Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A06-001216

BETWEEN:

ROMAN LUSKIN

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: John Wilson

Heard: June 1, 2007, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Samiya Ahmad for Mr. Alexander Mazin
No-one appearing for Mr. Luskin
Heather Kawaguchi for Personal Insurance Company of Canada

Issues:

The Applicant, Roman Luskin, was injured in a motor vehicle accident on July 13, 2005. He applied for and received statutory accident benefits from Personal Insurance Company of Canada ("Personal"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Luskin applied for arbitration at the Financial Services Commission of Ontario 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 issues in this hearing are:

1. Should this arbitration be dismissed?

2. If yes, is either or both Mr. Luskin and his counsel, Mr. Alexander Mazin, responsible for the Insurer's expenses in this arbitration?

Result:

1. The arbitration is dismissed, effective June 29, 2007.

2. Mr. Roman Luskin and Mr. Alexander Mazin shall pay a further $1,751.83 as the balance of fixed expenses in this matter forthwith. In addition, the existing order for $800 remains payable by Mr. Luskin and his solicitor.

EVIDENCE AND ANALYSIS:

This decision arises from an unusual motion to dismiss an arbitration application filed on behalf of Mr. Roman Luskin by Mr. Alexander Mazin. In an earlier decision, dated May 25, 2007, confirming an oral ruling made on May 4, 2007, I had found that Mr. Mazin was in breach of an undertaking to produce Mr. Luskin for a pre-hearing, and that both Mr. Luskin and Mr. Mazin were jointly responsible for an expense order in the amount of $800 to cover costs thrown away due to the abortive pre-hearings held in this matter.

The breach of the undertaking having not been remedied, nor the expense order satisfied, and no progress having been made towards even holding a constructive pre-hearing with the presence of Mr. Luskin, the Insurer brought a motion to dismiss the arbitration, and to claim its expenses against both Mr. Luskin and the counsel-of-record, Mr. Mazin.

Mr. Mazin chose not to attend the June 2, 2007 dismissal hearing, as, indeed, he had not appeared for the May 4, 2007 pre-hearing, even though he was clearly aware that his own actions

were at issue at both hearings. Only Ms. Samiya Ahmad, a student-at-law in Mr. Mazin's office, attended. Ms. Ahmad neither called any witnesses, nor did she file any affidavit evidence on behalf of either Mr. Luskin or Mr. Mazin. She stated, however, that she had instructions from Mr. Mazin with regard to the expense issue. She had no instructions, however, from Mr. Luskin.[2]

At the February 27, 2007 pre-hearing, the issue was merely the non-attendance of Mr. Luskin. At the April 23, 2007 pre-hearing, the problem had grown beyond the mere non-appearance of Mr. Luskin to include whether his solicitor fulfilled his obligations, evidenced in the March 2, 2007 pre-hearing letter to find a date when his client would be able to attend. In other words, did the notation "the parties agreed to reschedule the pre-hearing discussion to a time when Mr. Luskin is able to attend" constitute an undertaking given to the Commission, and was counsel in breach of an undertaking by appearing without Mr. Luskin, without a reasonable excuse or explanation?

I found that there was an enforceable undertaking given to Arbitrator Slotnick at the February 27, 2007 pre-hearing that bound Mr. Mazin as counsel of record to find a date when his client would and could attend a pre-hearing.

The Insurer brought a motion returnable on June 1, 2007 requesting that I dismiss this arbitration with costs against Mr. Luskin and his solicitor of record, Mr. Mazin.

Ms. Kawaguchi appeared on behalf of the Personal. Ms. Ahmad, student-at-law, appeared on behalf of Mr. Mazin who was solicitor of record in this matter.

I note that Ms. Ahmad did not wish to speak on behalf of Mr. Luskin, since her firm had apparently served notice the day before of its intention to remove itself from the file. No further action has since been taken, however, and Mr. Mazin remains solicitor of record.

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[2] I leave aside for the moment the propriety of Ms. Ahmad apparently representing both Mr. Luskin and Mr. Mazin when there was a possibility of divergence between their respective interests. see: *Iroquois Falls Power Corp. v. Jacobs Canada Inc. et al.*, 83 O.R. (3d) 438

Mr. Luskin did not appear for the motion hearing, although I am advised he left a message with a case administrator on May 31, 2007 stating that he would not attend. A later voice mail stated that he had hurt his foot and would not attend the hearing. Mr. Luskin apparently did not inform his own counsel of record, nor did he advise the Insurer of his projected non-attendance. This is the fourth recorded non-attendance of Mr. Luskin at arbitration proceedings launched in his name.

