Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A12-001515

BETWEEN:

SAT PAL

Applicant

and

INTACT INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Rosemary Muzzi

Heard: By telephone conference call on April 26, 2013.
Written submissions were received from Applicant on March 11, 2013 and April 22, 2013; and from Respondent on March 28, 2013.

Appearances: Sabrina Singh and Michael W. Kelly for Mr. Pal
Lora Castellucci for Intact Insurance Company

Issues:

Sat Pal, the applicant, injured in a motor vehicle accident on April 3, 2003, now seeks a determination by the Commission that he has a catastrophic impairment as defined in the *Schedule*.[1] Mr. Pal commenced a court action in 2005 in which he is seeking a non-earner and other benefits, and Intact is of the view that any dispute with respect to a catastrophic impairment determination should be joined to that outstanding action. The parties were unable to resolve their disputes through mediation, and Mr. Pal applied for arbitration at the Commission under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The preliminary issue is:

> Can Mr. Pal proceed to arbitration to determine catastrophic impairment or should his application be stayed because he has a court action pending where this matter may be determined?

Result:

> Mr. Pal may proceed with his application for arbitration to determine whether he has a catastrophic impairment.

EVIDENCE AND ANALYSIS:

This dispute arises because Mr. Pal made successive claims for benefits arising from the 2003 accident, notably a 2005 Statement of Claim in the Ontario Court, for non-earner benefits and medical expenses followed by a 2012 application to arbitrate a catastrophic impairment determination at the Commission.

The *Insurance Act* specifically grants an insured the choice to bring a proceeding in a court or to refer the issues in dispute to an arbitrator[2], and it is accepted that an insured is not necessarily bound by an earlier choice or election.[3] However, while an insured need not pursue all of their disputes in one forum, they may not pursue the *same* dispute in more than one forum.[4] Mr. Pal asserts that the issues are distinct and his explicit statutory right to choose the forum for resolution of his dispute should be respected. Intact argues that all issues should be joined in the court action as they are essentially the same.

[2] Section 281(1)

[3] *Non-Marine Underwriters, Mbrs. of Lloyd's and Mangat*, (FSCO P00-00020, August 1, 2000) ; *CGU Insurance Company of Canada and Bolger*, (FSCO P03-00018, May 29, 2003) appeals

[4] *King and Royal Insurance Company of Canada*, (FSCO A98-000234, March 24, 1999)

The Commission's faster, cheaper and less formal service is an alternative to the court but is not meant to encourage a multiplicity of proceedings;[5] therefore, the Commission engages in the following line of inquiry designed to identify and preclude such situations.[6]

- Are the disputed issues substantially similar?
- Is the civil action broader in scope, that is, does it encompass the issue seeking to be arbitrated, looking at the issues involved and the relief sought?
- Does the arbitration unduly duplicate the proceedings, leading to greater costs, delays and raising the spectre of inconsistent results?
- How far along is the civil action?
- Is there a serious impediment to having issues in the arbitration move to the civil action?

Examining the circumstances of Mr. Pal's case in this context, I find that Mr. Pal's application for arbitration does not duplicate or overlap with his court action and there is no other reason in this case to foreclose his choice to arbitrate the catastrophic impairment dispute at the Commission.

Are the issues substantially similar?

The specific issues that Mr. Pal seeks to litigate and arbitrate are dissimilar at a very basic level.

On their face, the issues involve separate and distinct sections of the *Schedule*, and, by virtue of the different applicable legal tests, will necessitate different lines of inquiry. In order to be entitled to non-earner benefits, an insured person must suffer a complete inability to carry on a normal life as a result of and within 104 weeks after the accident.[7] On the other hand, a catastrophic impairment caused by an accident can arise well after 104 weeks after the accident, and is one of a number of specifically defined conditions[8], none of which are characterized in the *Schedule*, or elsewhere, as a "complete inability to carry on a normal life."

