Appeal P14-00009

OFFICE OF THE DIRECTOR OF ARBITRATIONS

CHARTIS INSURANCE COMPANY OF CANADA

Appellant

and

MUHAMMAD TIPU

Respondent

and

BARTOLINI BERLINGIERI BARRAFATO FORTINO LLP

Intervenor

BEFORE: Delegate Lawrence Blackman

REPRESENTATIVES: Ms. Kadey B.J. Schultz and Ms. Bevin Shores for the Appellant, Chartis Insurance Company of Canada
Ms. Samia M. Alam for the Intervenor, Bartolini Berlingieri Barrafato Fortino LLP
Mr. Muhammad Tipu not appearing

HEARING DATE: November 28, 2014 in Hamilton Ontario

APPEAL ORDER

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

1. This appeal is dismissed and the Arbitrator's decisions dated February 13 and July 21, 2014 are confirmed.

May 22, 2015

Lawrence Blackman
Director's Delegate

Date

REASONS FOR DECISION

I. BACKGROUND AND NATURE OF THE APPEAL

This appeal addresses whether a law firm should pay legal costs at first instance of $2,983.97 as well as the insurer's $3,000 arbitration assessment fee.

As found by Arbitrator Pressman (the "Arbitrator") the Respondent, Mr. Muhammad Tipu, was injured in an August 30, 2010 motor vehicle accident. He applied for statutory accident benefits under the *1996 Schedule*[1] from his first party automobile insurer, the Appellant, Chartis Insurance Company of Canada.

On January 31, 2011 the Appellant denied the Respondent's claims for housekeeping and attendant care benefits. The Respondent's representatives, the Intervenor Bartolini Berlingieri Barrafato Fortino LLP, were unable to locate the Respondent. The Arbitrator found that "in order to preserve Mr. Tipu's rights," the Intervenor applied for mediation in January 2012. Mediation failed January 24, 2013. On April 25, 2013, the Intervenor applied for arbitration.

Upon motion by the Intervenor, the Arbitrator's February 13, 2014 Order permitted the Intervenor to withdraw as the Respondent's representative of record. The Appellant had argued that the Intervenor pay it $4,900 in costs and that the arbitration be deemed to be withdrawn. The Arbitrator denied both requests, the latter because the Respondent had not been given proper notice. Upon notice being subsequently sent to the Respondent, the Arbitrator dismissed the arbitration on July 21, 2014 with $2,983.97 in costs payable by the Respondent. The Arbitrator declined to award the Appellant its $3,000 assessment fee.

Subsections 282(11.2) and (11.3) of the *Insurance Act*, R.S.O. 1990, c. I.8, set out the liability of representatives for legal expenses:

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

Liability of representative for costs

(11.2) An arbitrator ***may make*** an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to personally pay ***all or part*** of any expenses awarded against a party if the arbitrator is satisfied that,

(a) in respect of a representative of an insured person, the representative commenced or conducted the proceeding ***without authority*** from the insured person ***or did not advise*** the insured person that he or she could be liable to pay all or part of the expenses of the proceeding;

(b) in respect of a representative of an insured person, the representative caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person; or

(c) the representative ***caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default***.

Non-application to solicitors

(11.3) Clause (11.2) (a) does not apply to a barrister or solicitor ***acting in the usual course of the practice of law***. [Emphasis added]

The Arbitrator's February 13, 2014 decision found:

(1) In regard to clause 282(11.2)(a) of the *Insurance Act*, the Intervenor was "acting in the usual course of the practice of law." Therefore, subsection 282(11.3) exempted it from liability for costs under clause 282(11.2)(a).

(2) In regard to clause 282(11.2)(b), the Intervenor did not advance a claim that was frivolous or vexatious.

(3) In regard to clause 282(11.2)(c), the Arbitrator was unable to find that the Intervenor caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default.

