des services financiers de l'Ontario

Appeal P01-00002

OFFICE OF THE DIRECTOR OF ARBITRATIONS

MARY GLINKA

Appellant
Respondent
on Cross-Appeal

and

DUFFERIN MUTUAL INSURANCE COMPANY

Respondent
Appellant
on Cross-Appeal

BEFORE: Stewart McMahon, Director's Delegate

REPRESENTATIVE: Roland Spiegel (for Ms. Glinka)
COUNSEL: Eric Grossman (for Dufferin)

APPEAL ORDER ON A PRELIMINARY ISSUE

Under section 283 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, **it is ordered that:**

1. The request by Dufferin Mutual Insurance Company to have Mr. Spiegel excluded from the Appeal, pursuant to Rule 63.6 of the *Dispute Resolution Practice Code*, is denied.

2. This order does not preclude the Insurer from renewing its request later in the proceeding.

March 7, 2001

Stewart M. McMahon
Director's Delegate

REASONS FOR DECISION

I. ISSUE

Should Mr. Roland Spiegel be precluded from representing Ms. Mary Glinka on the appeal, pursuant to Rule 63.6 of the *Dispute Resolution Practice Code*?

II. LEGISLATIVE CONTEXT

Rule 63.6 of the *Dispute Resolution Practice Code* (the *Code)* allows an adjudicator to exclude an agent who is incompetent, or who does not understand or refuses to comply with his duties and responsibilities. The section reads:

> An adjudicator may exclude from a hearing anyone, other than a duly qualified barrister and solicitor, appearing as an agent on behalf of a party if the adjudicator finds that the agent is not competent to properly represent the party or does not understand and comply with the duties and responsibilities of an advocate or adviser.

Rule 63.6 is modelled after s. 23(3) of the *Statutory Powers Procedure Act,* R.S.O. 1990 c. S.22 as amended (the *S.P.P.A.*)

III. BACKGROUND

Ms. Glinka applied to arbitrate her entitlement to treatment expenses related to chiropractic, physio, and massage therapies. She also sought payment for three assessments conducted pursuant to section

24 of the *Statutory Accident Benefits Schedule (SABS-96)*.[1] In addition, Ms. Glinka sought a special award, and payment of her arbitration expenses. Dufferin Mutual Insurance Company (Dufferin) sought payment of its expenses.

The arbitrator awarded Ms. Glinka a couple of additional months of treatment, but denied the bulk of this claim on the basis that she had failed to establish the treatment was reasonable and necessary. Likewise, the arbitrator allowed only a portion of the assessment expenses.

Ms. Glinka has appealed, claiming that the benefits should not have been reduced. Dufferin has appealed, submitting that the arbitrator erred in awarding any assessment expenses.

The arbitrator denied Ms. Glinka her arbitration expenses notwithstanding that she was partially successful, and could ordinarily have expected her expenses. The arbitrator went further and awarded Dufferin its expenses in relation to a witness who had to re-attend on a second day, because his cross-examination was not completed by Mr. Spiegel in a timely fashion. The arbitrator stated that "the overwhelming factor in this decision [the ruling on expenses] was the conduct of Ms. Glinka's representative, Mr. Spiegel." She found that Mr. Spiegel's conduct prolonged the hearing, and added very little to assist Ms. Glinka's claim.

The arbitrator devoted an entire section of her decision to the quality of Mr. Spiegel's representation. She commenced by stating that she felt "compelled to comment on the poor quality of Mr. Spiegel's representation." Thereafter, she catalogued the following concerns:

- he failed to provide pre-hearing disclosure of the documents he intended to rely upon;

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[1] Ontario Regulation 403/96, as amended, the *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*.

- he failed to provide pre-hearing notice of his intended witnesses and failed to arrange for appropriate summons;
- he sought to give evidence, and did not perceive "any impropriety in popping in and out of the witness box as an advocate/witness on the same case;"
- he was not familiar with the contents of the arbitration brief;
- his cross-examination of Dufferin's expert witness was incompetent.

She concluded her comments by stating:

> In my view, Mr. Spiegel is not competent to represent clients before this Tribunal. As this hearing is over, it would be useless to exclude Mr. Spiegel from any further participation in this hearing. However, Mr. Spiegel's conduct in the presentation of this case will be considered in my decision on expenses of this arbitration proceeding.

