



FSCO A14-001776

**BETWEEN:**

**ABDULRAHMAN AL-TAEE**

**Applicant**

**and**

**WEST ELGIN MUTUAL INSURANCE COMPANY**

**Insurer**

## **DECISION**

**Before:** Suesan Alves

**Heard:** November 30, 2015 and January 5, 2016 by teleconference call

**Appearances:** L. Scott Smith for Mr. Al-Taee  
Talaal Bond for West Elgin Mutual Insurance Company

**Issues:**

Counsel for the Applicant brought a motion at the beginning of the hearing for an Order excluding the reports of Kods Engineering dated April 29, 2014. Counsel for the Insurer submits that the documents are relevant and admissible and that none of the grounds raised by counsel for the Applicant render the reports inadmissible. Both parties seek expenses of the motion.

. The issues in this hearing are:

1. Should the Kods engineering reports dated April 29, 2014 be excluded from the hearing?
2. Which party is entitled to its expenses of this motion?

## **Result:**

1. The reports are relevant and are admissible.
2. I defer the determination of the expenses of this motion until the hearing is concluded.

## **EVIDENCE AND ANALYSIS:**

### **Background**

In this arbitration, Mr. Al-Tae claims income replacement benefits, interest and expenses from West Elgin Mutual Insurance Company. Mr. Al-Tae reported that on September 17, 2011 the vehicle he was driving was struck by an unidentified driver who fled the accident scene. West Elgin disputes Mr. Al-Tae's entitlement to all the relief it seeks.

In addition to claiming statutory accident benefits from West Elgin, Mr. Al-Tae also advanced a claim against the unidentified driver under section 265 of the *Insurance Act*, R.S.O 1990, c.I.8 as amended. West Elgin responded to that claim.

West Elgin assigned different adjusters to handle the first party claim and the unidentified driver claim. West Elgin also retained counsel in different law firms to represent it in relation to the different claims.

The adjuster or the law firm handling the defence of the claim against the unidentified driver retained Kods Engineering to provide an opinion as to whether the damage to the vehicles in the collision was consistent with the reported description of the accident. Kods Engineering provided that report as well as a second report in which it provided an opinion in relation to the biomechanical forces Mr. Al-Tae would have experienced during the collision.

On October 29, 2014, counsel for West Elgin in the unidentified driver claim produced the engineering reports to counsel for the Applicant. Counsel for West Elgin suggested that the report be produced to the accident benefits carrier. Counsel for Mr. Al-Tae did not agree to delivery of the reports to the accident benefits adjuster or consent to sharing of the reports.

On March 27, 2015, shortly before a private global mediation, the Kods Engineering reports were disclosed to counsel for the Insurer in the accident benefits claim. West Elgin's accident benefits adjuster then denied the Applicant's entitlement to accident benefits on the basis of misrepresentation under section 53 of the *Schedule*.

On or about April 30, 2015, counsel for the Insurer delivered a list of expert witnesses to counsel for the Applicant. The list included the engineer(s) who authored the reports. Counsel for the Applicant objected to the inclusion of the engineer(s) as witnesses and took the position that the reports had been improperly shared by West Elgin's counsel or adjusters in the tort action.

Counsel for both parties agreed to seek a ruling at the outset of the hearing as the ruling would have a significant impact on the length and costs associated with the arbitration.

### **Positions of the parties**

Counsel for Mr. Al-Tae submits that the engineering reports are inadmissible in this arbitration on two grounds. Firstly, he submits that West Elgin breached its duty of utmost good faith owed to Mr. Al-Tae by piercing its firewalls and sharing the engineering reports dated April 29, 2014 without the consent of its insured. Secondly, he submits that Mr. Al-Tae had a reasonable expectation of privacy in issues arising from the accident of September 17, 2011 and the Insurer violated Mr. Al-Tae's privacy rights by sharing the engineering reports with the accident benefits adjuster.

Counsel for West Elgin submits the firewall exists to prevent the flow of medical information from the accident benefits file to the tort file. However, there is no firewall which prevents the flow of information from the liability file to the accident benefits file. Counsel for Insurer submits that the Applicant does not have a reasonable expectation of privacy and the reports are admissible.

### **Analysis**

I will first determine whether the evidence is relevant then decide whether it should be excluded based on a breach of the firewall or a breach of Mr. Al-Tae's expectation of privacy.

### *Relevant?*

Section 15 of the *Statutory Power Procedures Act*, R.S.O. 1990 c. S22 provides that a tribunal may admit evidence at a hearing which is relevant, however, nothing is admissible that "would be inadmissible in a court by reason of any privilege under the law of evidence; or that is inadmissible under any statute.

Counsel for the Insurer submits that the Kods Engineering reports are relevant because they provide evidence "going to the nature, extent and severity of the collision and raise questions regarding Mr. Al-Tae's credibility to the extent that the opinion evidence, if accepted, directly contradicts Mr. Al-Tae's report of the nature and severity of the collision." West Elgin relied on those reports to deny Mr. Al-Tae's entitlement to statutory accident benefits based on a material misrepresentation.

I find that the opinion evidence if accepted, is relevant to the issues of Mr. Al-Tae's claims for income replacement benefits, interest and expenses, which are in dispute in this arbitration.

I now turn to whether the reports are inadmissible on the grounds raised by counsel for the Insurer.

### *A breach of the firewall?*

I accept counsel for the Applicant's submission that West Elgin owes a duty of good faith to Mr. Al-Tae. However, I am not persuaded that the firewall was breached.

