Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A11-002196

BETWEEN:

NICHOLAS LEONE

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Jeffrey Rogers

Heard: By written submissions, completed on January 16, 2012

Appearances: Mr. Alexander Voudouris, solicitor for Mr. Leone
Ms. Heather Kawaguchi, solicitor for State Farm Mutual Automobile Insurance Company

Issues:

Where there is a dispute about entitlement to statutory accident benefits between an insurer and a person injured as a result of an automobile accident, applying for mediation is a mandatory first step in the dispute resolution process. The issue in this hearing arises as a result of the long delay between the time when the Financial Services Commission receives an Application for Mediation, and when the Director appoints a mediator.

Mr. Leone says that, as a result of the delay, mediation is deemed to have failed and he could therefore apply for arbitration without participating in a formal mediation. State Farm says that the time limit within which mediation must occur does not start when the Commission receives

Mr. Leone's Application for Mediation. It starts when the Commission determines that the Application is complete and the Director appoints a mediator. Since this had not occurred when Mr. Leone filed his Application for Arbitration, the Application is premature and it should be stayed.

The preliminary issue is:

1. Did mediation fail before Mr. Leone commenced arbitration by way of Application for Arbitration?

2. Is either party liable to pay the other's expenses of this preliminary issue hearing?

Result:

1. Mediation is deemed to have failed before Mr. Leone commenced arbitration.

2. The decision on expenses is reserved to the hearing Arbitrator. Should the parties resolve the matter without a hearing but are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with *Rules* 75 to 79 of the *Dispute Resolution Practice Code.*

EVIDENCE AND ANALYSIS:

Overview

Mr. Leone was injured in a motor vehicle accident on September 11, 2009. He applied for and received statutory accident benefits from State Farm, payable under the *Schedule.*[1] Disputes arose over his entitlement to certain further benefits. Disputes about entitlement to statutory

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

accident benefits must be resolved under the process set out in sections 280 to 283 of the *Insurance Act* [2] and the applicable *Schedule*.

Section 281(2) of the *Act* precludes referring issues in dispute to arbitration "unless mediation was sought" and "mediation failed". A person seeking mediation must "file an application for the appointment of a mediator with the Commission."[3] Mediation has failed "when the mediator has given notice to the parties that…mediation will fail, or when the prescribed or agreed time for mediation has expired and no settlement has been reached."[4]

The "prescribed" time for mediation is found in section 10 of *O. Reg* 664. It states that "[A] mediator is required…to attempt to effect a settlement…within 60 days of the date on which the application for the appointment of a mediator is filed."

The Commission received Mr. Leone's Application for Arbitration more than 60 days after it received his Application for Mediation. The question therefore is whether Mr. Leone "filed" his Application for Mediation when he delivered it to the Commission.

For the reasons that follow, I find that Mr. Leone filed his Application for Mediation when he delivered it to the Commission. Mediation is therefore deemed to have failed before he filed his Application for Arbitration. That conclusion is based on the definition of "file" in the *Dispute Resolution Practice Code's* ("*DRPC*") Rules of Procedure.[5] It is consistent with the object of the *Act* and the *Schedule* to promote prompt payment of benefits and speedy resolution of disputes. To hold otherwise would make it impossible for injured persons to calculate time limits for commencing proceedings and result in differing time limits for injured persons whose circumstances are the same.

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[2]R.S.O. 1990, c.I.8, as amended

[3]Section 280(2) of the *Act*

[4]Section 280(7) of the *Act*

[5]*Fourth Edition*

The Facts

The facts are not in dispute. Mr. Leone delivered an Application for Mediation to the Commission under cover of letter dated September 28, 2010. The Commission acknowledged receiving the Application on September 30, 2010. The Commission assigned a mediation file number at that time and informed Mr. Leone that "we are currently experiencing an increase in processing time. Complete applications are taking longer to be assigned to a mediator as a result of the large volume of applications which we continue to receive.[6]"

Mr. Leone delivered an Application for Arbitration to the Commission under cover of letter dated March 14, 2011. Mediation had not taken place. The letter states that Mr. Leone is relying on the fact that mediation is deemed to have failed as a result of the passage of the prescribed time.[7] The Application for Arbitration is stamped as received by the Commission on March 18, 2011. That is 169 days after the Commission acknowledged receiving the Application for Mediation.

The Commission informed Mr. Leone by letter dated July 14, 2011 that it could not process his Application for Arbitration because mediation had not failed. The correspondence indicated that the Application would be held in abeyance for 20 days so that Mr. Leone could address the "jurisdictional concerns".[8] Mr. Leone responded by reiterating his position that mediation was deemed to have failed by the passage of the prescribed time.