I am satisfied that both Mr. Luskin's counsel and Mr. Luskin were served with the motion materials, and had fair notice of the hearing.

After canvassing the views of counsel present, I proceeded with the hearing of the motion in the absence of Mr. Luskin.

Having heard submissions on the issues of costs and the dismissal from both counsel, and having reviewed the motion materials including the supporting affidavits, I granted the Personal's request conditionally. I made the following oral order which was repeated in my letter of June 1, 2007:

> Mr. Roman Luskin and his counsel, Mr. Alexander Mazin, are jointly and severally responsible for the expenses of the Insurer, the Personal, to date, which I assess at $2,434.83 plus disbursements of $117. Since I have already ordered that they pay costs of $800, a further expense order will go in the amount of $1,751.83. This amount is ordered payable forthwith, and is based on a finding that the conduct of this arbitration to date has abused the process of this Commission and that Mr. Luskin and his counsel caused costs to be incurred unnecessarily.

Secondly, I dismissed the arbitration effective June 29, 2007, subject to the following condition:

> Should Mr. Luskin provide proof of payment of the outstanding expense orders prior to the effective date of this order, provide a Doctor's letter certifying his inability to attend this motion hearing due to a disabling foot injury, and provide cogent reasons that the arbitration not be dismissed, he shall be permitted to move to set aside the proposed dismissal of this arbitration. Failing the provision of all of the above, the order will be made final as of the close of business on June 29, 2007, and the arbitration will be finally dismissed.

Needless to say the June 29 deadline has now passed and I am advised that no contact has been received by the Commission from Mr. Luskin, and that he has taken no action to set aside my interim order.

What follows are the supplemental written reasons arising from the above orders.

In an arbitration hearing, it is expected that production and other issues will be clarified and resolved prior to pre-hearing. In other words, by the time the pre-hearing stage is reached and final dates are set for the substantive arbitration hearing, the *Dispute Resolution Practice Code (Fourth Edition, Updated – October 2003)* (the "*Code*") assumes that an arbitration is[3] virtually ready for hearing within the next four months.

In this matter, according to the affidavit evidence supplied by the Insurer, the arbitration was far from ready. Although agreements had been reached as to the release of requested material, counsel for Mr. Luskin had not returned the executed releases to allow the material to be produced. There were also innumerable difficulties with the provision of information and the attendance at assessments. This arbitration was particularly unready to proceed by the time that the first pre-hearing was scheduled.

This matter then progressed through three abortive pre-hearings before counsel finally admitted at the dismissal motion that there were no current instructions from Mr. Luskin. Curiously, however, to date Mr. Mazin has taken no steps to formally ask to be removed from the record.

It is unusual to dismiss an arbitration prior to a full hearing on the merits, absent the consent of both parties to a dismissal. There are, however, rare instances when the circumstances suggest that a matter should not be forced to proceed through the system to a formal arbitration hearing, such as when the outcome is a foregone conclusion and there is absolutely no possibility of success.

[3] There are some similarities to the stage covered by Rule 48 of the *Rules of Civil Procedure* which deals with the setting down of a matter for trial.

The easy, uncontroversial route to take is to let this arbitration proceed, unopposed, to the final hearing, with the opposing party accumulating costs all the way. In this matter, I think such an approach is inappropriate, a waste of resources, and potentially unfair to both parties.

On the face of it, it would be a travesty of justice and waste of resources if there was no way to terminate an arbitration in circumstances where there was no possibility of success at a hearing. Certainly, if a party bringing the arbitration is unwilling to participate in the process, and providing instructions to counsel, let alone appearing for pre-hearings, motions, and hearings as required, such would likely be the case.

An early dismissal of an arbitration relies on more than just an interpretation of the general principles of the arbitration system. At least three potential bases for an early decision dismissing an arbitration are found in the *Statutory Powers Procedure Act* (*SPPA*), a law which applies to all arbitrations. Section 4.6 of the *SPPA* contains the following provisions:

> 4.6 (1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,
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> (a) the proceeding is frivolous, vexatious or is commenced in bad faith;
>
> (b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
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> (c) some aspect of the statutory requirements for bringing the proceeding has not been met.

Section 4.6 (2) provides some preconditions for a dismissal on this basis:

> (2) Before dismissing a proceeding under this section, a tribunal shall give notice of its intention to dismiss the proceeding to,
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> (a) all parties to the proceeding if the proceeding is being dismissed for reasons referred to in clause (1) (b); or
>
> (b) the party who commences the proceeding if the proceeding is being dismissed for any other reason.

