



Neutral Citation: 2008 ONFSCDRS 55

FSCO A07-000135 and A07-000136

**BETWEEN:**

**ABDUL ZAHER WAHIDPUR**

**Applicant**

**and**

**UNIFUND ASSURANCE COMPANY**

**Insurer**

## **DECISION ON A PRELIMINARY ISSUE**

**Before:** Robert A. Kominar

**Heard:** November 20, 2007, at the offices of the Financial Services Commission of Ontario in Toronto.

**Appearances:** Karl Girdhari for Mr. Wahidpur  
Mauro D'Agostino for Unifund Assurance Company

**Issues:**

The Applicant, Abdul Zaher Wahidpur, was injured in motor vehicle accidents on December 2 and December 15, 2005. He applied for income replacement benefits from Unifund Assurance Company ("Unifund"), payable under the *Schedule*.<sup>1</sup> Unifund requested information about collateral insurance coverage prior to determining entitlement to this benefit. The parties were unable to resolve their disputes through mediation, and Mr. Wahidpur applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup> *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

The preliminary issue is:

1. Is Mr. Wahidpur precluded from receiving income replacement benefits for the period between February 27, 2006 and June 6, 2007, the date on which he provided Unifund with a duly completed authorization to request information about his entitlement to short-term collateral disability benefits from RBC, due to his failure to comply with requests made under section 33 of the *Schedule* for that information.

**Result:**

1. Mr. Wahidpur is precluded from receiving income replacement benefits from February 27, 2006 through June 6, 2007.
2. If the parties cannot agree on expenses of the preliminary issue hearing, an expense hearing may be requested as provided for in the *Dispute Resolution Practice Code* and I shall assess them.

**EVIDENCE AND ANALYSIS:**

**Evidence of Maria Jolly**

Ms Jolly is an employee of Unifund and her role is to represent the company at FSCO accident benefit mediations. She was the representative for Unifund during Mr. Wahidpur's mediation. Initially, Mr. Girdhari objected to her testifying if she was going to be asked to reveal what settlement discussions had occurred during the mediation. I agreed that it was not relevant or appropriate for Ms Jolly to relate the content of any such settlement discussions in the hearing. Mr. D'Agostino advised that it was not his intention to have Ms Jolly reveal any confidential information, but only to address her understanding of the nature of the dispute the insurer had with Mr. Wahidpur's claims at the time of the mediation. After considering the matter I allowed Ms Jolly to testify about her involvement with the FSCO mediation process but not about any settlement discussions.

Ms Jolly testified that she had met with the file adjuster prior to the mediation and learned from him that Unifund's concerns about Mr. Wahidpur's income replacement benefit claim primarily related to an ongoing failure to provide the Insurer with information about a collateral insurer

they had specific knowledge of. Her recollection was that at the mediation the Applicant's legal representative explicitly undertook to provide information about collateral benefits to Unifund. To her knowledge that information was never provided by the Applicant. On cross-examination, Ms Jolly agreed that her notes, recorded after the mediation, simply state that all of the issues in dispute failed. Her recollection of the mediation was that, although the substantive issues failed, the agreement reached between the parties was that, after the information requested by Unifund was provided, Mr. Wahidpur's entitlement to income replacement benefits would be reviewed again.

It is evident that the Report of Mediator in this case records none of this discussion. I take notice of the fact that mediation reports at the Commission typically do not speak to such matters. Ms Jolly also conceded that she never requested that the mediator amend the report to include what she suggests was a procedural agreement reached by the parties. And here I further take notice of the fact that mediation reports at the Commission do specifically allow for recording agreements such as legal representatives' undertakings to produce the specific materials.

I have no reason to doubt Ms Jolly's recollection of the undertakings given by the Applicant's legal representative at the mediation, and in fact I find that her recollections are quite plausible given the nature of the dispute between the parties at the time. However, I also find that Ms Jolly's evidence only has weight in the context of supporting the evidence of the adjuster, which I find to be much more directly relevant to and probative of the issues in this hearing.