Under cover of letter dated August 16, 2011, the Commission informed Mr. Leone that it had registered his Application on that date and had sent a copy to State Farm. On August 26, 2011, State Farm delivered a Response in which it raised the jurisdictional issue and other defences.

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[6] Applicant's Document Brief, Tab 4

[7] Applicant's Document Brief, Tab 5

[8] Insurer's Document Brief, Tab 15

By letter of August 18, 2011 the Commission informed Mr. Leone that his Application for Mediation had been "recently assigned" and a mediator had been appointed. The letter also informed him that the mediator would attempt to resolve the dispute within 60 days from the date of appointment. The expiry date was said to be October 17, 2011[9]. That was 382 days after the Commission acknowledged receiving the Application for Mediation.

By letter of August 31, 2011, Mr. Leone informed the Commission that he would not be participating in mediation since it was his position that mediation had already failed.[10]
On October 28, 2011, the Mediator wrote to the parties informing them that it had been "determined that mediation did not take place…" and the file would be closed.[11]

The Application is "filed" upon delivery to the Commission

The Commission received Mr. Leone's Application for Arbitration more than 60 days after it received his Application for Mediation. In fact, it received the Application for Arbitration 169 days after he delivered his Application for Mediation. The question is whether Mr. Leone "filed" his Application for Mediation when he delivered it to the Commission.

The *Insurance Act* which requires a person seeking mediation to "file an application for the appointment of a mediator with the Commission"[12] . There is no definition of "file" in the *Insurance Act*. Neither is there a definition of "file" in O. Reg. 664 which requires a mediator to attempt settlement "within 60 days of the date on which the application for the appointment of a mediator is filed."

[9] Applicant's Document Brief, Tab 9

[10] Applicant's Document Brief, Tab 11

[11] Applicant's Document Brief, Tab 14

[12] Section 280(2) of the *Act*

The definition is found in *Rule* 4.1 of *The Dispute Resolution Practice Code* which defines "file" to mean "file with the Dispute Resolution Group" (DRG). Notably, the definition does not require any action by the Commission for a document to be filed. *Rule* 6 prescribes how a document is filed. It states that, where the *Rules* require a document to be filed, the document must be "delivered to the Dispute Resolution Group" by one of the permitted methods. *Rule* 12 sets out the requirements for applying for mediation. *Rule* 12.1 states that a "party who applies for mediation must file, in duplicate, a completed ***Application for Mediation***... " Therefore, in order to file his Application for Mediation, Mr. Leone was required to deliver a complete Application to the Dispute Resolution Group.

Mr. Leone delivered his Application for Mediation to the Dispute Resolution Group, no later than September 30, 2010. *Rule* 12.3 allows the Commission to hold an application in abeyance where it appears incomplete. There is no evidence that Mr. Leone's Application was incomplete. Therefore, Mr. Leone met the requirements for filing his Application for Mediation by delivery of a complete Application to the DRG no later than September 30, 2010. I find that Mr. Leone filed his Application for Mediation, no later than September 30, 2010.[13]

There is no merit to State Farm's submission that the Application is not filed until a mediator is appointed. The definition of "file" does not suggest that interpretation. The *Insurance Act* and the *Rules* themselves treat filing and appointing a mediator as separate events. Section 280(2) of the *Act* sets the requirement for filing the application. Section 280(3) then requires the Director to "ensure that a mediator is appointed promptly." *Rule* 13.1 states that on "receipt of a completed ***Application for Mediation…*** a mediator will be appointed promptly." The Commission recognized this separation when it advised Mr. Leone that "[C]omplete applications are taking longer to be assigned to a mediator as a result of the large volume of applications which we continue to receive.[14]"

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[13]There may be cases in which the date the Commission acknowledges receiving the Application is different from the date on which it was received or delivered. That issue was not critical in this case. I do not purport to decide that the date the Commission acknowledges receipt is the date of filing. I also do not purport to decide when an Application is filed, if it is in fact incomplete on the date that it is delivered.

[14]See footnote 6, *supra*

Since the prescribed time for mediation had expired when Mr. Leone filed his Application for Arbitration, there was no jurisdictional barrier to his doing so. This conclusion is consistent with the scheme and intent of the *Act,* the *Schedule* and the *Rules* as they aim to promote prompt payment of benefits and speedy dispute resolution. The legislation and the *Rules* are all replete with fixed time limits intended to serve this purpose. Accepting State Farm's position would mean that there is no fixed time for completing mediation. That would render meaningless the requirement in the *Act* and the *Rules* for the prompt appointment of a mediator.