Rather, the Arbitrator found that the Intervenor's request to withdraw shortly after filing for arbitration and prior to the scheduling of a pre-hearing discussion limited any further expense to the Appellant.

An insurer's $3,000 arbitration assessment fee is potentially payable under section 7 of the Dispute Resolution Expenses Schedule to R.R.O. 1990, Reg. 664. The provision reads:

> There ***may be awarded to an insurer*** the total of all amounts in respect of a claim by an insured person that are included under section 4 of Ontario Regulation 11/01 (Assessment of Expenses and Expenditures) made under the Financial Services Commission of Ontario Act, 1997 in determining ***the amount of the insurer's total assessment for arbitrations under section 282 of the Act***, total assessment for appeals under section 283 of the Act or total assessment for applications under section 284 of the Act, ***if the insured person***, ***on or after March 1, 2006***,
>
> (a) ***refused or failed to submit to an examination relating to the claim under section 42 of Ontario Regulation 403/96*** (Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996) made under the Act or under section 44 of Ontario Regulation 34/10 (Statutory Accident Benefits Schedule — Effective September 1, 2010) made under the Act. …
>
> [Emphasis added]

The Arbitrator's July 13, 2014 decision denied the Appellant payment of its $3,000 assessment on the basis there was insufficient evidence the Appellant had complied "with section 44 on issues of notice and reasonableness."

Succinctly, the Appellant's argument is:

1. The Arbitrator erred in her February 13, 2014 decision in allowing the Intervenor to withdraw without being responsible for the Appellant's legal expenses.

2. The Arbitrator erred in her July 21, 2014 decision in not awarding the Appellant its $3,000 arbitration assessment fee in addition to $2,983.97 in fees and disbursements.

Turning first to the Arbitrator's February 13, 2014 decision, paragraph 5 of the Appellant's July 31, 2014 reply submissions "reiterates that it is not, for the purposes of this Appeal, alleging that expenses are warranted due to the proceeding being frivolous or vexatious" under paragraph 282(11.2)(b) of the *Insurance Act*. The Appellant confirmed same in oral submissions.

Regarding clause 282(11.2)(a), the Appellant submits that the Arbitrator erred in:

1. Finding in the absence of any evidence and on the basis of conjecture that the Respondent intended to dispute the Appellant's denial of benefits. Rather, there was no evidence the Respondent intended to pursue accident benefits since at least January 2011.

2. Finding that the Intervenor was acting in the ordinary course of the practice of law when it filed for arbitration without the Respondent's knowledge or authorization. Rather, the Intervenor had no instructions or authority to proceed, having sent only a July 29, 2013 letter to the Respondent. Further, the Arbitrator failed to consider the relevance, materiality and admissibility of the document relied upon by the Intervenor as a Retainer/ Power of Attorney, misinterpreting it as authority to commence an arbitration proceeding.

3. Finding that the Intervenor's commencement of arbitration to avoid a negligence claim was acting in the ordinary course of the practice of law. Rather, the Intervenor was acting as a litigant. Being the real principal in the arbitration, it ceased to be acting in the usual course of the practice of law.

4. Overlooking the Intervenor's conflict of interest in having issued a statement of claim against the Respondent arising out of the same motor vehicle accident. The Intervenor had a duty to stop acting for the Respondent. As stated in Rule 3.4-2 of the *Rules of Professional Conduct* of the Law Society of Upper Canada:

   > A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and it is reasonable for the lawyer to conclude that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

   In this case, there was neither disclosure to nor consent from the Respondent.

5. Failing to consider there was no correspondence from the Intervenor to the Respondent advising that the Respondent was at risk of losing his benefits or of incurring the $3,000 insurer's arbitration assessment fee and further legal expense.

6. Misinterpreting clause 282(11.2)(a) as having as a prerequisite a finding that the proceeding lacked merit or that it was frivolous or vexatious.