Although mediation reports can record the Mediator's conclusions that certain documentation which had been requested in advance and not produced was necessary for effective mediation to occur, I have no ability on the evidence before me to determine whether the lack of information in the Report of Mediator on this point arose out of the mediator's decision that the information wasn't necessary for mediation, or because it wasn't ever discussed. For these reasons I do not rely heavily on Ms Jolly's testimony, although I do not discount it entirely. The Report of Mediator at the Commission is a more fulsome document for recording outcomes than parties at times realize and it would be in their interests to avail themselves of the opportunities available to record all of their specific agreements there, not simply that substantive issues failed or were

resolved. As evidenced by this case, it is often the procedural and interim agreements that give rise to ongoing disputes that end up in arbitration.

### **Roderick Thorne's evidence**

Mr. Thorne was the adjuster who handled Mr. Wahidpur's claim for accident benefits from the outset. He testified that he was responsible for adjusting claims arising out of two accidents which Mr. Wahidpur was involved in on December 2, 2005 and December 15, 2005. He recalls that he first spoke to Mr. Wahidpur on the telephone on December 19, 2005. At that time he obtained details of the accidents from Mr. Wahidpur including his: family status, the nature of his injuries, his employment status, etc. Mr. Thorne testified that, on December 19, 2005, Mr. Wahidpur told him that, after the accident which had occurred on December 2, 2005, he returned to work and that he had suffered no accident-related injuries. He also told Mr. Thorne that he personally had not engaged in any housekeeping duties prior to that accident.

Mr. Thorne followed up on this discussion by mailing Mr. Wahidpur an application for accident benefits package. Mr. Wahidpur completed and returned this package to Mr. Thorne in early January, 2006. Within that application Mr. Wahidpur advised Unifund that he was employed and working at the time of the accident. Mr. Wahidpur was apparently not legally represented at the time. Unifund acknowledged receipt of this application for benefits in writing and requested that Mr. Wahidpur provide them with a disability certificate (OCF-3) and an employer's confirmation of income (OCF-2). Mr. Thorne testified that from the claim number on the correspondence he knows that this request was made in relation to the second accident, and that this is consistent with Mr. Wahidpur having advised him on the telephone that he did not sustain any injuries in the first accident.

Mr. Wahidpur did provide Unifund with a disability certificate promptly but did not provide an OCF-2 for some time. In an explanation of benefits (OCF-9) dated February 2, 2006, relating to the second accident and bearing its identifying claim number, Mr. Thorne requested that Mr. Wahidpur provide him with information related to the short-term disability coverage

available to him from his employer. Mr. Thorne specified that he required this information to calculate the potential quantum of an income replacement benefit if entitlement were established.

On March 1, 2006, Mr. Thorne received a new application for accident benefits, dated February 26, 2006, which was related to the December 15, 2005 accident; this time prepared by a paralegal, Mr. Loreto Scarolo. Within that application it was disclosed that Mr. Wahidpur was employed at the time of the accident by a firm named Jeldwin, had access to short term disability benefits there and also had actually received benefits for approximately three to four months from the short-term disability carrier commencing in December, 2005.

When Mr. Thorne received an OCF-2 from Mr. Wahidpur's employer it clearly indicated that he had access to benefits from both Sun Life and RBC. The policy numbers associated with these plans were identified to Unifund.

On November 21, 2006, Mr. Thorne received yet another application for accident benefits from Mr. Wahidpur, this time related to the earlier accident which had occurred on December 2, 2005. Of note is that Mr. Wahidpur had a different legal representative on this file, Mr. Henry Goldentuler. Contrary to the information contained in earlier applications, this one indicated that Mr. Wahidpur was single at the time of the accident. It also indicated that Mr. Wahidpur continued to work after the accident and had benefits through Sun Life which he had been receiving during the last year.

