



Neutral Citation: 2013 ONFSCDRS 154

FSCO A12-000077

BETWEEN:

ELIANA ANTON

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Anne Sone

Heard: April 24, 2013, at the offices of the Financial Services Commission of Ontario in Toronto and May 24, 2013 by telephone.

Appearances: Harley Kruger for Mrs. Anton
Ryan Kirshenblatt for Economical Mutual Insurance Company

Issue:

The Applicant, Eliana Anton, was injured in a motor vehicle accident on February 16, 2009. She applied for statutory accident benefits for caregiving, attendant care and housekeeping from Economical Mutual Insurance Company (Economical), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mrs. Anton applied for arbitration

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

at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Is Mrs. Anton precluded from seeking entitlement to caregiving, attendant care, and housekeeping and home maintenance benefits because she refused to attend scheduled insurer's examinations?

Result:

1. Mrs. Anton is precluded from seeking entitlement to benefits for caregiving, attendant care, and housekeeping and maintenance benefits during the period that she did not submit to examinations after May 25, 2009.

Overview:

As a result of her accident on February 16, 2009, Ms. Anton testified that she sustained injuries to her head, neck, shoulders, back and left knee. In her OCF-1 (Application for Accident Benefits) dated March 3, 2009, Ms. Anton stated that she suffered from headaches, dizziness, poor sleep, anxiety, stress, poor appetite and fear of driving.

After Economical received Ms. Anton's Application for Accident Benefits, it initially paid housekeeping, caregiving and attendant care benefits. In May 2009, Economical arranged section 42 insurer's examinations² to determine whether Ms. Anton continued to be entitled to these benefits. These examinations were scheduled for the end of May and the beginning of June 2009.

Ms. Anton failed to attend any of the scheduled section 42 assessments regarding her claim for housekeeping, caregiving and attendant care benefits. Ms. Anton's legal representative, Ms. Esipov, informed Economical that Ms. Anton did not wish to attend the insurer's examinations because she felt that she would not meet the applicable disability tests.

²Economical arranged examinations with an occupational therapist, an orthopedic surgeon, a kinesiologist and a psychologist.

Ms. Esipov also advised Economical that Ms. Anton did not wish to re-schedule the examinations that were arranged to assess her entitlement to those benefits.

Following Ms. Anton's statement that she did not wish to attend the assessments, Economical confirmed her decision in writing and suspended Ms. Anton's caregiver, attendant care and housekeeping benefits pursuant to section 37(7) of the *Schedule*.

Statutory Framework:

Under section 42 of the *Schedule*, an insurer may require an insured person to be examined (by one or more persons chosen by the insurer) for the purposes of assisting it to determine if that person is entitled to a benefit under the *Schedule*.

Paragraph 42(10)(b) requires the insured person to attend the examination and to submit to all reasonable physical, psychological, mental and functional examinations.

Subsection 42(9)(1) states:

The following applies if the attendance of the insured person is required at an examination:

1. The Insurer shall make reasonable efforts to schedule the examination for a day and time that are convenient for the insured person.

Subsection 37(7) states that if the insured person fails or refuses to comply with subsection 42(10), the insurer may:

- (a) make a determination that the insured person is no longer entitled to the specified benefit; and
- (b) ... refuse to pay specified benefits relating to the period after the insured person failed or refused to comply with subsection 42(10) and before the insured person submits to the examination ...

Similarly, subsection 39(13) of the *Schedule* provides that if an insured person fails or refuses to comply with subsection 42(10), the insurer may,

- (a) make a determination that the insured person is not entitled to attendant care benefits; and
- (b) refuse to pay attendant care benefits relating to the period after the insured person failed or refused to comply with subsection 42(10) and before the insured person submits to the examination ...

On the other hand, paragraph 37(8)(c) states that if the insured person subsequently complies with subsection 42(10), the insurer shall,

- (c) pay all amounts, if any, that were withheld during the period of non-compliance if the insured person provides not later than the 10th business day after the failure or refusal to comply, or as soon as practicable after that day, a reasonable explanation for not complying with subsection 42(10).³

EVIDENCE and ANALYSIS:

Sub-Issues:

The sub-issues in this preliminary issue hearing are the following:

- Did Ms. Anton fail to attend or to make herself reasonably available for scheduled insurer's examinations?⁴
- Did Ms. Anton offer an explanation for her non-attendance and was Ms. Anton's explanation, if any, reasonable?