Ms. Glinka has appealed the expenses issue. She also claims that the arbitrator is biased.

Dufferin submitted in its *Response to Appeal*, that the arbitrator's finding that Mr. Spiegel is not competent should be upheld, and that I should "apply [my] discretionary authority to bar Mr. Spiegel from acting as representative for the Appellant."

The arbitrator clearly expressed her view that Mr. Spiegel was incompetent, but she did not exercise her discretion under Rule 63.6 of the *Code*. In any event, I am not certain that such a determination at the arbitration stage would automatically exclude the agent at the appeal stage. Accordingly, I am of the view that I must satisfy myself that Mr. Spiegel is not competent to represent Ms. Glinka on the appeal.

IV. SUBMISSIONS

Dufferin's counsel made three submissions in support of his client's request:

- He referred me to and relied upon the findings of the arbitrator;

- He referred me to and relied upon negative comments concerning Mr. Spiegel's conduct in *Grozdanovsky and Wawanesa Mutual Insurance Company*, (OIC A99-000289 April 7, 2000);

- He referred me to Mr. Spiegel's submissions filed in support of the appeal, suggesting they demonstrated he was not competent to act on the appeal.

Ms. Glinka's initial *Reply* did not directly address Dufferin's request that Mr. Spiegel be excluded. At my urging, Mr. Spiegel filed an additional *Reply*. His submissions are limited to four lines. He submits that his client appointed him as her agent and that she rejects Dufferin's assertions. In fairness, his initial *Notice of Appeal*, which contains lengthy submissions, challenges a number of the arbitrator's findings regarding his conduct of the arbitration.

Neither party provided me with any analysis of the provisions of Rule 63.6, any comment on the process that should be employed, or any jurisprudence. On my own initiative, I have reviewed and rely upon two decisions: *Codina v. Law Society of Upper Canada*, [1996] O.J. No. 3348, and *R. v. Romanowicz* (1999), 45 O.R.(3d) 506 (C.A.), and the loose-leaf service authored by Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals*, (Toronto, Carswell) which at 12-174.4 cites *R. v. Romanowicz* as the leading case concerning the right of an adjudicator to exclude an agent.

V. ANALYSIS

(i) Process

Codina v. Law Society of Upper Canada, provides two useful comments on process issues. Very briefly, Ms. Codina was the subject of a complaint before a panel of the discipline committee of the Law Society. Mr. Harry Koypto, who had recently been disbarred on the grounds of dishonest

conduct, appeared as agent for Ms. Codina. Counsel for the Law Society, relying upon section 23(3) of the *S.P.P.A.*, asked that Mr. Koypto be excluded. The panel convened a preliminary hearing to consider the request. Mr. Koypto asked for an opportunity to give *viva voce* evidence. In addition to his testimony, the panel also considered the reasons given by Convocation upon Mr. Koypto's disbarment and the Divisional Court's reasons in upholding Convocation's decision.

I take two things from this decision. One, a formal hearing may be appropriate. Two, I may consider extraneous evidence. In particular, while the issue must be Mr. Spiegel's fitness to appear on this appeal, I may take account of Mr. Spiegel's conduct in other cases before the Financial Services Commission of Ontario (the Commission).

In *R. v. Romanowicz*, the Court of Appeal was concerned with the right of a judge presiding over the trial of a summary conviction offence, to exclude an agent. At par. 79, the Court stated that if the trial judge was satisfied that there was any basis for excluding the agent, an inquiry should be held "in which all interested parties are given a full opportunity to present their positions on the issue." The Court also stated that the rules of evidence need not apply, but "the dictates of procedural fairness must."

I do not read this decision as a directive that *viva voce* evidence or oral submissions are necessary in every case. Clearly, the agent must be given an opportunity to present his answer to the charge that he is not fit. In the *Codina* case, Mr. Koypto asked for an opportunity to respond to the Law Society's allegation by giving evidence. In contrast, Mr. Spiegel has shown little inclination to confront Dufferin's request head on. Likewise, Dufferin's submissions are quite limited.

The Commission's processes are less formal than a court process, and are designed to provide a more expeditious means of resolving disputes. For example, the appeal unit at the Commission routinely deals with preliminary matters, including significant issues such as a request for a stay, on the basis of the party's submissions in the *Notice of Appeal, Response to Appeal, and Reply by the Appellant*. In the

circumstances of this case, I am satisfied that I am not unduly constraining the dictates of fairness by proceeding without inviting further submissions or calling for *viva voce* evidence.