7. Failing to find that the innocent party, the Appellant, needs to be paid. The Arbitrator's present expense order is unenforceable as no one knows where the Respondent is. The Arbitrator's decision is predicated on the presumption there are no consequences for the Respondent. It is a hollow decision for the Appellant but an easy one for the Arbitrator.

Regarding clause 282(11.2)(c), the Appellant submits that the Arbitrator erred in:

1. Looking at how quickly the Intervenor sought to withdraw after starting arbitration rather than at its more than two year delay after losing contact with the Respondent before moving to withdraw as his representative. The Arbitrator further erred in failing to consider that the Intervenor made no effort to search for the Respondent whatsoever.

2. Failing to find that if the Intervenor had withdrawn as representative at any time in the five months before the Application for Mediation was filed or at any time in the approximately twenty months before the Application for Arbitration was filed, the expenses of arbitration would have been avoided.

3. Finding that the Intervenor was merely preserving the Respondent's rights in filing for arbitration when it had already filed an Application for Mediation which was sufficient.

4. Failing to consider it was clear there was no limitation period to protect. Housekeeping and attendant care benefits were refused January 31, 2011. The limitation period expired January 31, 2013. The Application for Mediation was filed January 31, 2012.

5. Failing to send a warning to lawyers representing insured persons that they are exposed to legal expenses if, being in a position of power in relation to the insured, they take steps that create the risk of costs. Here, the Intervenor put the Respondent in a position of peril.

Regarding its $3,000 arbitration assessment fee, the Appellant submits:

1. The Respondent failed to attend the insurer's medical examinations ("IMEs") it had scheduled for March 25 and March 28, 2011. The Appellant had not had any independent

contact with the Respondent after January 17, 2011 when he had attended an IME.

2. The weight of the evidence supports the Respondent's IME non-attendance being the result of his moving and having abandoned his claim and the Intervenor failing to apprise the Appellant of this in a timely fashion. The content of the Respondent's OCF-25 (Notice of Examination) regarding its scheduled IMEs does not alter this. Rather, the onus is on the insured person to prove that an insurer's notices are deficient.

3. While clause 44(5)(a) of the *2010 Schedule*[2] states that the insurer shall give the insured person notice setting out "the medical and any other reasons for the examination," clause 37(1)(b) regarding an insurer determining ongoing entitlement to a benefit does not. Clause 44(5)(a) thus has "appropriate elasticity" that sometimes medical reasons are necessary, and sometimes they are not. In this case the Appellant's OCF-25 stated that the purpose of the IME was to determine ongoing entitlement to income replacement benefits ("IRBs"). The IME was reasonable as IRB entitlement had not yet been assessed.

   Yan and State Farm Mutual Automobile Insurance Company, (FSCO A12-004991, August 28, 2014), in a matter under the *1996 Schedule*, found that notices stating the purpose of the IMEs as assessing "Income Replacement Benefits" were sufficient and complied with the requirements of subsection 44(5) of the *2010 Schedule*.

4. The industry practice is that insurers schedule IMEs unilaterally. If there is any conflict with the date, the insurer will "most definitely" reschedule. There is no requirement that an insurer must first check with the claimant or opposing counsel that a time and location are convenient. Rather, there is only a responsive obligation on the insurer that on being advised a claimant is not available or cannot attend at a location, to make reasonable efforts to reschedule or relocate the examination.

5. The Arbitrator failed to consider subsection 55(2) of the *2010 Schedule* that an insured person cannot apply for mediation if he or she has failed to attend a section 44 IME.

[2] *The Statutory Accident Benefits Schedule — Effective September 1, 2010,* Ontario Regulation 34/10, as amended.

The Appellant submits that due to the expense involved, should the Arbitrator's decisions be set aside, this matter should not be returned to arbitration for a rehearing. Rather, the appellate officer should make the appropriate rulings.

