Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A11-002496

BETWEEN:

KAMALAVELU VADIVELU

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A MOTION

Before: Arbitrator Charles Matheson

Heard: Written submissions completed by May 7, 2018

Appearances: Mr. S. Wilson, Lawyer, for Mr. Kamalavelu Vadivelu
Ms. P. Samworth, Lawyer, for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Mr. Kamalavelu Vadivelu (the "Applicant"), was injured in a motor vehicle accident on February 15, 2007. He applied for and received statutory accident benefits from State Farm Mutual Insurance Company (the "Insurer"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Kamalavelu Vadivelu, through his

[1] Effective September 1, 2010, the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*New Regulation*") came into force. The transition rules in the *New Regulation* provide that, subject to certain exceptions, benefits that would have been available pursuant to the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996* (the "*Old Regulation*") shall be paid under the *New Regulation*, but in amounts determined under the *Old Regulation*. As a result, both the *Old Regulation* and the *New Regulation* are applicable to accidents that occurred on or after November 1, 1996 and before September 1, 2010 and both should be considered.

representative, applied for arbitration at the Financial Services Commission of Ontario ("FSCO") under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

The matters went to a hearing and as a result the Applicant was awarded an Income Replacement benefit ("IRB") of $400.00 per week, which was contained in a March 15, 2012 order.

On September 25, 2013 the Insurer brought an application to FSCO seeking to vary or revoke the consent award dated March 15, 2012. Prior to the variation hearing this motion was brought by the Applicant.

The issues in this hearing are:

1. Should the Application for Variation be dismissed, or alternatively should the Insurer be precluded from relying upon the information which was provided to it by the Insurer's Body Injury Unit ("BIU") or any information it obtained as a consequence of the information it obtained from the BIU?
2. Which party is liable for the expenses of this proceeding?

Result:

1. The Application for Variation is not dismissed, and the Insurer is not precluded in relying on any evidence that was provided by the BIU.
2. I defer the expense issue to the Variation hearing arbitrator.

Evidence:

The undisputed chronology of events are as follows:

The Insurer started paying IRB's, without any further collaborating evidence, to the Applicant, on a good faith basis after receiving the signed OCF-1(Application for Accident Benefits) and a signed OCF-2 (Employer's Confirmation Form).

The Insurer submits that an investigation conducted by State Farm Special Investigations Unit ("SIU") and the State Farm Accident Benefits Department ("ABD") revealed that there was a fraudulent employer signature on the OCF-2.

From that point forward State Farm BIU, named as a defendant representing its own Insured in a tort matter, started an investigation regarding the Applicant's employment in his role as a Plaintiff in his tort case. The BIU assigned the investigation to its Special Investigations Unit ("SIU"), where they eventually obtained a statement from the purported employer that the Applicant had misrepresented his employment information. SIU reported this back to BIU, who in turn reported its findings to the ABD.

ABD then applied for the Variation hearing in order to vacate the original order to pay IRB.

Arbitrator Snider wrote in a pre-hearing letter dated May 18, 2017 the following findings:

> It is clear to me that the documents provided to date are sufficient for me to conclude that yes, the Insurer's Tort, ABD and SIU departments shared information and documentation of various sorts over the years that this file has been open.

Arguments:

It is the position of the Applicant that there was no fraud or misrepresentation on his part. The sharing of information between the tort and AB side of an Insurer is a breach of its obligation of "good faith". The Applicant submits that it makes no difference whether the bad faith conduct was committed by an employee who acts for the ABD or that of the BIU, the fact is that the actions impacted the Applicant's privacy.

The Applicant argues that at the time of the accident s. 258.3 of the *Insurance Act* was in place and required the Applicant to proceed with the accident benefit claims under the *Schedule* prior to beginning his tort action. This means that the Insurer was bound to keep the Applicant's

information separated by a "firewall" to prevent any breach of its obligation to act in good faith. The Applicant asserts that the Insurer must ensure that there is no contact between accident benefits and the tort departments, thus no exchange of information should occur.

The Applicant argues that the key principle of acting in good faith is that the Insurer is not to prefer its own interests to that of the Applicant's. The moment the information was exchanged the Insurer was pursuing its own interests, hence it acted in bad faith which is contrary to the good faith obligation of utmost trust and fair dealings which an accident benefit Insurer owes to its Applicant. The Applicant relies in part, on paragraph 59 of *Dervisholli v Cervenak*[2] which reads as follows:

> [The Insurer]….provided unfettered access to the Plaintiff's accident benefit file together with information from another claimant accident file contents. Without the Plaintiff's consent to, or court order, the transmission of this information to [Insurer's counsel], State Farm allowed an unauthorized intrusion into the Plaintiff's privacy interests which are contrary to the good faith obligation of utmost trust and fair dealings which State Farm owed to the Plaintiff.

The Applicant submits that the only remedy for the breach of good faith is to dismiss the Variation Order Application or, in the alternative, prevent the Insurer from using the information that it obtained from the BIU.

The Insurer argues that it has maintained its obligation of good faith in this matter, and denies an inference that certain employees have responsibilities to both departments within State Farm.