(3) The notice of intention to dismiss a proceeding shall set out the reasons for the dismissal and inform the parties of their right to make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

...

7 (1) Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding. R.S.O. 1990, c. S.22, s. 7; 1994, c. 27, s. 56 (14).

Following the second pre-hearing of April 23, 2007, the pre-hearing letter contained the following notice concerning a further resumption:

> It is not only anticipated but ordered that Mr. Luskin shall attend personally.

The pre-hearing letter containing this order was sent to both Mr. Luskin and his counsel. I am satisfied that both received the letter.

The *SPPA* provides at section 1.7(1):

> **Effect of non-attendance at hearing after due notice**
>
> 7(1) Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding. R.S.O. 1990, c. S.22, s. 7; 1994, c. 27, s. 56 (14).

The April 23, 2007 letter also contained the following notice:

> Given the distinct possibility that the agreement to produce Mr. Luskin for the resumed pre-hearing constitutes an undertaking given to the tribunal on behalf of the counsel of record, ***I am advising Mr. Alexander Mazin that, as solicitor of record, it is possible that he may be found liable for any award of costs arising from the two abortive pre-hearings to date and the failure to produce Mr. Luskin***
>
> Consequently, Mr. Mazin may wish to have counsel appear on his behalf at the next resumption on May 4, 2007 to make any necessary submissions, should an expense award ultimately be found appropriate.

Given the provisions of the *SPPA* cited above, the notice contained in the April 23 letter, and the non-appearance of Mr. Luskin at two subsequent events, I accept that I would have power to dismiss this arbitration on that basis.

As noted earlier, section 4.6(1)(a) also provides for dismissal on the grounds that "the proceeding is frivolous, vexatious or is commenced in bad faith."

The dismissal of an action prior to a full hearing in the court system is not an ordinary event. The *Rules of Civil Procedure* provides a virtually complete code of practice for the courts, and indeed the court rules deal with all manner of dismissals. *The Dispute Resolution Practice Code* which applies to arbitration is not as comprehensive. While there is no specific foundation for a motion to dismiss in the *Code*, I find that such is not a barrier to dealing with the Insurer's motion.

While I have no direct evidence about the situation surrounding the commencement of the arbitration, nor about the factual foundation of Mr. Luskin's claim, there are grounds to consider that the continuation of this arbitration would be "vexatious."

"Vexatious" is not a common term. Rather, it is a term of art used in legal decisions and law for centuries to describe a specific manner of conduct. Lord Blackburn observed in *Metropolitan Bank Ltd. et al. V. Pooley* (1885) 10 App. Cas. 210:

> (T)he Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing.

The courts have often examined the meaning of "vexatious" in the context of "hopeless" litigation. Vexatious litigation includes situations where the court has no power to grant the relief sought (see *Dreyfus v. Peruvian Guano Co.* (1889) 41 Ch.D. 151); if no reasonable person can possibly expect to obtain relief in it, (see *Lawrance v. Lord Norreys* et al., (1888) 39 Ch. D.

213); or if the applicant has no proper authority to pursue the remedy (see *R. ex rel Tolfree v. Clark et al.* [1943] O.R. 501).

In this case, the most relevant consideration would be whether Mr. Luskin "can possibly expect to obtain relief" by means of this arbitration as it currently stands.

As Cameron, J. remarked recently: "the categories of vexatious proceedings are never closed and must be determined by an objective standard."[4] He further noted that: "(A)n action that initially had some merit might be rendered vexatious through subsequent conduct."

Lord Diplock said:

> My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nonetheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.[5]

Bowen, L.J. in *Willis v. Earl Beauchamp*[6] characterized vexatious litigation as a process that "can really lead to no possible good."

Riddell J.A. in *R. ex rel Tolfree v. Clark* [7] et al. also commented:

> The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: Evans v. Barclay's Bank.

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[4] *Canada (Attorney General) v. Hainsworth* [2004] O.J. No. 2730

[5] *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529, at p. 536

[6] [1886-90] ALL E.R. Rep. 515

[7] [1943] O.R. 501

As is discussed later in this decision, there are cogent reasons for ordering a dismissal at this time, based specifically on my finding that a continuation of the arbitration in light of the ongoing refusal to obey arbitral orders, and to participate in the arbitration process would specifically be an abuse of procedure.

Apart from providing more employment to arbitrators, lawyers, court reporters and support staff, the continuation of this arbitration, in the face of the virtual disappearance from the process of Mr. Luskin, "can really lead to no possible good." In addition, it is likely that the continuation of a procedure, in the light of the conduct of the Applicant and his solicitor, would bring the administration of justice and the arbitration system into disrepute.