II. ANALYSIS

1. Clause 282(11.2)(a) of the *Insurance Act*

This case raises four potential questions under clause 282(11.2)(a) of the *Insurance Act*:

1. Was the Intervenor acting outside the usual course of the practice of law and, hence, potentially liable for legal expenses under clause 282(11.2)(a)?

2. If so, did the Intervenor:

   (a) commence or conduct the proceeding without authority from the Respondent, and/or,

   (b) fail to advise the Respondent that he could be liable to pay all or part of the expenses of the proceeding.

3. If the answer to either question 2(a) or (b) is in the affirmative, did the Arbitrator err in the exercise of her discretion amounting to an error in law?

The Arbitrator's February 13, 2014 decision found the limitation period was approaching with the Respondent yet to be found. She noted that representatives may commence proceedings on behalf of a client with whom they have lost contact both to preserve the client's rights regarding limitation periods and to avoid a negligence claim. The representative will then usually seek permission to withdraw as representative of record.

The Arbitrator found that that the Intervenor did just that, three months after having preserved the Respondent's rights. Therefore, the Arbitrator found that the Intervenor was "acting in the usual course of the practice of law" under subsection 282(11.3) of the *Insurance Act* and hence exempt from clause 282(11.2)(a).

In any event, regardless of subsection 282(11.3), the Arbitrator found that the Intervenor had confirmed its authority to commence or conduct the proceeding, in part based on the affidavit evidence of Mr. Paul Barrafato sworn September 17, 2013. The latter attested that the Respondent retained his firm, in part, to assist his claim for statutory accident benefits. The Appellant had paid the Respondent $1,957.16 in housekeeping benefits and $2,955.51 for medical/rehabilitation benefits. It had also spent $11,272.31 for examinations.

The Deponent attested that pursuant to the retainer agreement signed August 31, 2010 by the Respondent, his office was acting under a general power of attorney authorizing them as legal representatives to act on the Respondent's behalf in the event they were unable to locate him after a reasonably diligent search until such time as the Respondent was located or an order from a court of competent jurisdiction directed otherwise.

The Deponent further attested that to protect the Respondent's rights, it filed for mediation of the Respondent's claims for attendant care, housekeeping and medical benefits and the cost of examinations for denied treatment plans. The Mediator declined a consent adjournment to allow the Intervenor to find the Respondent. The Intervenor filed for arbitration as it only had 90 days from the Report of Mediator to do so.

I was not referred to any cross-examination of the Deponent.

The Arbitrator found that the Intervenor had an insured person as a client at the time it filed the Application for Arbitration, had the authority to commence and conduct an arbitration proceeding as required by clause 282(11.2)(a) of the *Insurance A*ct and provided a valid explanation for filing for arbitration.

Subsection 283(1) of the *Insurance Act* restricts appeals from the order of an arbitrator to questions of law. In *Young and Liberty Mutual Insurance Company*, (FSCO P03-00043, June 20, 2005), application for judicial review dismissed, 2006 CanLII 7286 (ON SCDC), Delegate Evans cited Delegate McMahon in *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00022, February 26, 2003):

> …errors of law include findings of fact made in the complete absence of supporting evidence, made on the basis of conjecture, or made on the basis of a misapprehension of the evidence caused by a misdirection on a legal principle. The vital distinction is between a conclusion that there was "no evidence" to support a finding and a mere "insufficiency of evidence."

In finding the Intervenor had authority to commence or conduct the proceeding the Arbitrator also relied on a redacted copy of the Intervenor's retainer agreement. Footnote 5 of the February 13, 2014 decision noted the Appellant's argument that the retainer was inadmissible and invalid. The Arbitrator disagreed, finding the retainer agreement relevant as the Appellant's argument centred on the Intervenor's authority to commence a proceeding on the Respondent's behalf.