Section 281.1 of the *Act,* section 51(1) of the *Schedule* and *Rule* 11 of the *DRPC* require that an Application for Mediation be filed no later than 2 years from the date the insurer provided written notice of refusal to pay an amount claimed. Accepting State Farm's submission that the Application is not filed until a mediator is appointed would mean that an insured person does not know whether he or she has met this limitation when delivering an Application to the Commission. It would mean that the period differs from application to application and that close to 1 year of the permitted time was consumed by the delay in this case. Conceivably, if delays increase to the point where it takes 2 years to appoint a mediator, an insured person who attempts to file an Application immediately upon denial would see his or her rights extinguished, before the first step in the dispute resolution process has occurred. The Legislature could not have intended that absurd result.

Mr. Leone's Agreement to Extend Time for Mediation

After the mediator was appointed, the assistant to Mr. Leone's solicitor agreed to extend the time for mediation. Mr. Leone had applied for arbitration several months earlier. Mr. Leone's solicitor was not aware of the agreement, when it was made. Upon becoming aware of the agreement, the solicitor informed the mediator that his assistant acted without authority and reiterated Mr. Leone's position that mediation had failed before the mediator was appointed.

I accept State Farm's submission that the assistant's agreement could be binding because she had the apparent authority to make it. However, when the assistant agreed to extend the time, mediation had already failed because a mediator had not attempted "to effect a settlement…

within sixty days after the date on which the application for the appointment of a mediator is filed." The assistant's agreement could not confer jurisdiction to mediate in these circumstances.

Contrary Position Taken by Commission

In its submissions State Farm noted that the Commission took the position in some of its correspondence that arbitration cannot be commenced until after the mediator reported that mediation had failed. That position ignored the statutory alternative of mediation being deemed to have failed. It does not bind an arbitrator and cannot influence my ruling.

Rule 25.2 requires a person applying for arbitration to file a copy of the Report of Mediator along with an Application for Arbitration. A Report of Mediator will not be available in Mr. Leone's circumstances. It would be unreasonable to apply Rule 25.2 in circumstances where mediation is deemed to have failed. Rule 81.1(b) allows an arbitrator to decide that any Rule does not apply in respect of a proceeding. I exercise my discretion to waive compliance with Rule 25.2 in this case.

OTHER CONSIDERATIONS:

Cornie v. Security National[15]

The decision by the Court in the above case came to my attention after I had drafted this decision, but before its release. In that case, the Court arrived at the same conclusion on the issue I have decided, for similar reasons.

[15][2012 ONSC 905]

Late Notice of Application for Mediation given to State Farm

State Farm pointed out that the Commission did not send it a copy of Mr. Leone's Application for Mediation until a mediator had been appointed. It submitted that the Commission must therefore have considered the Application to be incomplete until that time.

Rule 13.1 requires the Commission to deliver a copy of the Application to the other party "[O]n receipt of a completed ***Application for Mediation.***" It is not clear when the Commission conducts its assessment of whether a completed application was received. Correspondence from the Commission to Mr. Leone on October 8, 2010 in which it stated that "[C]omplete applications are taking longer to be assigned to a mediator as a result of the large volume of applications…[16]", suggests that the assessment had been done by that time. The potential breach by the Commission of its obligations under *Rule* 13.1 has no bearing on my ruling.

Unnecessary Expense to Insurers

State Farm submitted that accepting Mr. Leone's position would be unfair to insurers because they will incur the fee of $3,000 which is levied upon filing an Application for Arbitration, without having had the opportunity to resolve the dispute by way of a mediated settlement. On the other hand, Mr. Leone faces the potential of irreparable harm as a result of delay in recovery of benefits to which he is entitled. The erosion of statutory rights to a speedy dispute resolution process can have serious consequences for both sides. My ruling brings little comfort to applicants as a group, since it potentially moves the backlog from mediation to arbitration. I see no adjudicative remedy.

[16] Applicant's Document Brief, Tab 4

EXPENSES:

Mr. Leone made no submissions on expenses, except to claim entitlement. State Farm made brief submissions. I am not in a position to decide the issue on the current record. There was nothing unusual about the hearing that would put me in a unique position to determine this issue. Therefore, in order to avoid a multiplicity of interlocutory proceedings, I reserve the decision on expenses to the hearing Arbitrator.

However, should the parties resolve the matter without a hearing but are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with *Rules* 75 to 79 of the *Dispute Resolution Practice Code.*

Jeffrey Rogers Arbitrator	February 10, 2012 Date

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NICHOLAS LEONE

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mediation is deemed to have failed before Mr. Leone commenced arbitration.

2. The decision on expenses is reserved to the hearing Arbitrator. Should the parties resolve the matter without a hearing but are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with *Rules* 75 to 79 of the *Dispute Resolution Practice Code.*

Jeffrey Rogers
Arbitrator

February 10, 2012
Date