[5] *Mangat (supra)*
[6] *King and Royal Insurance (supra)*
[7] Section 12 of the *Schedule*
[8] Section 2(1.1) of the *Schedule*

This latter point leads to another fundamental dissimilarity: an insured who meets the test for non-earner benefits qualifies to receive those benefits. An insured who has been determined to have a catastrophic impairment, on the other hand, must specifically apply to qualify to receive extended housekeeping and increased attendant care and medical benefits. Practically speaking, a catastrophic impairment determination may not necessarily automatically entitle an insured to any monetary benefit.

Is the civil action broader in scope; that is, does it encompass the issue to be arbitrated, looking at the issues involved and the relief sought?

Intact also argues that the claim is worded so broadly that it is all encompassing – "entitlement to accident benefits." The civil action does not encompass the issue to be arbitrated. As already indicated the catastrophic impairment designation exists separate and apart from the entitlement test for the non-earner benefit and is not at the root of any of the medical benefits claims advanced by Mr. Pal in court.

Intact claims the broad issues of causation, disability and credibility are subsumed in each of the civil action and the arbitration, and on that basis the matters should proceed in one forum. I do not accept this argument. First, this assertion is bald, Intact having offered no evidence or proof that any of these issues are at the heart of either of the proceedings. Second, if the common general issues of credibility, disability and causation are to become the basis upon which disputes are joined either in court or at the Commission, the insured's right to choice of forum is effectively denied because any dispute under the *Schedule* could engage these issues. However, in any proceeding, the decision-maker's findings around the questions of causation, disability and credibility will generally be linked to the specific issues before that decision maker.

Finally, in addition to there being no overlap of issues, a determination that an insured has a catastrophic impairment provides no relief that overlaps with the damages and monetary benefits sought in the court action. Given the nature of the issues to be pursued and the relief sought, there is virtually no overlap between the court action and any Commission proceeding.

Does the arbitration unduly duplicate the proceedings, leading to greater costs, delays and raising the spectre of inconsistent results?

The only duplication that may arise between the court action and the Commission proceeding is with some of the evidence on which the parties intend to rely. While the parties may choose to rely on some of the same lay witnesses, medical experts or documents, I am not persuaded that this situation will lead to greater costs, delays or raise the spectre of inconsistent results.

I do not accept Intact's delay argument. The court action has proceeded and is ready to be set down for trial. The Commission proceeding is at the initial stages. A pre-hearing conference was scheduled for December 2, 2012, at which point the arbitration hearing dates could have been set or settlement discussed. Instead, Intact requested this preliminary issue hearing. So far, the only delay in moving the matter forward has been occasioned by the Insurer.

Any catastrophic impairment determination hearing can be scheduled at the Commission at the parties' convenience, and can typically be heard in four days. The number of witnesses allowed and volume of documents produced is generally far fewer at the Commission than one would see in a court action. The Commission is an expert tribunal, used to dealing with this very issue. Any arbitration hearing can be focused and expeditious.

As a result, costs are much lower at the Commission than they are in a court action.

Therefore, I see no risk of undue delay or exorbitant costs.

For similar reasons, I am not satisfied of any risk of inconsistent results. There is no risk of opposing findings because the specific tests considered are so different. Even if similar evidence is introduced, any findings related to the credibility of that evidence, generally, will be specific to the issue at hand and within the particular context of the proceeding.

Finally, it is the Commission's own practice, often at the request of the parties, to bifurcate the catastrophic impairment designation arbitration from any other issues that may be in dispute, recognizing that the impairment question is separate and distinct from the question of specific entitlement to benefits flowing from that designation and that the monetary benefits issues are more easily disputed, or, often, even resolved, with a final word on the impairment issue.

Conclusion

Having considered all of these circumstances, I find that there is no reason to deny Mr. Pal's choice to have the catastrophic impairment designation issue decided at the Commission.

EXPENSES:

I exercise my discretion to award Mr. Pal his expenses incurred in this preliminary issue hearing.

Rosemary Muzzi Arbitrator	August 9, 2013 Date

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ARBITRATION ORDER

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

1. Mr. Pal may pursue his application for arbitration to determine whether he has a catastrophic impairment.

August 9, 2013

Rosemary Muzzi
Arbitrator

Date