The Arbitrator noted that, in any event, her determination was based on all of the evidence and submissions and not solely on the retainer document. I am not persuaded there was no evidence supporting the Arbitrator's findings that the Intervenor was acting in the usual course of the practice of law and that it had authority to commence and conduct the arbitration. I am not persuaded that the Intervenor's commencement of arbitration to avoid a negligence claim negated it acting in the usual course of the practice of law to also preserve its client's rights.

Mr. Barrafato's affidavit states that his firm commenced a tort claim for both the Respondent and his wife. As "a back-up claim," being unable to obtain instructions, it also issued a claim by the Respondent's wife against the Respondent who was the driver at the time of the accident. That the Intervenor should not also have been representing the Respondent's spouse goes to the sufficiency of the evidence, not that there was no evidence that the Intervenor was acting in the usual course of the practice of law regarding the Respondent's first party, no-fault claim.

I fail to see that Arbitrator added as a prerequisite to clause 282(11.2)(a) of the *Insurance Act* that the arbitration must lack merit. Rather, at page five of her decision, the Arbitrator properly applied that consideration to clause 282(11.2)(b) of whether the Intervenor had caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured. However, the merit of the claim may be a consideration in the exercise of discretion of whether to order costs payable in the event counsel does fall within one of the provisions.

Allison and Markel Insurance Company of Canada, (August 21, 1996, OIC P-001231), held:

> ***An award of expenses is a matter within the discretion of the arbitrator, although the discretion must be exercised reasonably*. *Because the discretion is given to the arbitrator, it should not be interfered with lightly on appeal***. The arbitrator is able to consider the evidence in totality, including observing and hearing any witnesses, and usually is in the best position to assess the merits of the case and the way it was handled by the parties. ***Generally, his or her determination should not be disturbed unless the party appealing the order can point to a serious error in the exercise of the discretion: for example, the arbitrator adopted a wrong approach, based the decision on irrelevant considerations or inadequate evidence, or failed to look at the merits of the individual case by inappropriately fettering his or her discretion***.[Emphasis added]

The Divisional Court, in *Carleton v. Beaverton Hotel*, 2009 CanLII 92124 (ON SC), held that the governing principles in awarding costs personally against a lawyer were set out by the Supreme Court of Canada in *Young v. Young*, 1993 CanLII 34 (SCC):

> …***The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister***. … Moreover, courts must be ***extremely cautious*** in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [Emphasis added]

The Divisional Court further stated:

> I agree with the appellant's submission that the "extreme caution" which courts must exercise in awarding costs against a solicitor personally as stated in Young v. Young, means that ***these awards must only be made sparingly, with care and discretion, only in clear cases*** and not simply because the conduct of a solicitor may appear to fall within the circumstances described in rule 57.07(1).
> [Emphasis added]

The Divisional Court agreed with a two-part inquiry:

> The first inquiry is whether the lawyer's conduct falls within rule 57.07(1) in the sense of causing costs to be incurred unnecessarily and then the second step is to consider, as a matter of discretion (and applying the extreme caution principle), whether in the circumstances of the particular case, the imposition of costs against the lawyer personally is warranted.

Thus, in *Marshall Estate (Re)* [1998] O.J. No. 258, Sutherland J. stated at paragraph 11:

> … something more than mistake, error in judgment or mere negligence must be shown for liability of the solicitor or counsel to result...

Likewise, the New Brunswick Court of Appeal held in *Blair v. Ouelette* [1990] CarswellNB 243.

> Throughout the case law the predominant theme is that in order to impose liability there must be more than mistake, error of judgment or mere negligence on the part of the solicitor. Gertner in Studies in Civil Procedure, 1979**,** says at pages 77 and 78 in relation to liability at common law: "There must be a serious dereliction of the solicitor's duty to the court, something which justifies the use of the word 'gross'".

It would be an error if an arbitrator fettered his or her discretion in finding that if a representative fell into any clause of subsection 282(11.2), the representative was automatically liable to pay legal expenses. Rather, subsection 282(11.2) states that an arbitrator "may make" an order requiring a person representing an insured person or an insurer for compensation in an arbitration to personally pay all or part of any expenses awarded against a party if satisfied that the representative falls into one of the three enumerated situations. The provision does not say that the arbitrator "shall" make that finding.