To summarize, as of November 21, 2006, Mr. Thorne had received three different applications for accident benefits from Mr. Wahidpur: one with no legal representative involved, one with a paralegal involved, and one with a lawyer involved. Mr. Goldentuler was asserting a claim in relation to the December 2<sup>nd</sup> accident and Mr. Scarolo and Mr. Wahidpur personally had asserted claims with regard to the December 15<sup>th</sup> accident. Mr. Goldentuler at that time did not refer to his involvement in any way with the December 15<sup>th</sup> accident.

In an OCF-9, dated May 6, 2006, Mr. Thorne renewed his request to Mr. Wahidpur for information about collateral benefits, as he had received no information about the payments

which Mr. Wahidpur stated he that had been receiving from his short-term disability carrier. He sent this request by mail both to Mr. Wahidpur and to Mr. Scarolo, the paralegal representative. Since he was communicating with regard to the December 15<sup>th</sup> accident he did not copy Mr. Goldentuler with his request. Mr. Thorne explained that it is not unknown for people to retain different legal representatives for different accidents and thus he did not believe he had any authority to involve Mr. Goldentuler in the matter at that time. As far as he had been advised by Mr. Wahidpur, Mr. Scarolo was properly retained on this first accident and Mr. Thorne had no notice that that relationship had ended.

Mr. Thorne was referred by counsel to a letter dated March 30, 2006 which seems to have been sent to the property damage adjuster by Mr. Goldentuler, advising that person that he was Mr. Wahidpur's legal representative on the December 15<sup>th</sup> accident. When Mr. Thorne learned about Mr. Goldentuler's involvement in the property damage matter, he wrote to him advising that Unifund had another legal representative on record and that it would be necessary for that representative to withdraw before they could recognize him.

No response to this correspondence was forthcoming from Mr. Goldentuler's office and so Mr. Thorne wrote, once again on May 4, 2006, advising Mr. Goldentuler that they were in receipt of claims which he sent in on Mr. Wahidpur's behalf related to the December 2<sup>nd</sup> accident; but that until the representation issue was resolved on the December 15<sup>th</sup> accident, they could not deal with him on that file. Basically Unifund took the eminently sensible position that Mr. Wahidpur could only have one legal representative on any given accident at any given time. Mr. Thorne testified that he had numerous discussions with various support staff at Mr. Goldentuler's office about this problem and that he was assured that the matter would be addressed.

Getting back to the documentation that Unifund was requesting in regards to the collateral coverage, it was not provided by Mr. Wahidpur, Mr. Scarolo or Mr. Goldentuler.

On December 27, 2006, Mr. Thorne sent an OCF-9 to both Mr. Wahidpur and Mr. Goldentuler relating to the December 15<sup>th</sup> accident. When he was asked why this documentation was sent to Mr. Goldentuler even though he never provided Unifund with evidence of the withdrawal of the

previous legal representative, he stated that by that time Mr. Goldentuler had appeared at FSCO mediations related to both accident dates, and that if FSCO had now accepted him as the appropriate legal representative, then it was acceptable for Unifund to do so as well.

This relates back to the evidence of Ms Jolly who represented Unifund at the mediation. Mr. Thorne stated that he had advised her that he had been requesting information about this collateral coverage issue for months. He further testified that Ms Jolly's report to him after the mediation was that Mr. Goldentuler had undertaken to provide the information.

After obtaining this feedback on the mediation from Ms Jolly, Mr. Thorne sent out another OCF-9 dated December 27, 2006, this time with a bright green sticker attached to it reading "ALERT." It stated that pursuant to section 33 of the *Schedule*, Unifund would not pay benefits until the material that it had been requesting regarding collateral benefits was provided. He allowed Mr. Wahidpur a period of ten days for compliance. Mr. Thorne also requested that Mr. Wahidpur provide him with an authorization so that he could personally attempt to get the disability file from RBC and perhaps expedite matters for both parties. Mr. Thorne testified that he affixed this green sticker to the form in an effort to get Mr. Wahidpur and Mr. Goldentuler to recognize that the Insurer was very serious in its request for this relevant information and that they expected it to be responded to promptly.