Lord Esher observed that "The court has an inherent authority and duty to protect a party to an action against frivolous and vexatious proceedings."[8]

Mr. Luskin has demonstrated his absolute unwillingness to participate in this process. In spite of the knowledge of the hearings and pre-hearings, the knowledge of the requirement to attend, and the adjournment of matters to facilitate his attendance, he has failed to attend four different proceedings. He has also declined to contest the interim dismissal order or file any material in support of the continuance of this arbitration. His pattern of conduct has been set, and there is no reason to suspect that he has any intention of changing it.

Given that Mr. Luskin bears the burden of proving his claim, without Mr. Luskin to testify or provide some support for his claim, it is virtually impossible that he will succeed in his claim. Ultimately, even if the matter is left to continue, he will not succeed.[9]

As such, I find that this arbitration, with the continuation of this process without the direct participation of Mr. Luskin, has become vexatious as the law knows that term. Although it is a bit circular, it is trite law that vexatious proceedings in themselves are an abuse of process.

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[8] *Davey v. Bentinck* 2 L.J.Q.B. 114 Lord Esher M.R.

[9] I note that Mr. Luskin's failure to attend DACs and assessments, as well as his apparent failure to provide necessary information to the Insurer, when requested, bode poorly for the success of the arbitration.

Given such a finding, I would be correct in dismissing this arbitration under section 4.6(1)(a) of the *SPPA*. I also have, pursuant to section 23(1), a separate and wide-ranging power to deal with an abuse of process. Section 23(1) reads as follows:

> 23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

Since maintaining a vexatious proceeding amounts to an abuse of process, I also have jurisdiction to fashion an appropriate remedy to address such abuse, including, ultimately, dismissal.

Having regard to the spirit of Rule 1.1 of the *Code* that promotes a process that is "most just, quickest and least expensive", I find that the continuation of this arbitration would run against the spirit of the process. The Insurer would be prejudiced by any continuation of the arbitration process beyond this point.

In addition, Mr. Luskin, as his case stands presently, would not likely benefit either. Indeed, he stands to be prejudiced by the continuation of this matter. Unless he emerges from his lethargy to prosecute his claim with vigour, he will be faced with a claim to reimburse the Insurer for its further expenses in this matter, a claim which, based on the present circumstances, would be likely to succeed.

In Mr. Luskin's case, orders were made specifically to attend at the pre-hearings and the motion hearing. These were not obeyed. In the words of Master Dash: "(F)or orders of the court to have any meaning they must be enforced."[10] If Mr. Luskin was ever engaged in this arbitration process, it is now clear that he no longer is. Consequently, I am comfortable that it is in the spirit of the dispute resolution system to dismiss Mr. Luskin's arbitration claim at this stage in the proceedings, on the basis that a continuance in the face of an ongoing refusal to obey the order to

[10] *Baksh v. Sun Media*, 63 O.R. (3d) 5

appear as well as the order to pay the interim expense order, would represent an ongoing abuse of process.

I note from the un-contradicted affidavit of Ms. Suilan Lue, filed in support of the Insurer's motion that Mr. Luskin's sense of detachment from his insurance claim is not a recent phenomenon. Ms. Lue notes, *inter alia*, the failure to file a timely application for benefits, without explanation, the failure to file an explanation when requested, the failure to file a disability certificate, when requested, and the failure to provide details of possible other insurance that may have been responsible for payment of accident benefits.

Ms. Lue further documents the ongoing failure to attend three DAC assessments which were arranged by the Insurer to determine Mr. Luskin's entitlement to benefits, as well as several insurer's examinations. It is of note that Mr. Luskin was at all times represented by Alexander Mazin who actually is listed on the initial application for benefits made in relation to the Downsview treatment expenses.

Further evidence of Mr. Luskin's apparent detachment from his claim is noted in the affidavit of David Dinner, also served in support of the Insurer's motion which notes that neither the Application for Mediation, nor the Application for Arbitration were signed by Mr. Luskin personally.

Mr. Dinner's affidavit also discloses that despite Mr. Mazin's agreement to allow the Insurer "to obtain our client's medical records for the period of one year prior to loss to date and ongoing", counsel for the Insurer "never received the executed authorizations to obtain any of the productions", notwithstanding that the process was agreed upon by Mr. Mazin, and the releases were provided to Mr. Mazin by Ms. Kawaguchi.

Secondarily, in the event that Mr. Luskin's conduct does not amount to an abuse of process, I would also rely on Mr. Luskin's non-attendance given due notice and, as a result of his non-participation, the almost complete impossibility of success should this matter proceed.