This is because Bulletin No. 184 issued by the Insurance Bureau of Canada in July 1997, entitled "Internal Transfer of Information from Accident Benefit Adjuster to Tort Adjuster" deals as its heading suggests, with the transfer of information from the accident benefits adjuster to the tort adjuster. According to this document all members of the Insurance Bureau of Canada that under

Rule 13 of the All Industry Claims Agreement which states: Insurers agree, as a matter of corporate policy, they shall not gather medical information from doctors or their employees, without the written consent of the patient, subject only to any right to such information under law or rules of practice.” The Bulletin goes on to address the need for Insurers to maintain firewalls in order to prevent the breach of this Rule.

The focus of the Bulletin is on preventing the tort adjuster from accessing medical information in the accident benefit file. There is nothing in the Bulletin which indicates that the transfer of information from the tort file to the accident benefits file is prevented by the firewall. As counsel for the Insurer put it, the firewall is one way; it prevents access to the accidents benefit file.

In *Klingbeil (Litigation Guardian of) v. Worthington Trucking Inc. et al.*, (1997), 36 O.R. (3d) 656 (Gen. Div.) one law firm acted for the insurer in relation to the accident benefit claims and the liability claims arising from the same accident. Justice Ferrier held that this was improper unless the insured consented. Justice Ferrier held that while he was not bound by the IBC Bulletin memorandum, he endorsed it, and went on to impose additional restrictions. In that context, he stated that only with the consent of the claimant in the no fault benefits claim could an insurer transfer information “from one file to the other.”

This could be read as a reference to the prohibition of transferring information from the accident benefits file to the tort file or as a statement that the firewall works in both directions and that information could not be transferred from either file without the insured’s consent. The latter interpretation is not consistent with the underlying purpose of the Bulletin. If the latter interpretation was Justice Ferrier’s intention, he cited no authority for this proposition and in my view his comments were *obiter*. For these reasons I am not persuaded that the *Klingbeil* decision is authority for the proposition that the firewall operates in both directions.

One of the Kodsí reports includes a copy of a medical brief and Mr. Al-Taeé’s statement among the documents reviewed by the engineer. I asked counsel for the Applicant whether there was any allegation that the medical information on which Mr. Kodsí relied had been improperly obtained from the accident benefits file. Counsel for the Applicant responded that there had been

no impropriety, that the documentation had been disclosed by counsel for the Applicant to counsel for the Insurer in the tort action as part of his production obligations in that action.

### *A reasonable expectation of privacy?*

Counsel for the Applicant submits that his client had a reasonable expectation of privacy. He provided no statute or case law to support this position. I am not persuaded that Mr. Al-Tae'e could be said to have a reasonable expectation of privacy in relation to the engineering reports if the unidentified driver claim is a tort claim.

### *The unidentified driver claim*

The motion was argued on the basis that the unidentified driver claim is a tort claim. However, Mr. Al-Tae'e's claim under section 265 of the *Insurance Act*, is a claim based on the insurance contract, and as between him and West Elgin is more appropriately viewed as a first party claim. *Schmitz v. Lombard General Insurance Company of Canada 2014 ONCA 88(CanLII)*; *Chahine and Al-Dabak v. Grybas*, 2014 ONSC 4698,

Considering the firewall and privacy arguments raised by counsel for the Applicant in the context of that the s.265 claim is a first party claim, I find that there was no breach of the firewall because counsel for the Applicant advised that had been no impropriety in the provision of medical information to the unidentified driver claim file.

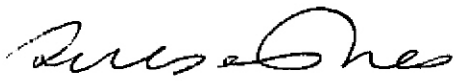
However, Mr. Al-Tae'e's right to maintain as private the information in the unidentified driver claims file has been breached. Counsel for the Applicant was asked to consent to the dissemination of the engineering reports to the accident benefits adjuster. He refused. The caselaw indicates that the information can only be disseminated with the consent of the insured or pursuant to an order.

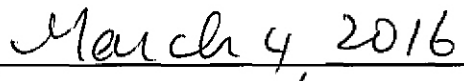
Although Mr. Al-Tae's privacy rights were violated, I nevertheless admit the reports in the interest of having all relevant evidence before me to make a determination on the merits. I also do so because of the principle that a privilege or privacy interest is waived when there is a need to defend against a claim. *Cook v. Ip.* (1985), 52 O.R. (2d) 289, Ont. C.A.; *Kagan and CAA Insurance Company* ( FSCO A12-003935 June 2, 2014 )

For these reasons I am persuaded that the Kods Engineering reports should be admitted. The hearing will resume as scheduled on May 17, 2016 in London.

**EXPENSES:**

I defer the expenses of this motion to the conclusion of the hearing

  
\_\_\_\_\_  
Suesan Alves  
Arbitrator

  
\_\_\_\_\_  
Date

Financial Services  
Commission  
of Ontario

Commission des  
services financiers  
de l'Ontario



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**BETWEEN:**

**ABDULRAHMAN AL-TAEE**

**Applicant**

and

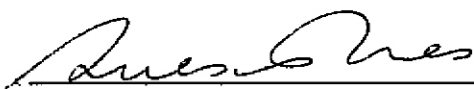
**WEST ELGIN MUTUAL INSURANCE COMPANY**

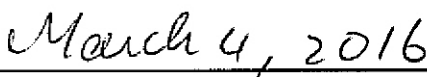
**Insurer**

### **ARBITRATION ORDER**

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

1. The Kodsi Engineering reports are relevant and are admissible.
2. The determination of the expenses of this motion is deferred until the hearing is concluded.

  
\_\_\_\_\_  
Susesan Alves  
Arbitrator

  
\_\_\_\_\_  
Date