In a letter from Mr. Goldentuler which appears to be dated January 3, 2006, but which Mr. Thorne testified is actually date stamped as being received on January 7, 2007, a request seems to have been made by Mr. Wahidpur's counsel to RBC for a copy of his disability file. This letter advised that Mr. Goldentuler's office would produce the file to Unifund once it was received from RBC. Mr. Thorne had also requested copies of Mr. Wahidpur's T4's and Notices of Assessment. These documents were not produced to Unifund. Mr. Wahidpur did however ultimately provide Unifund with a release to obtain the collateral insurance file.

Mr. Thorne testified that he had by that date made many phone attempts to reach Mr. Goldentuler but that his support staff always told him that he was unavailable and would return the call. Mr. Goldentuler, according to Mr. Thorne's evidence, never returned these calls.

Mr. Thorne specifically recalls discussing Unifund's need for information about collateral insurance with an employee of Mr. Goldentuler's, one Maria Gadzinska. She specifically promised him that Mr. Goldentuler would get back to him, but again he never did.

Mr. Thorne was asked to identify the Response to the Application for Arbitration, which once again stated that the Insurer required Mr. Wahidpur's employer's file, and collateral benefit information to proceed to determine his entitlement to income replacement benefits. When Mr. Thorne ultimately attempted to obtain the employer's file himself, he was advised that the release form which Mr. Wahidpur had executed and provided to him was insufficient due to there being some unclarified form of dispute going on in the file. The employer's representative did however disclose to Mr. Thorne that their information was that Mr. Wahidpur had been out of the country for most of 2006. Mr. Thorne inquired as to whether RBC just administered short-term disability benefits or whether they provided them and was advised that there was some issue between the employer and RBC as well. In effect, Mr. Thorne received no useful information from the employer regarding Mr. Wahidpur's collateral benefits.

Ultimately, by May 17, 2007, approximately one and a half years after the accident, Unifund had received no response from anyone clarifying the nature of Mr. Wahidpur's collateral insurance coverage, other than some vague information stating that he actually had received some form of these benefits. This obviously was important information for Unifund to take into account in assessing his entitlement to income replacement benefits. Beyond this, Mr. Thorne testified that he was never offered any explanation from any representative or from Mr. Wahidpur personally as to why this information had not been forthcoming, despite the multiple requests made for it over time.

The arbitration pre-hearing took place on June 6, 2007. No production of the requested collateral benefit information was made prior to that. At the pre-hearing no update on Mr. Wahidpur's employment status was given to Unifund, nor did he produce any of the requested income tax records to support his claims. Mr. Thorne noted that the Insurer's concerns under section 33 of the *Schedule* were specifically discussed at the pre-hearing and at that time Mr. Goldentuler did not offer any explanation for the delay in producing the information. Mr. Wahidpur did not speak



at all during the pre-hearing according to Mr. Thorne. So Unifund left the arbitration pre-hearing without any more information than they had coming into it.

On June 11, 2007, Unifund was provided with a copy of a Statement of Claim that was issued by Mr. Wahidpur against RBC, dated December 6, 2006. Obviously this legal action was commenced some six months before the pre-hearing in this arbitration took place. Yet its existence was not disclosed at the pre-hearing. Mr. Thorne advised that only at this point in time was Unifund advised that there was some issue surrounding collateral benefits. As of the time of the pre-hearing Mr. Thorne stated that Unifund still had no idea as to what benefits Mr. Wahidpur was entitled to or might receive in the future from this collateral insurer, although it did know that he had received some such benefits.

## ANALYSIS

The relevant section of the Schedule in this case is section 33 which reads as follows:

### DUTY OF APPLICANT TO PROVIDE INFORMATION

**33. (1)** A person applying for a benefit under this Regulation shall, within 10 business days after receiving a request from the insurer, provide the insurer with the following:

1. Any information reasonably required to assist the insurer in determining the person's entitlement to a benefit.
2. A statutory declaration as to the circumstances that gave rise to the application for a benefit.
3. The number, street and municipality where the person ordinarily resides.
4. Proof of the person's identity. O. Reg. 403/96, s. 33 (1); O. Reg. 546/05, s. 7.