I have also considered whether a stay of the arbitration, or a finding that the matter was constructively abandoned by Mr. Luskin, would be a more appropriate remedy rather than a final dismissal.

There has been an alternative approach taken by many arbitrators over the years to situations where an applicant and/or counsel failed to appear for an arbitration. Rather than dismissing the arbitration outright and finding in favour of the Insurer on all issues in dispute, some arbitrators have made a finding of "constructive withdrawal." Arbitrator Seife summarized this approach in 1996:

> In my view, for an application to be considered withdrawn, it is not necessary that the applicant expressly make a request to that effect. An application may be "constructively" withdrawn when the applicant has abandoned the claim through lack of due diligence or interest in pursuing his/her application. [11]

The difference between a withdrawal and a dismissal can be important for an insured. A negative finding on entitlement by an arbitrator can have the result of barring all future claims brought by an insured on the basis of *res judicata*.

In a withdrawal, the specific claims are not adjudicated and, although an applicant may be responsible for the costs thrown away by the Insurer in the arbitration, further adjudication of the substantive claims may not be barred. This is important when one considers that the potential duration of medical claims can run up to ten years, and that the difficulties arising from an accident may still manifest themselves after a dismissal of the arbitration. This is a fair and just approach where there is some doubt about an insured's intentions in an arbitration and little context for the failure to appear.

Arbitrator Ashby, in a recent decision, has emphasized the extraordinary nature of a final dismissal order without a hearing on the merits:

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[11] *Quattrocchi and State Farm Mutual Automobile Insurance Company* (OIC A-006854, June 11, 1996)

> The foregoing definitions suggest that a litigant must wilfully bring an unmeritorious claim, conduct the action deceptively, maliciously or fail to fulfill a duty or obligation in a manner inconsistent with honest mistake. [12]

In this matter, had Mr. Luskin merely been non-compliant with arbitral orders, without the further evidence of his apparent abandonment of his arbitration, I might be inclined to find that there has been some sort of constructive withdrawal by Mr. Luskin. However, in the light of the entirety of the conduct of this claim, such a course of action is entirely inappropriate.

During the claims period, Mr. Luskin is alleged to have failed to provide necessary information, failed to make himself available for DACs and for insurer's examinations, and failed to sign releases for information agreed to by his counsel.

During the period of the arbitration, he failed to show for four matters scheduled at the Commission, notwithstanding orders requiring his attendance and the service of the documents and the notices upon Mr. Luskin personally as well as his counsel. (I note that the record indicates that the motion record in the motion to dismiss was served by process server upon Mr. Luskin.)

Mr. Luskin was aware of these proceedings. He chose not to appear, nor to file any reasonable explanation for his non-appearance. In this context, I will repeat the comments of Pitt J. in *509521 Ontario Ltd. v. Canadian Imperial Bank of Commerce*:

> It is my view that there comes a time when it is vital to emphasize the need for compliance with orders of the court. We hear judges lecturing young people, and people in other courts, of the importance of preserving the institution of law and order and we have here some of the pillars of the community, the Canadian Imperial Bank of Commerce and Ernst & Young Inc. acting as if what the judge said didn't matter.[13]

The "constructive withdrawal" approach to dismissing arbitrations was developed to mitigate the potential harshness of a dismissal on the merits of an action to an insured. In this matter,

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[12] *Fedoseev and RBC General Insurance Company* (FSCO A05-002435, December 6, 2006).

[13] [1996] O.J. 2567

however, Mr. Luskin has demonstrated his contempt for this process by his actions. By his complete failure to engage himself in an action that is conducted in his name and, supposedly for his benefit, he has forfeited any right to indulgence or mitigation of the rigours entailed by a dismissal of his arbitration. A finding of constructive withdrawal would be completely inappropriate in this matter.

At the motion hearing, I made an oral ruling that the matter be dismissed, but subject to the condition that Mr. Luskin had until June 29 to remedy his default in appearance and payment of the outstanding expense orders.

In doing so, I relied on section 23(1) of the *Statutory Powers Procedure Act* which provides that: "(A) tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."

The Introduction to the *Code*, which governs arbitrations at the Commission, notes that our procedural rules aim to promote "timely, cost-effective and fair dispute resolution services." It would be neither fair nor cost-effective to stay this matter and leave it forever in some kind of limbo, waiting for Mr. Luskin to move the matter forward or to purge his failure to obey the outstanding orders. Given my earlier finding about Mr. Luskin's apparent intentions, merely staying the matter is not a fair solution.