³Paragraph 39 (14)(c) contains a similar provision specifically regarding attendant care benefits.

⁴Under sections 37 and 42 of the *Schedule*.

- If I find that Ms. Anton failed to attend or to make herself reasonably available for insurer's examinations for caregiver, attendant care and housekeeping benefits, without a reasonable explanation, what are the implications on these benefits for Ms. Anton?⁵

Did Ms. Anton fail to attend or to make herself reasonably available for insurer's examinations?

Unless otherwise indicated, the parties did not dispute the oral and written evidence in this preliminary issue hearing. As part of her accident benefits claim, Ms. Anton submitted an Application for Accident Benefits, as well as an OCF-10 (Election of Income Replacement, Non-Earner or Caregiver Benefit).⁶ Ms. Anton elected to receive a caregiver benefit.

Ms. Anton also submitted an OCF-3 (Disability Certificate) in connection with her claim for caregiver and housekeeping benefits. The first disability certificate was dated February 24, 2009. The disability certificate indicated that Ms. Anton was substantially disabled from performing the essential tasks of her pre-accident employment, and was also substantially disabled from performing the caregiving activities that she normally performed before the accident. Various assessments were recommended by Ms. Anton's health provider who completed the disability certificate.⁷

Since Ms. Anton may have qualified to receive either an income replacement or a caregiver benefit, Ms. Montgomery-Slaby, an adjuster with Economical asked Ms. Anton to elect which benefit she wanted to receive. Economical sent Ms. Anton a registered letter dated April 27, 2009 and asked her to complete an Election of Income Replacement, Non-Earner or Caregiver Benefit form. The Insurer advised Ms. Anton in that letter that she would be required to participate in insurer's examinations scheduled pursuant to section 42 of the *Schedule*.

⁵For example, is Ms. Anton precluded from claiming these benefits from the date of her non-attendance on May 25, 2009, until the time that she attends the previously scheduled examinations?

⁶Ms. Anton testified that her children were 17 and 13 years old at the time of the accident.

⁷Exhibit 1, Tab 2A, page 4 – see Part 8(b) of disability certificate where it asks: “Are further examinations, investigations or consultations contemplated or required?”

This correspondence was copied to the Ms. Anton's legal representative at the time, Accident Claims Advisors.

Economical confirmed receipt of Ms. Anton's Election on May 12, 2009, by sending a registered letter to Ms. Anton dated May 14, 2009. After receiving the Election, Economical requested that Ms. Anton attend a section 42 insurer's examination to address Ms. Anton's entitlement to a caregiver benefit.

By this time, Ms. Anton had already submitted an OCF-6 (Application for Expenses) claiming housekeeping, attendant care and caregiving benefits.

In advance of scheduling the insurer's examinations, Economical requested Ms. Anton to submit a new disability certificate and an updated Form 1. These requests were sent by registered letters to Ms. Anton dated May 13, 2009 and May 14, 2009.

On May 13, 2009, Economical notified Ms. Anton by registered mail that it required her to attend an occupational therapy insurer's examination to assess Ms. Anton's entitlement to a housekeeping benefit and an attendant care benefit. This letter enclosed an OCF-25 (Notice of Examination) and specified that no benefits would be payable, if Ms. Anton failed to attend the examination. It was copied to Ms. Anton's legal representative.

On May 14, 2009, Economical notified Ms. Anton of three insurer's examinations that had been scheduled in order to assess her entitlement to a caregiver benefit. These assessments included an orthopedic surgery assessment, a functional abilities evaluation and a psychological assessment. The letter was sent by registered mail, enclosed the Notice of Examination and advised Ms. Anton that no benefits would be payable should she fail to attend or participate in the scheduled examinations. It was also copied to Ms. Anton's legal representative.

The insurer's examinations were to take place on May 26, 27, 28 and June 4, 2009.

Economical submitted that it complied with all procedural requirements in the *Schedule* in order to determine whether Ms. Anton continued to be entitled to the benefits that she claimed.