**(1.1)** If requested by the insurer, a person who applies for a benefit under this Regulation as a result of an accident shall submit to an examination under oath, but is not required to,

- (a) submit to more than one examination under oath in respect of matters relating to the same accident; or
- (b) submit to an examination under oath during a period when the person is incapable of being examined under oath because of his or her physical, mental or psychological condition. O. Reg. 281/03, s. 12 (1).

**(1.2)** A person is entitled to be represented at his or her own expense at the examination under oath by such counsel or other representative of his or her choice as the law otherwise permits. O. Reg. 281/03, s. 12 (1).

**(1.3)** The insurer shall make reasonable efforts to schedule the examination under oath for a time and location that are convenient for the person and shall give the person reasonable advance notice of the following:

1. The date and location of the examination.
2. That the person is entitled to be represented in the manner described in subsection (1.2).
3. The reason or reasons for the examination.
4. That the scope of the examination will be limited to matters that are relevant to the person's entitlement to benefits. O. Reg. 281/03, s. 12 (1).

(1.4) The insurer shall limit the scope of the examination under oath to matters that are relevant to the person's entitlement to benefits under this Regulation. O. Reg. 281/03, s. 12 (1).

(2) The insurer is not liable to pay a benefit in respect of any period during which the insured person failed to comply with subsection (1) or (1.1). O. Reg. 281/03, s. 12 (2).

(3) Subsection (2) does not apply in respect of a non-compliance with subsection (1.1) if,

- (a) the insurer fails to comply with subsection (1.3) or (1.4); or
- (b) the insurer interferes with the insured person's right to be represented as described in subsection (1.2). O. Reg. 281/03, s. 12 (2).

(4) If an insured person who failed to comply with subsection (1) or (1.1) subsequently complies with that subsection, the insurer,

- (a) shall resume payment of the benefit, if a benefit was being paid; and
- (b) shall pay all amounts that were withheld during the period of non-compliance, if the insured person provides a reasonable explanation for the delay in complying with the subsection. O. Reg. 281/03, s. 12 (2).

The parties do not differ on the issue of whether information about collateral insurance benefits are "reasonably required" by the insurer on an income replacement benefit claim. Clearly they are relevant information. Where they do differ is in their interpretation as to whether an insurer is entitled to require that information in determining "entitlement" to income replacement benefits as set out in section 33 (1) (1). Mr. Girdhari argued that the pre-hearing letter in this arbitration explicitly stated that only "entitlement" to income replacement benefits was in issue here, not the quantum of those benefits and that short-term disability payments are only relevant to assessing quantum. Mr. D'Agostino argues however that entitlement is not an abstract determination and clearly involves an assessment by the insurer of "what amount," if any, the insured person may be entitled to. His position is that Mr. Wahidpur may have been entitled to anywhere between \$400 per week and zero depending on the short-term disability situation.

The literal and technical approach to reading the *Schedule* which Mr. Girdhari recommends is counterintuitive and manifestly impractical. He essentially is confusing "entitlement" with "eligibility." Part II of the *Schedule* codifies the income replacement benefit scheme in Ontario.

Part II is subdivided into sections dealing with eligibility for income replacement benefits, period of the benefits, amount of the benefit, collateral payments, gross income calculations, adjustment after age 65, entitlement arising after age 65, and return to employment.

In my view, entitlement to an income replacement benefit must be interpreted as being entitlement to some specific amount. Assessing entitlement to income replacement benefits has multiple aspects. A person must satisfy the insurer that they, for instance, were actually employed at the time of the accident, that they meet the requisite disability test, that they reported the income underlying their claim for income tax purposes if necessary, the amount of their net income at the time of the accident, as well as whether they have entitlement to any other collateral insurance which might offset the requirement of an auto insurer to pay income replacement benefits. It is after considering all of these factors that an auto insurer decides whether an insured is entitled to income replacement benefits in some specific amount.