The Insurer has a right to closure, just as an insured does. Consequently, I find that it is appropriate to finally dismiss this arbitration, effective June 29, 2007, the final deadline granted to Mr. Luskin to rectify his default.

EXPENSES:

The Insurer has been successful in having Mr. Luskin's application for arbitration dismissed. Mr. Luskin is in breach of an order to attend a hearing, and an order for payment of expenses. I see no reason to exempt Mr. Luskin from one of the normal consequences of losing at law: the payment of costs.

The request that Mr. Luskin's counsel also be responsible for any expense order is more controversial. In my earlier expense decision in this matter, I found that both Mr. Luskin and his counsel should be jointly and severally liable for the Insurer's costs. I found as well that there was no evidence before me that Mr. Mazin nor his employees took sufficient positive action to ensure that their undertaking was satisfied, nor that they took the necessary and appropriate steps to address the issues raised by their client's failure to appear.

In addition, I found specifically that the cavalier attitude taken by Mr. Mazin to his obligations arising from his undertaking and its subsequent breach constituted an affront to the arbitration system and amounted to an abuse of the process of this tribunal.

In this motion, the Insurer requested its costs in the arbitration and the dismissal specifically from both the Applicant and his counsel. Mr. Mazin had already been put on notice of his potential personal liability for costs in this matter.

I was advised that Ms. Ahmad, student-at-law, attended at the motion hearing on behalf of Mr. Mazin, and not Mr. Luskin, notwithstanding that Mr. Mazin was still counsel of record for Mr. Luskin.[14] Ms. Ahmad did not file any supporting affidavits nor present any evidence either oral or written in support of her arguments that Mr. Mazin should not be found responsible. Nor did she request to cross-examine the makers of the affidavits filed in support of the dismissal motion.

Given the potential implications of the June 1, 2007 motion, both for Mr. Mazin and Mr. Luskin, I am troubled that no evidence was called, and no attempt was made to challenge the evidence presented on behalf of the Insurer.

[14] A letter from Ms. Ahmad on file dated May 31, 2007 advised the Commission "that we are requesting a date to bring a motion to get off the record for the abovementioned matter" – however, no further action appears to have been taken by Alexander Mazin to be removed.

It is important to note that Mr. Mazin appears to have been involved in this claim from the very beginning, even draughting the original claim for benefits.[15]

Based on the evidence filed, it is apparent that Mr. Luskin did not sign any documents in this arbitration. That, in itself is not unusual. If solicitors could not sign certain documents on behalf of the clients who retained them, the practice of law, and particularly litigation, would be slowed to a virtual halt. There is a certain presumption that a solicitor has authority from his client and, indeed, warrants his authority from his client, when undertaking work on his or her behalf.

Unless there are alarm bells sounding in a matter, courts and tribunals are generally unwilling to enquire into a lawyer's retainer. This reflects the residual influence of the position taken by the Common Law courts with regard to a solicitor's retainer. As Lord Wright noted:

> At one time the Common Law Courts acted very firmly upon the view that, if an attorney took upon himself to sue or defend, the Courts would presume his authority and not inquire into it.[16]

No longer, however, is the authority of a solicitor to remain unquestioned under any circumstance. In *Scherer v. Paletta*[17], Justice Evans referred to the fact that the solicitor's "want of authority" may be brought to the attention of the court and the discretion exercised whether to enter a judgment. It is clear that there is discretion to enquire into a retainer in unusual circumstances. This discretion is longstanding. *In Hood v. Phillips*[18], the Master of the Rolls said:

> Before filing a bill, it is the duty of a solicitor to obtain distinct authority; the general rule is that he ought to have it in writing, but though this is the proper course, still it is not necessary, if it be proved that the plaintiff has afterwards

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[15] The claim for benefits is the only document in this matter that purports to be signed by Mr. Luskin personally.

[16] Lord Wright, in *Myers v. Elman*, [1940] A.C. 282, a case cited by Borins J. as "the leading case on the exercise of judicial discretion in the assessment of costs against a solicitor personally."

[17] [1966] 2 O.R. 524-527

[18] 6 Beav. 176

> acquiesced in the proceedings, and that the circumstances are such that the Court can infer an authority. Whenever the question arises, whether the authority has been given or not, and it becomes the subject of doubt and argument, the onus of proving it, lies on the solicitor.

Likewise, *in Pinner v. Knights*, it was stated:

> The law of the Court is perfectly clear, that if the authority afterwards comes into question, aye or no, whether there is an authority from the client or not, and there is no writing, it will go against the solicitor unless he can prove distinct authority or implied authority by acquiescence or some other means.[19]

The test for some enquiry into a retainer is expressed variously as "great suspicion", whether it "comes into question", "if the solicitor's authority is disputed", or "it becomes the subject of doubt and argument."[20] None of these is a particularly high threshold.