Accordingly, a two-step inquiry would equally apply to subsection 282(11.2). First, does the conduct of the representative fall within one of the three enumerated clauses (subject to the subsection 282(11.3) exemption)? If so, do the circumstances of the case warrant the imposition of costs personally against the representative? Regarding the second step, the principle of extreme caution applies that such awards be made sparingly in clear cases.

Accordingly, it is not sufficient that the Appellant, as the innocent party, "needs to be paid." The Arbitrator found that the subsection 282(11.3) exemption applied to clause 282(11.2)(a). I am not persuaded that the Arbitrator erred in law in that determination. Hence, the second question, that of the exercise of discretion in regard to that clause did not arise. However, if that question did arise, I am not persuaded that the Arbitrator would have erred in exercising her discretion in not awarding legal costs personally against the Intervenor in the circumstances of this case.

The Arbitrator did not address whether the Intervenor failed to advise the Respondent that he could be liable to pay all or part of the expenses of the proceeding. Given the Arbitrator's finding that the subsection 282(11.3) exemption applied to clause 282(11.2)(a), that was not required.

2. Clause 282(11.2)(c) of the *Insurance Act*

Mr. Barrafato's affidavit stated that prior to commencing arbitration in April 2013 his firm:

1. Left a voice mail for the Respondent on August 21, 2011 that was not returned.

2. Attempted to reach the Respondent on April 2, 2012. The number provided by the Respondent was no longer in service.

3. Attempted to serve the Respondent with his wife's tort claim at his last known address in Ontario on October 24 and November 14, 2012. The process server was advised the Respondent had moved to Alberta.

4. Between November 2012 and January 22, 2013, placed numerous telephone calls to the Respondent's last known telephone number as well as writing his last known address and a further Ontario address obtained through an Ontario Ministry of Transportation license plate search. Service of the statement of claim on the Respondent was also unsuccessfully attempted at this alternate address.

5. Conducted numerous Canada 411 searches in both Ontario and Alberta.

Again, I was not referred to any cross-examination of the Deponent. I am unable to see that the evidence supports that the Intervenor did nothing in the two years from January 2011 to locate the Respondent.

Mediation, by itself, does not preserve an insured person's rights. Rather, if compulsory, non-binding mediation fails to resolve a dispute, under subsection 281(1) of the *Insurance Act* arbitration or a court proceeding must be commenced. The general limitation period under subsection 281.1(1) is two years after the insurer's refusal to pay the benefit claimed.

In this case, the Appellant had denied the Respondent's housekeeping and attendant care benefits on January 31, 2011. The limitation period thus normally would have expired January 30, 2013.

It was only by virtue of the 90-day extension under clause 281.1(2)(b) of the *Insurance Act* from the February 6, 2013 Report of Mediator (more than a year after the Intervenor had applied for mediation) that the Application for Arbitration dated April 23, 2013 preserved the Respondent's rights.

The Arbitrator stated that she could not find that the Intervenor caused the Appellant to incur the expenses of the arbitration proceeding without reasonable cause or to be wasted by unreasonable delay or other default. Following the decisions in *Lombardi* and *Young*, I am not persuaded there was an absence of evidence to support this finding.

The Appellant relied on *Rooz v. Certas Direct Insurance Co.*, 2010 ONSC 2773, where the Divisional Court found the arbitrator's decision to award expenses personally against a representative under clause 282(11.2)(c) reasonable in the circumstances of that case. The Arbitrator distinguished *Rooz* where, unlike here, the insurer had denied the claim from its inception and the benefits in dispute represented a debt owed to a service provider. Further, the Divisional Court stated that the arbitrator in that case had found the claim suspect. As well, the arbitrator found that the representative had failed to provide any evidence of a retainer.

