CITATION: Grewal v. AIG Insurance Company of Canada, 2018 ONSC 1202
DIVISIONAL COURT FILE NO.: DC-17-050-JR
DATE: 20180223

ONTARIO SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

RE: BHUPINDER SINGH GREWAL, Applicant

-and-

AIG INSURANCE COMPANY OF CANADA and FINANCIAL SERVICES COMMISSION OF ONTARIO, Respondents

BEFORE: Wilton-Siegel, Myers, and Charney JJ.

COUNSEL: *F.J. Burns*, lawyer for the Applicant

J.C. Blouin, lawyer for AIG Insurance Company of Canada,

Jessica Spence, lawyer for Financial Services Commission of Ontario

HEARD at Toronto: February 20, 2018

ENDORSEMENT

F.L. Myers J:

The Application

[1] The Applicant, Bhupinder Grewal, brings an application for judicial review of the order of director's delegate Jeffrey Rogers dated November 29, 2016. The director's delegate dismissed the applicant's request for a variation or revocation of a previous arbitration award denying the applicant three heads of statutory accident benefits ("SABS") to which he claimed entitlement as a result of injuries that he suffered in a motor vehicle collision.

[2] The applicant argued that new evidence that he submitted entitled him to a variation or revocation of the arbitration award under s. 284 of the *Insurance Act,* RSO 1990, c I.8 (as it stood prior to the major amendments in 2014).

[3] In his decision rejecting the requested variation or revocation of the arbitration award, the director's delegate found that the applicant had failed to establish the grounds required to review the prior arbitration of his SABS entitlement. In particular, the director's delegate found that the fresh evidence submitted by the applicant could have been obtained prior to the initial arbitration with the exercise of reasonable diligence. In addition, the director's delegate found that, even if

the fresh evidence was admitted, it could not have led to a different conclusion at the prior arbitration.

[4] The fresh evidence consists of four medical reports, including two written by experts retained by the respondent insurer. All of the reports conclude that, based on validated psychometric test results, the applicant suffered significant and traumatic brain injury as a result of the motor vehicle collision. The applicant argues that, if the initial arbitrator had this information, he would have concluded that the applicant was entitled to SABS in some amount. The applicant asks for a fresh hearing to be held to determine the proper quantum of benefits to which he is entitled.

[5] The director's delegate found that after the applicant initially failed to provide test results that met validation testing safeguards, the arbitrator rejected the applicant's late effort to proffer validated test results. An appeal from the arbitration was dismissed. Putting forward those test results now, as supporting appendices to new experts' diagnostic reports, could be characterized as a collateral attack on the decision to exclude the test results.

[6] In any event, the director's delegate also considered the eligibility criteria for each of the three heads of SABS sought by the applicant. On income replacement benefits, the director's delegate noted that none of the new reports addressed the question of whether the applicant "can engage in any employment for which he is reasonably suited by education, training or experience." That is the test for income replacement benefits entitlement that the arbitrator was required to consider and did consider. The new reports support a diagnosis of injury and proposed treatment, but do not address the question of the applicant's post-accident employability or functionality. The applicant produced no documents concerning his post-accident income despite having been re-employed as a truck driver for some time after his initial recovery. He produced no witnesses to provide evidence of what, if any, limitations in employment he may suffer. The arbitrator also found that the applicant had been unwilling to participate in some of the functionality tests proposed for him.

[7] The director's delegate found that "[e]ntitlement to IRBs is a question of function, not diagnosis. A person diagnosed with psychological disorders and cognitive impairments could nevertheless be functionally employable." The applicant's fresh evidence did not address at all the functional issue of whether the applicant was able to engage in any employment for which he is reasonably suited by education, training or experience.

[8] On housekeeping benefits, the director's delegate found that nothing in the new diagnostic reports suggested that the applicant's impairments prevented him from engaging in the "extremely limited" housekeeping and home maintenance tasks that the arbitrator found he performed both before and after his accident.

[9] Finally, for attendant care benefits, the director's delegate found that nothing in the new reports shows that the applicant needs attendant care. To the contrary, two of the new reports concluded the opposite.

Jurisdiction

[10] The applicant brings this proceeding under ss. 2 and 6 (1) of the *Judicial Review Procedure Act*, RSO 1990, c J.1.

The Standard of Review

[11] The parties agree that reasonableness is the appropriate standard of review of the director's delegate's decision.