In this matter, it might be said that "the question arises" from the collective circumstances surrounding the handling of the claim.

1. Mr. Mazin has never been able to produce Mr. Luskin at a hearing or pre-hearing, and failed to honour an undertaking to so do.

2. Mr. Luskin appears to have signed no authorizing documents in this hearing.

3. The only, apparently signed, document is the application for benefits, which from the dates listed on its face seems to imply that Mr. Luskin was a minor at the time of its execution. There is no evidence of Mr. Luskin ratifying the decision to apply for benefits once of age.[21]

4 Representatives of Mazin & Rooz (now Mazin Rooz Mazin) acknowledged appearing repeatedly without the benefit of instructions from Mr. Luskin and yet took no positive steps to be removed from the record.

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[19] 6 Beav. 174

[20] See *Marie v. Marie*, 23 L.J.N.S. Ch. 154, *Allen v. Bone*, 4 Beav. 493 *Yonge v. Toynbee*, [1910] 1 K.B. 215 *Myers v. Elman*, [1940] A.C. 282, as to the above test.

[21] See *Toronto Marlboro Major Junior "A" Hockey Club et al. V. Tonelli et al.*, 18 O.R. (2d) 21 Lerner J. stated: "...the authorities state that all infant's contracts, except (i) those for necessaries, (ii) beneficial contracts of service and (iii) voidable contracts which are not repudiated and are ratified, are void."

Most of these problems, taken individually, are mere irregularities. Collectively, they give cause for concern. While one robin does not make a spring, the appearance of an entire flock is perhaps a sign that something is happening. In this matter, I find that the confluence of circumstances, including the raising of the issue of the missing signatures on the affidavits, was sufficient to raise doubt about the retainer.

Consequently, the burden fell on Mr. Mazin[22] to clear up any doubt as to his retainer, either through submissions, or preferably through documentary or affidavit evidence. This was not done.

I have also noted the reference to the absence of an applicant's signature to the application for arbitration. While it is common for counsel to execute many documents[23] on a client's behalf, there are limitations to this practice.

It is of note that there are two places for an insured's signature on an application for arbitration. The first is with regard to certifying the truth of the statements contained in the application and the authorization to release information including medical reports to *Arbitration Services, Dispute Resolution Services.*

The second signature line is a confirmation of the authority of a representative where a representative is not a lawyer. While the second signature is optional, the first is not, even with the presence of a lawyer on file, since the signature relates to the disclosure of personal health information to the Commission for the purposes of the arbitration. Section 18 1(a) of the

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[22] In *Allen v. Bone*, 4 Beav. 493, the Master of the Rolls said: "An authority may however be implied where the client acquiesces in and adopts the proceedings; but if the solicitor's authority is disputed, it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the Court will treat him as unauthorized, and he must abide by the consequences of his neglect."

[23] Lord Wright, in *Myers v. Elman*, (supra) observed: "I wish to add that in the conduct of litigation the Court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one."

Personal Health Information Protection Act, 2004[24] provides that such consent "must be a consent of the individual." As such, the signature of the lawyer, authorized or not, is insufficient.

However, despite the cloud of mystery surrounding Mr. Mazin's representation of Mr. Luskin, I find the most cogent reasons for an award of expenses to be paid by Mr. Mazin to arise directly from my previous, interim decision in this matter of May 25, 2007. In that matter, I found that Mr. Mazin was in breach of an undertaking to the Commission and to the other side, a condition that he has not seen fit to remedy to date.

The expenses ordered have not been paid either by Mr. Luskin or by Mr. Mazin. Mr. Mazin remains counsel of record in this matter. Despite a letter to the Commission indicating that his firm would take action to get off the record, no such action has been taken. Nor am I advised that Mr. Mazin has applied for or received a stay of my order.[25]

In my earlier decision, I found that "Mr. Mazin's unexplained conduct in this manner could easily be interpreted as an indifference or recklessness to his obligation to this tribunal and the arbitration process." There is judicial commentary on a solicitor's responsibility in such situations that bears repeating:

> Accordingly, the solicitor has a continuing legal obligation to use all reasonable efforts to perform his or her undertaking. In the circumstances contemplated by this action, I conclude this requires the solicitor to cease acting on behalf of the client from the time when the solicitor learns that the client proposes to take actions that would frustrate the undertaking.[26]

I also note the further comment that:

> (W)hile the law surrounding undertakings may seem harsh, it is clear that even where a solicitor does not have it in his power to fulfill his undertaking, he or she

[24] S.O. 2004, Chapter 3

[25] Rule 50.3 of the *Code* provides that "An appeal does not stop an arbitration order from taking effect, unless the Director orders otherwise.