Mr. Girdhari argues that it is reasonable for an insured person to disclose that they have been in receipt of income replacement from a collateral insurer and then consistently fail for over one and a half years to disclose any meaningful information about that entitlement, notwithstanding that he had at least two legal representatives working for him during that time period, because the Insurer should have made a decision on entitlement and then worried about quantum later. With respect, I completely disagree with this analysis, if for no other reason than if an insurer makes a determination that an insured person is entitled to income replacement benefits, then they are required to pay those benefits, but without sufficient relevant information, it is manifestly unfair to expect an insurer to guess at the proper quantum. I appreciate that at times insurers do accept informal information to get the process started with a view toward adjusting what is owed after formal documentation arrives. However, that approach, which is the one I find that Mr. Girdhari and Mr. Goldentuler seem to be advocating, is not nearly as reasonable when there is clear evidence that some form of collateral coverage was being paid. It is unfair to expect that an insurer should just pay the maximum income replacement benefit under the *Schedule* and then make a claim for repayment if it later finds out that it paid too much. This approach is impractical if for no other reason than that demands for repayment must be made within one

year, and taking this case as an example, it is quite conceivable that if benefits had been overpaid they would not have been recoverable by the insurer.

Section 33 is not to be read as punitive in my view. Its function however is to provide insurers a mechanism to clearly communicate to an insured person their need for relevant information in adjusting claims. It is trite to say that relationships between claimants and first party insurers are not intended to be adversarial. But that does not mean that they are so informal and collegial that there is no need for the parties to rationally support their claims with documentation and other forms of evidence. Perhaps these relationships are best governed by the *glasnost* era phrase “trust by verify.”

There must be some flexibility in sharing of information between insured persons and insurers. The reality is that it often takes time to obtain the supporting documentation which an insurer needs from third parties. However, when the failure to provide clearly relevant information to an insurer becomes a pattern of avoidance, which I find to be the case here, then it is appropriate for the mechanism of section 33 to be employed. I find that Mr. Thorne consistently over a long period of time requested information about collateral coverage from Mr. Wahidpur and his legal representatives and was not accorded even the courtesy of a phone call explaining what, if any, problem there was in providing this information. I particularly find it troubling that the evidence I have is that both at the mediation and at the pre-hearing undertakings were given by Mr. Goldentuler to provide this information which were not honoured. Mr. Goldentuler did not testify at this arbitration. When I asked Mr. Girdhari after his submissions why Mr. Goldentuler’s office didn’t reply to any of Mr. Thorne’s requests for this information, he had no response other than that he could not speak for Mr. Goldentuler.

In conclusion, I find that there was a consistent pattern of denial of relevant information in assessing Mr. Wahidpur’s entitlement to income replacement benefits and further that he was given explicit notice that the Insurer was relying on section 33 to obtain this information. As a result, I find that Mr. Wahidpur is not entitled to income replacement benefits for the period of time during which he failed to provide information about his collateral benefits to Unifund.

**EXPENSES:**

If the parties cannot agree on expenses of the preliminary issue hearing, an expense hearing may be requested as provided for in the *Dispute Resolution Practice Code* and I shall assess them.

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Robert A. Kominar  
Arbitrator

April 2, 2008

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Date



Neutral Citation: 2008 ONFSCDRS 55

FSCO A07-000135 and A07-000136

**BETWEEN:**

**ABDUL ZAHER WAHIDPUR**

**Applicant**

and

**UNIFUND ASSURANCE 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. Mr. Wahidpur is precluded from receiving income replacement benefits from February 27, 2006 through June 6, 2007.
2. If the parties cannot agree on expenses of the preliminary issue hearing, an expense hearing may be requested as provided for in the *Dispute Resolution Practice Code* and I shall assess them.

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Robert A. Kominar  
Arbitrator

April 2, 2008

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Date