[12] Wilton-Siegel J. recently described this standard of review in *Agyapong v. Jevco Insurance Company et al.*, 2018 ONSC 878 (CanLII), in this way:

> [12] I am of the view that the appropriate standard of review of the Decision is reasonableness. In particular, the standard of review of the statutory interpretation of s. 35(3) of the SABS is reasonableness, as the exercise falls squarely within the Arbitrator's expertise in the interpretation of a home statute: see *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642 (CanLII) at para. 18. Similarly, the standard of review of the Arbitrator's determination with respect to the application of the principles of causation to the Applicant's case is reasonableness for the same reason. In addition, neither of these issues is of central importance to the legal system as a whole.
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> [13] In determining whether a decision is reasonable, the court is concerned largely with the justification, transparency and intelligibility of the Board's reasons, as well as whether the decision falls within a range of possible, acceptable outcomes, given the facts and law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) at para. 47.

Analysis

[13] In order to be entitled to a variation or revocation of a previous arbitration award denying the applicant SABS, s. 284 (3) of the *Insurance Act*, which applied to this case, provided that the applicant must establish that (i) there was a material change in the circumstances of the insured, (ii) evidence that was not available later became available, or (iii) there was an error in the order.

[14] In *Lanctot and Zurich Insurance Company* (FSCO PO2-000343, October 30, 2003) FSCO's Director of Arbitrations found that to satisfy the statutory requirement, new evidence must not have been obtainable before the initial hearing with the exercise of reasonable diligence and the evidence must be capable of having "an important influence on the outcome." These glosses have not been subject to comment by this court previously insofar as counsel have been able to determine. It is certainly reasonable that, while s. 284 (3) is written in broad terms, it cannot be that any slight alteration in an immaterial piece of evidence can be sufficient to undermine the finality of a concluded arbitration. However, the test for re-opening a hearing should not be too stringent so as to recognize the seriousness of the issues to SABS applicants

and the fact that benefits may continue for years and even decades. Changes can and will no doubt occur as people age.

[15] It is not necessary for me to determine the precise scope of any limitations under s. 284 (3) in this case however because: (a) the director's delegate reasonably concluded that the proposed fresh evidence was obtainable by diligence; (b) even if they are admitted, the new reports do not address the findings of entitlement to benefits made by the arbitrator; and (c) if and when the applicant obtains evidence that is fresh evidence and that does address his entitlement to SABS, he will be entitled to move under s. 284 (3) at that time.

[16] The applicant argues that he proves his "entitlement" by establishing that he has been diagnosed with a substantial injury. However, a finding of injury is just the first step in the SABS process. Each of the benefits has eligibility criteria. For income replacement benefits after the first 104 weeks, for example, as noted above, the applicant must prove that he is unable to engage in any employment for which he is reasonably suited by education, training, or experience. The applicant says that this can be inferred from the degree of his injuries as set out in the new diagnostic reports. However, the arbitrator was clear that, even from his experienced vantage point, evidence as to functionality was required. A lay person, including an experienced arbitrator, is not able to draw an inference concerning whether the applicant can engage in employment for which he is reasonably suited from the four new medical reports. As the director's delegate noted, none of the four reports addresses the applicant's vocational aptitude, much less the applicable SABS eligibility criteria. These are questions that require expert evidence in the circumstances of the applicant's condition.

[17] The reason that the applicant was unsuccessful in obtaining benefits was not just that he had not proved his injury. The arbitrator also found that he did not prove that he suffered any loss of income, any diminution in his ability to perform his limited pre-accident housekeeping responsibilities, or a need for any attendant care services beyond what had already been provided to him. Nothing in the fresh evidence undermines the findings in the initial decision concerning the applicant's credibility and that he did not suffer the functional deficits alleged. Nor, as the director's delegate notes, is there any evidence supporting the applicant's submission that his cognitive impairments, as diagnosed in the reports, prevented him from proving such losses.

[18] The applicant conflates his entitlement to benefits with a finding of fact that he has suffered injury. No doubt the finding of injury is a key step in the process of proving entitlement to SABS. However, even if the applicant's initial failure to pass validity tests impaired his ability to prove the exact nature of his injury before the arbitrator, and even assuming that valid results could not have been obtained with the exercise of reasonable diligence, that still does not undermine the award made by the arbitrator or make unreasonable the decision of the director's delegate. The director's delegate carefully reviewed and explained how eligibility for each benefit was determined by the arbitrator and why the four new diagnostic reports do not bear on the fundamental factual issues underlying the eligibility criteria for each benefit assessed by the arbitrator.

[19] The proposed new evidence simply does not address the grounds for the arbitration award whatever the limits or breadth of the fresh evidence test may be under s. 284 (3). As noted above, if and when that changes, the applicant will have his remedy then.

[20] Therefore, I would dismiss the application.

[21] Counsel agreed that costs of $4,000 should be awarded to the successful party. Therefore, the applicant shall pay AIG costs on a partial indemnity basis fixed at $4,000 all-inclusive within 60 days.

[22] FSCO does not seek costs.

F.L. Myers J.

I agree.
Wilton-Siegel J.

I agree.
Charney J.

Date: February 23, 2018