(ii) Grounds for excluding an agent

In *R. v. Romanowicz,* at par. 73, the Court stated:

> The power to refuse audience to an agent must be invoked whenever it is necessary to do so to protect the proper administration of justice. The proper administration of justice requires that the accused's constitutional rights, particularly the right to a fair trial, be protected. It also requires the fair treatment of other participants in the process (e.g. witnesses) and that the proceedings be conducted in a manner that will command the respect of the community.

However, the Court also voiced a strong note of caution in relation to any attempt to interfere with a party's choice of representative, stating at par. 76;

> It is not enough that the trial judge believes that the accused would be better off with other representation or that the process would operate more smoothly and effectively if the accused were represented by someone else. Disqualification of an accused's chosen representative is a serious matter and is warranted only where it is necessary to protect the proper administration of justice.

In my view, these principles are equally applicable to the Commission's proceedings. While the Constitutional rights referred to by the Court, which was considering a criminal proceeding, may not be applicable, the Commission has a general power, as expressed in section 23 of the *S.P.P.A.,* to make orders to prevent an abuse of its process, and in particular to exclude agents in appropriate circumstances.

The power to exclude an agent must principally be seen as a tool to protect the interests of the person represented by the agent. It may also be used to safeguard the tribunal's process. Finally, it may be employed at the request of another party seeking to protect its own interests. However, it is a blunt and

severe tool that is not particularly suited to redressing the concerns of an adverse party. Such concerns are better addressed through the judicious use of pre-hearing orders, in-hearing directions, and expense sanctions. It is fair to note that the Commission's views on expenses have been primarily shaped by the need to assure access. However, in appropriate cases, adjudicators have imposed expense sanctions. This case is a perfect example. As noted above, the arbitrator denied the Insured her expenses in circumstances where she would ordinarily have been awarded them, and granted the Insurer a portion of its expenses.

R. v. Romanowicz, is also helpful in establishing the standard of review. The court made it clear that an agent is not to be held to the standard of a lawyer. A brief review of the facts illustrates the gulf between the two standards. Mr. Romanowicz was charged with leaving the scene of a motor vehicle accident. His defence was that he did not leave with the intent of avoiding civil or criminal liability. On his agent's advise, he chose not to testify. He was convicted. It would appear that it was common ground at appeal that this defence was all but doomed without the accused's direct evidence, and that any competent lawyer would have recognized this and counselled him to take the stand. The Court held that having chosen to be represented by an agent, he could not later be heard to complain that the agent did not perform to the standard of a lawyer. In its conclusions, the Court stated that the agent's conduct was not sufficiently sub-standard that it compromised the accused's right to a fair trial or required the trial judge to act on his authority to disqualify the agent.

If agents are entitled to appear, as they are at the Commission, it follows, that the adjudicator and the parties will not always have the benefit of trained counsel.

(iii) Application of the law to the facts of the case

In considering the weight to attach to the arbitrator's comments, I take heed that some of them are being challenged in the appeal. However, the strength of some of these challenges must be questioned.

In particular, I note that Mr. Spiegel takes issue with the arbitrator's comments about what occurred during the course of the hearing, but that he has chosen not to file a copy of the transcript. As noted on many occasions, challenging the arbitrator's record of what was said during a hearing is all but impossible without a transcript. In addition, I note that on some issues, other arbitrators have made comments similar to those expressed by the arbitrator in this case.

The arbitrator's concerns about Mr. Spiegel's competence can usefully be divided into two categories. One, comments about his pre-hearing disclosure obligations. Two, comments about his conduct of the hearing.

Regarding pre-hearing obligations, the arbitrator noted that Mr. Spiegel failed to disclose what documents he intended to rely upon or what witnesses he intended to call. Arbitrator Sampliner made a similar comment in *Grozdanovsky*. I also note that in *Dhawan and State Farm Mutual Automobile Insurance Company* (FSCO A00-000031) Mr. Spiegel refused to comply with undertakings given at a pre-hearing, necessitating a resumption of the pre-hearing and an order for production.[2]

I am distressed by Mr. Spiegel's apparent disregard for his obligations, but sadly this failing is not unique to Mr. Spiegel. However, having been warned repeatedly, and in a formal way, Mr. Spiegel should note that such behaviour will not be tolerated indefinitely.