Again, following the Supreme Court of Canada in *Young*, I find that expense awards against representatives are to be approached cautiously and not, as argued, as punitive measures against representatives of insured persons with the extra punishment of the $3,000 insurer's assessment. Further, I take from *Allison* that the function of appeals in expense awards is not to rehear the matter or second-guess the arbitrator at first instance. I am not persuaded that the Arbitrator erred in law regarding the application of clause 282(11.2)(c) of the *Insurance Act*.

3. $3,000 Assessment

The Appellant submits that the Respondent refused or failed to attend IMEs on March 25 and 28, 2011, entitling it to its $3,000 assessment fee. The Arbitrator's July 21, 2014 decision found that the evidence adduced to support the assertion was insufficient, specifically that the Appellant had complied with "section 44 on issues of notice and reasonableness." As a result, she declined to award the Appellant its $3,000 assessment fee.

The Arbitrator's February 13, 2014 decision noted that this matter came under the *1996 Schedule*. Section 44 in the *1996 Schedule* refers to the method of payment of benefits. It does not pertain to IMEs. However, section 44 of the *2010 Schedule* specifically addresses IMEs. In the *1996 Schedule*, IMEs are addressed in section 42. Accordingly, the Arbitrator erred in referencing the wrong version of the *Schedule*.

Subsections 42(1) and (4) provide of the *1996 Schedule* provide:

> 42(1) For the purposes of assisting an insurer determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made, an insurer may, ***as often as is reasonably necessary***, require an insured person to be examined under this section by one or more persons chosen by the insurer who are members of a health profession or are social workers or who have expertise in vocational rehabilitation.
>
> …
>
> (4) Whenever the insurer requires an insured person to be examined under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,
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> (a) the reasons for the examination;
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> (b) the type of examination that will be conducted and whether the attendance of the insured person is required during the examination;
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> (c) the name of the person or persons who will conduct the examination, the regulated health professions to which they belong and their titles and designations indicating their specialization, if any, in their professions; and
>
> (d) if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days. [Emphasis added]

In *Augustin and Unifund Assurance Company*, (FSCO A12-00045, November 13, 2013), Arbitrator Sapin held regarding whether an insured person was precluded from commencing mediation because she failed to attend an IME:

> ***Given the serious consequences to an insured person*** of refusing to attend an IE for which proper notice has been given – barred from commencing a mediation proceeding to dispute an insurer's denial of medical treatment – ***the notice***

> ***requirements set out in s. 44(5) should be strictly construed and the insurer's notice should be closely examined to ensure it complies. The requirements are mandatory.*** They are there to balance the naturally intrusive nature of an IE and to ensure fairness. The insured person is entitled to make an informed decision about whether they wish to pursue their claims and attend the IE, or not. The legislature has determined that, in fairness, an insured person is entitled to specific information, including medical reasons, about why they are being required to attend an IE. I find it would be unreasonable and unfair to require them to attend without first being in possession of that information. [Emphasis added]

I agree with Arbitrator Sapin. I find that a similar strict approach applies to whether the insurer's $3,000 assessment for arbitration should be awarded. I do not agree with the Appellant's argued "appropriate elasticity" regarding the $3,000 assessment.

There are several components to the requisite notice that an insurer must provide under subsection 42(4) of the *1996 Schedule*. The Arbitrator failed to indicate where the Appellant's notice was inadequate. Looking at the Appellant's March 15, 2011 OCF-25 (Notice of Examination), one can only speculate as to the Arbitrator's concern in this regard.

However, a further requirement of subsection 42(1) of the *1996 Schedule* is that the IME is allowed as often as is "reasonably necessary." The Arbitrator found there was insufficient evidence as to the reasonableness of the requested IMEs. The Arbitrator noted in this regard that the affidavit of Ms. Deborah Sherren sworn September 23, 2013 was not helpful.