[26] *Bogoroch & Associates v. Sternberg* [2005] O.J. No. 2522 H.J. Wilton-Siegel J.

> may be ordered to make good any loss flowing from the failure to perform the undertaking as loss flowing from a breach of duty committed by a solicitor as an officer of the court.[27]

In my previous decision, I found that the cavalier attitude taken by Mr. Mazin to his obligations arising from his undertaking and its subsequent breach constituted an affront to the arbitration system and amounted to an abuse of the process of this tribunal. That decision was released on May 25, 2007. Mr. Mazin has now had some three months to rectify the underlying situation.

While he has advised that he is taking steps to appeal the cost order against him personally, Mr. Mazin has remained on the record in this arbitration, and has certainly taken no steps to acknowledge his default on the issue of producing Mr. Luskin for the pre-hearing and the various subsequent proceedings. As Wilton-Spiegel J. so clearly expressed the issue, he should either fulfill the undertaking or get off the record if the client was the obstacle to fulfilling the lawyer's obligations. As discussed earlier, nothing has happened, save the appeal of my order.

Given the information contained in the un-contradicted affidavits of Suilan Lue and David Dinner filed in support of the motion to dismiss, I am satisfied that Mr. Mazin was involved in this claim from its very inception. I have already outlined some of the litany of failures by Mr. Luskin and his solicitor. These include the failure to provide information about insurance policies, the failure to return signed authorizations, notwithstanding agreements to do so, and the failure to respond appropriately to requests for section 42 examinations and DACs.

Mr. Mazin's actions in the conduct of this matter are unusual. His apparent view that he need not justify his actions to this tribunal takes him outside the usual protections and deference granted to a solicitor in the pursuance of his client's claim. There may well be good answers to the questions raised about Mr. Mazin's conduct in this matter. However, he has not expressed any.

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[27] *March v. Joseph* [1897] 1 Ch. 213, 245 per Lord Russell of Killowen C.J.

By way of context for Mr. Mazin's actions in this matter, it is important to bear in mind the provisions of Rule 4.01 (1) of the *Rules of Professional Conduct* which provides:

> **4.01.1 (1)** When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

I do not accept that Mr. Mazin's actions in this matter were characterized by either "candour, fairness, courtesy and respect" to the tribunal.

Mr. Mazin was, and is in breach of his undertaking, in breach of an order (that has not to date been stayed) to pay expenses, and his conduct in handling this case fell far below the minimal standards expected in a solicitor handling an accident benefit claims case. I also adopt the reasons given in my earlier decision in this matter relating to conduct that is "frivolous and vexatious" and find that such a description applies equally to the dismissal of this arbitration.

I find that Mr. Mazin's unexplained and unjustified conduct in this matter was relevant to the dismissal of the arbitration and that, as such, "caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person" in accordance with section 282(11.2) of the *Insurance Act*.

Amount of the Expense Order:

At the June 1, 2007 hearing, I heard submissions as to the amount of the expenses claimed by the Insurer. Ms. Kawaguchi filed her Bill of Costs in this matter, and both Mr. Luskin and Mr. Mazin were given the opportunity to make submissions as to any order.

In my letter decision following the hearing, I dealt with the issue of expenses in this matter as follows:

> Since I have already ordered that they pay costs of $800, a further expense order will go in the amount of $1,751.83.

Given that the parties all had the opportunity to provide input into the issue of quantum, I see no reason to alter my original order. Indeed, a total expense order of $2,551.83 (including the first cost order) seems quite reasonable in the context of the multiple pre-hearings and motions held in this matter, and the difficulties alluded to in the affidavit material with regard to the conduct of the file. Consequently, in addition to the existing order for $800, which remains payable, Mr. Luskin and his solicitor shall pay a further $1,751.83 as the balance of fixed expenses in this matter.

	October 1, 2007
John Wilson Arbitrator	Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A06-001216

BETWEEN:

ROMAN LUSKIN

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. I order that this arbitration be dismissed, effective June 29, 2007.

2. Mr. Roman Luskin and Mr. Alexander Mazin shall pay a further $1,751.83 as the balance of fixed expenses in this matter forthwith. In addition, the existing order for $800 remains payable by both Mr. Luskin and his solicitor

October 1, 2007

John Wilson
Arbitrator

Date