With respect to Mr. Spiegel's conduct of the hearing, two principle complaints were noted. One, the incompetent nature of his cross-examination of a physician. Two, his attempts to give expert evidence regarding his involvement as Ms. Glinka's case manager.

[2] A recent application to appeal the pre-hearing order was refused, though I note that the ruling may still be contested once the decision in the main hearing is released.

Cross-examination is a difficult art that can be mastered only with repeated practice. Mr. Spiegel is a relatively inexperienced agent (at least at the arbitration stage) and this must be taken into account when assessing his skill. Of more concern to me is his apparent reluctance to take direction from the arbitrator. However, the prejudice to Dufferin was addressed by an expense sanction. With respect to the prejudice to Ms. Glinka, if I compare it to the prejudice to Mr. Romanowicz, it would not seem sufficiently severe that I should interfere with her choice of advocate.

With respect to the attempt to give expert evidence, I note that as an arbitrator, I presided over *Tesfai and Allstate Insurance Company of Canada* (FSCO A99-000321, July 26, 2000) on which Mr. Spiegel appeared. Mr. Spiegel also attempted to give expert evidence in that proceeding, claiming that he had acted as Mr. Tesfai's rehabilitation manager. I refused to let Mr. Spiegel give expert evidence, ruling that his attempt to act as an expert witness was incompatible with his role as an advocate at the hearing.

Mr. Spiegel relies upon a decision by Arbitrator Novick in *Klerides and Allstate Insurance Company of Canada* (FSCO A00-000169) released in a letter dated December 12, 2000. Allstate's counsel attempted to preclude Mr. Spiegel from acting as the Insured's representative at the up-coming hearing, on the basis that he had indicated an intention to also appear as an expert witness. The arbitrator deferred the matter to the hearing arbitrator. Mr. Spiegel views the decision as support for his contention that he may be both an expert witness and an advocate at a hearing. I disagree. Arbitrator Novick merely noted that there may be instances where an advocate may have evidence to offer, and that the decision to allow or disallow the advocate to give that evidence should be left to the hearing arbitrator.

In my view, it is a wholly different matter to say that an advocate presenting a case before a tribunal, can also seek to give expert evidence. The advocate's duty to the tribunal is inconsistent with his duty as an expert witness. The same person cannot wear both hats. If Mr. Spiegel is acting as a rehabilitation

consultant or a case manager, and is intent on giving expert evidence in that capacity, he will have to recognize that he will not be able to act as her advocate at the hearing. In this case, the arbitrator precluded Mr. Spiegel from giving expert evidence, thereby removing the potential bar to his continuing to act as her advocate. The same principle applies at the appeal stage.

V. CONCLUSIONS

I do not believe that it would be a measured response to exclude Mr. Spiegel at this juncture. However, this ruling should not be read by Mr. Spiegel as an endorsement of his conduct. This decision is without prejudice to Dufferin's right to renew its request at a later date.

One last note. In *R. v. Romanowicz*, the Court stated that a trial judge was under a positive duty to ensure that the decision to use an agent was an informed decision. It would appear that trial judges routinely address this by requiring agents to file an acknowledgement signed by the client. I think this makes a great deal of sense. Mr. Spiegel's continued right to act as Ms. Glinka's agent is contingent upon him filing an acknowledgement signed by her that includes the following:

- Mr. Spiegel is not a lawyer;
- Mr. Spiegel is not a member of the Law Society of Upper Canada and is not subject to the supervision or discipline of a professional body;
- Mr. Spiegel is not required to carry insurance;
- an order for expenses in favour of Dufferin was made against her at the arbitration stage, and as a named party she is potentially liable for Dufferin's expenses at the Appeal stage;
- having been informed of the above, she wants Mr. Spiegel to act as her agent.

I note that the arbitrator indicated that there appears to be some undisclosed relationship between Mr. Spiegel and one of the assessment firms, and one of the treatment centres. If there is any form of indemnity agreement between Ms. Glinka and one of these entities, the acknowledgement may refer to this agreement, but only if it stipulates that notwithstanding the agreement, Ms. Glinka remains personally liable to Dufferin for any award of expenses.

March 7, 2001

Stewart M. McMahon
Director's Delegate