I am unable to disagree. Ms. Sherren attests to the Respondent failing to attend IMEs scheduled for March 25 and March 28, 2011. She does not state why these IMEs were reasonably necessary. The Appellant's counsel endeavoured to assist at oral appeal submissions by stating that no prior IME had been held regarding IRBs. However, counsel do not give evidence.

An IME had been conducted January 17, 2011 by an occupational therapist. On the basis of that IME, the Appellant ended payment of attendant care and housekeeping benefits. I was not advised as to any evidence indicating why a further IME for IRBs was reasonably necessary.

The March 31, 2013 Explanation of Benefits states that because of his non-attendance, the Respondent's entitlement to IRBs was being suspended. I was not referred to evidence of any

payment of IRBs. I was not referred to any claim by the Respondent for IRBs. The Respondent's September 1, 2011 OCF-1 (Application for Accident Benefits) does not note in the applicable Part 8 for IRBs that the Respondent's injuries prevented him from working, his gross pre-accident income or what time period provided his highest average weekly income. It is not clear that an IRB claim was being made. Importantly, neither the February 6, 2013 Report of Mediator nor the April 23, 2013 Application for Arbitration note a claim for IRBs.

The Appellant's March 2011 IMEs were scheduled with a chiropractor and a doctor of sports medicine. There is no indication why both these examinations were reasonably necessary. There is no indication why sports medicine was a reasonably necessary area of expertise for a claimant who, according to the OCF-1, was a taxi driver.

I disagree that the failure of an insured person to attend an IME automatically warrants payment of the insurer's $3,000 assessment for arbitration. I disagree that the onus is on the insured to prove that the notices are deficient. I disagree that industry practice may overrule statutory language. Especially considering the significant intrusiveness and substantive consequences of IMEs, effect should be given to the Legislative constraints provided.

I am not persuaded that the Arbitrator erred in law in finding that the onus was on the Appellant to establish as a pre-requisite to being awarded its $3,000 assessment for arbitration that its IMEs were reasonably necessary. I am not persuaded that the Arbitrator erred in finding that the Appellant did not meet its onus.

As with awards against representatives, section 7 of the Dispute Resolution Expenses Schedule gives the adjudicator discretion regarding the award of the assessment. I am not persuaded that the Arbitrator erred in any exercise of her discretion.

4. The Arbitrator's Expense Award

The Intervenor argued that the Arbitrator erred in her July 21, 2014 expense decision in allowing the Appellant $2,983.97 in costs. It submits that 9.3 hours of preparation for a two and a half hour motion to get off the record was disproportionate, as was 8.9 hours for unsolicited

additional submissions. It argues that the total of 28.7 hours allowed was unreasonable given the relatively simple issue to be decided.

The Intervenor further argues that most of these expenses involved the Appellant's endeavour to obtain its legal expenses. It submits that only $985.23 in legal costs should be allowed.

The Intervenor relied on *Allison* regarding the $3,000 assessment, that the discretion given to the arbitrator should not be interfered with lightly on appeal. I find *Allison* equally applicable here. I agree with paragraph 72 of the Intervenor's July 17, 2014 submissions that the "purpose of an appeal is not to rehear the case or second-guess the Arbitrator's interpretation of the evidence." Accordingly, I reject the Intervenor's submissions in this regard.

III. EXPENSES

My May 29, 2014 preliminary appeal order noted the Appellant and the Intervenor agreed that both were entitled to seek their legal expenses of this appeal, subject to the adjudicator's discretion and the *Dispute Resolution Practice Code* (Fourth Edition, Updated – January 2014).

In oral submissions at the main appeal hearing, the parties stated that they had agreed on the issue of legal expenses of this appeal. They further agreed I was not tainted by documentation given to me that I returned to counsel. I thus make no order regarding the legal expenses of this appeal.

	May 22, 2015
Lawrence Blackman Director's Delegate	Date