The Insurer argues that the ABU conducted its own investigation into the validity of the employment of the Applicant and discovered that the information provided was a clear misrepresentation of what was submitted by the Applicant. It is asserted that the ABU had a right to do its own investigation and not rely solely on the information provided by the tort investigation.

[2] [2015] O.J. No. 2076

The Insurer relies in part, on the *Personal Information Protection and Electronic Documents Act* ("PIPEDA")[3], section 7 (1) (b.1), under the heading of Collection without knowledge or consent, which reads as follows:

> 7(1) for the purposes of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if:
>
> (b.1) of information that is collected is contained in a witness statement and the disclosure is necessary to assess, process or settle an insurance claim;

The Insurer argues that it obtained a statement from the Applicant's alleged employer stating that the Insured did not work at Ambish Technologies, and PIPEDA allowed the information to be released. Further, the Insurer submits it always acted in good faith because it had the Applicant's authorization to gather and disseminate the Applicant's information because the Applicant signed the OCF-2 on February 23, 2007 and under Part 2 this form states the following:

> I authorize my employer to disclose to my insurance company or its authorized representative, any relevant information about my employment, including copies of relevant documents directly relating to my application for income replacement benefits and details of any collateral sources of income or benefits.

Further, the Applicant signed the OCF-1 and on the last page of that document it states:

> I am also aware that you and persons acting for you may be required or permitted by law to disclose this information to others without my knowledge or consent.

The Insurer also relies on the arbitration decision of *Al-Taee and West Elgin Mutual Insurance Company* [4]("Al-Taee"). The Insurer argues that decision deals with the exact issue as the present

[3] S.C 2000, c.5, as amended
[4] (FSCO A14-001776, March 4, 2016)

case. The Insurer argues that information from a tort investigation can be used in an accident benefit case. The Insurer argues the decision in *Al-Taee* should be followed, because in that decision the information was relevant, accurate and probative to the overall issue in the matter. The shared documents were ultimately allowed into evidence, despite the information not being properly obtained.

The Applicant argues that *Al-Taee* is wrongly decided. The Applicant argues that the arbitrator in that case did not deal with the present case's primary issue, namely whether there can be any sharing of information by the Insurer's two departments, and if so, whether such action constitutes bad faith by the Insurer.

The Applicant acknowledges that the arbitrator in *Al-Taee* did find that the Applicant's privacy had been breached, but also allowed the documents in as evidence because of the interest of having all relevant information before the arbitrator.

The Applicant argues that such a breach of the Applicant's privacy rights, which constitutes a bad faith act, should have consequences upon the Insurer. As such the Application for Variation should be dismissed or the information shared ought to be excluded as evidence at arbitration.

Decision:

I note that Arbitrator Snider made the factual determination that the ABD and the tort departments shared information. Therefore I do not need to examine this issue further.

I note that the subject matter of the Variation Application is based on a fraudulent misrepresentation by the Applicant in regards to his employment and the impact of that on his IRB entitlement. This issue is before the variation hearing arbitrator. I need not delve any further into this issue, other than to recognize that the alleged document statements, and or witnesses to the Insurer's claim, are relevant to this proceeding.

In my view, I must first ascertain whether or not a breach of privacy has occurred before I can determine what consequences should flow from that breach of good faith. The burden of proof of the privacy breach and the establishment of my authority and jurisdiction to provide the relief sought remains with the Applicant.

It is clear from reading *Dervisholli v Cervenak*[5] that consequences do flow from the breach of privacy. However, that case can be distinguished from the present case. In *Dervisholli* the information firewall was a one-way street firewall, with the sole purpose of preventing medical information being provided to the tort department from the accident benefit department. In contrast, the present case is about non-medical information being relayed from the tort department to the accident benefit department.

In my view, the Applicant has failed to provide me with the authority or jurisdiction in which I may act in this matter. It is simply beyond my jurisdiction to widen the scope of the firewall which was introduced by the insurance industry as the industry's best practice subsequently endorsed by the court. The concept is noble, but in my view, I do not have the power to provide the remedies the Applicant is seeking.

In regards to privacy breaches, the onus of proof of a breach is on the Applicant.
In my view, the evidence is clear that section 7 of PIPEDA allows for the gathering of information by the Insurer's organization. It is evidenced by the Insurer that its two departments turned their minds to this question. This is reflected in the log notes provided by the Insurer. The Applicant admits that there is no medical information contained within the documents transferred to and from the two departments. The properly executed OCF-1 and OCF-2 clearly provide that information the Applicant provided to the Insurer could be back-checked and verified by the Insurer, at any time by any department. I remain unpersuaded that a breach of the Applicant's privacy, or a breach of his expectations of privacy, has occurred.

For these reasons, the Applicant's motion is dismissed in its entirety.

[5] Supra, Footnote 2.

Expenses:

Neither party made submissions on expenses. I defer a decision on expenses to the Variation hearing arbitrator.

	May 31, 2018
Charles Matheson Arbitrator	Date

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ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. The Applicant's motion is dismissed in its entirety.

May 31, 2018

Charles Matheson
Arbitrator

Date