

Accident Benefits “Deemed Failed Mediation”

Cornie v. Security National; Hurst v. Aviva; Singh v. Aviva and Clarke v. State Farm: Collective Motion addressing the issue of a “Deemed Failed Mediation”

On February 8, 2012 the Ontario Superior Court of Justice released their decision regarding a collective motion brought by four defendant insurance companies, all of which sought to strike the Statement of Claim, effectively dismissing the actions; or, in the alternative, have the actions stayed. At the root of the motions was the issue of whether a mediation can be “deemed” to have failed if it has not taken place within the 60 day time limit as set out in the *Dispute Resolution Practice Code* (“DRPC”).

In each of the four cases before the Court, the Plaintiffs filed their request for mediation, the Plaintiffs’ solicitor wrote to the Dispute Resolution Services Mediation Unit of FSCO asking them to send a mediator’s report confirming the mediation had failed and relied on sections 19 and 21 of the *DRPC*. In response to the Plaintiffs’ request for a failed mediation, FSCO advised that a Report of Mediator could not be issued confirming failure of all the issues in dispute because they have not been mediated within 60 days of the filing of the applications. FSCO further advised that due to the dramatic increase in application volume in recent years a significant backlog has developed, resulting in longer wait times for assignment. Mr. Justice Sloan reasoned that:

- The 60 day period established in Section 19 of the *DRPC*, which states that a mediation must be concluded within 60 days of the filing of an application for mediation, is mandatory and not directory.
- Sections 281.1(1) & 281.1(2)(b) of the *Insurance Act*, as amended, allows for the extension of the limitation period beyond the two years and if the actual mediation does not take place it does not undermine the limitation period set out in the *Insurance Act*.
- Although FSCO advised the filing of the Application for Mediation does not take place until a mediator is appointed, nowhere in the *DRPC* does it state that the 60 days, as referred to in Rule 19.1, does not commence to run until a mediator is appointed.
- Even though courts have no jurisdiction until there is a failed mediation, the *Insurance Act* is clear that 60 days after an accident victim has filed an application for mediation s/he has more than once choice to proceed, one of which is to commence a court action.
- Section 280(8) of the *Insurance Act* could still be complied with, despite the allowance for a “deemed mediation/deemed failure of mediation” by the mediator as there is no reason why a mediator could not issue a report at the request of either parties stating that the mediation failed because the prescribed time period expired.
- Prejudice to the Plaintiffs’ far outweigh any prejudice to the insurance companies not being able to force the Plaintiffs into mediation after 60 days.
- If Plaintiffs cannot get a mediation in accordance with the published rules, they can at least serve a Statement of Claim in an effort to get the Statutory Accident Benefits they feel they are entitled to receive.

Ultimately, Justice Sloan dismissed all four motions with costs. At the crux of the decision, Justice Sloan laid a heavy hand on FSCO’s Dispute Resolution Services’ Mediation Unit, concluding that it “is functioning without timelines and has been doing so for years.” Justice Sloan further found it “preposterous” that accident victims must simply wait for a mediation to take place without a firm timeline and that they should not remain “in perpetual limbo.” It is uncertain as to whether this decision will be appealed by any of the insurers at this time. Dutton Brock will keep you up to date on this decision.

If you would like more information on motor vehicle insurance, please do not hesitate to call.

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