Economical requested an updated disability certificate pursuant to s. 37(1) and s. 39(5) and sent Ms. Anton notices advising her of the locations, dates, and times of the examinations, the health disciplines in which those assessors practiced, and the specified benefits that were to be addressed by each examination. Economical also clearly advised Ms. Anton of the consequences for non-attendance at those examinations.

In addition, the notice letters, and their enclosures, were sent by registered mail to the address that was specified on Ms. Anton's Application for Accident Benefits, and were copied to her legal representative. Economical had no record or reason to believe that these registered letters were not received by Ms. Anton.⁸

Economical also submitted that each of the scheduled insurer's examinations was reasonably required. Ms. Anton's first disability certificate listed orthopedic injuries that included cervical, thoracic and lumbar strain/sprain, sacroiliac sprain/strain and contusions to Ms. Anton's left knee and left lower leg. Part 8 of that disability certificate recommended an in-home assessment, and a psychological assessment. In addition, Ms. Anton's second disability certificate dated July 22, 2009 recommended a functional abilities evaluation at Part 8.

Ms. Anton did not dispute any of these submissions.

In her testimony, Ms. Anton admitted that she did not attend the occupational therapy insurer's examination, the orthopedic surgery insurer's examination, the functional abilities evaluation and the psychological insurer's examination in connection with her claims for caregiving, attendant care and housekeeping benefits.

⁸In cross-examination, Ms. Anton admitted that her address had not changed since the time of the accident, and that the address specified on Economical's letters was the address where Ms. Anton regularly receives mail.

Was there an explanation for Ms. Anton's non-attendance, and if so, was that explanation reasonable?

On the morning of May 25th 2009, Ms. Anton's legal representative, Ms. Gula Esspiov, left a voicemail for Ms. Montgomery-Slaby. Ms. Montgomery-Slaby returned Ms. Essipov's phone call and Ms. Essipov advised her that Ms. Anton would not be attending the upcoming insurer's examinations.

Ms. Anton provided two reasons for not attending the scheduled insurer's examinations. The first reason was that she was "too exhausted" with Economical's assessment procedure. The second reason was that Ms. Anton felt that she was not in enough pain to meet the applicable disability tests with respect to the upcoming assessments and the benefits that they would address, so she preferred not to attend.

When she was advised of Ms. Anton's anticipated non-attendance and her explanations for it, Ms. Montgomery-Slaby advised Ms. Anton's legal representative that she would send written correspondence confirming the conversation. In addition, Ms. Anton's benefits would be stopped on the basis of her refusal to attend the scheduled examinations.

Ms. Montgomery-Slaby sent Ms. Anton a registered letter dated May 25, 2009 confirming stoppage of Ms. Anton's caregiver, attendant care and housekeeping benefits.⁹ That letter was copied to Ms. Anton's legal representative.

Ms. Montgomery-Slaby noted the contents of the conversation with Ms. Anton's legal representative, immediately after the telephone call concluded, in her log notes on May 25th 2009 at 9:44 a.m. These notes state as follows:

⁹With regard to the address contained on the May 25, 2009 registered letter from Economical, Ms. Anton admitted in cross-examination that this address was her address at the time.

CONTACT

-Clmnt's legal rep Gula called, L/M to return her call...

-Called back at XXX-XXX-XXXX – spoke W/Gula, advised she has just spoke W/clmnt and clmnt has advised her she does not wish to attend the assessments upcoming this week re: her OCGR benefit as she is “too exhausted” W/the procedures of the insurance company, Gula asked what day and time she would like to reschedule and clmnt did not give to her, claimed she know's [sic] the assessments are going to come back not entitling her to the benefit anymore so she would just prefer not to attend – explained to legal rep then benefit is being stopped eff. today for non-compliance of the rqrd assessments, Gula is aware and advised has already explained that to clmnt and clmnt is aware also, advised would be sending written correspondence confirming clmnt's decision as well and confirmation clmnt's OCGR benefit is stopped/discontinued eff. today...

Ms. Anton questioned the accuracy and completeness of the adjuster log notes that Economical submitted; however, as Ms. Esipov did not testify in order to contradict them, I accept these notes as accurately reflecting the contents of the conversation between Ms. Montgomery-Slaby and Ms. Esipov.

Ms. Anton admitted in cross-examination that she never provided Economical with any medical documentation or a doctor's note to support her “exhaustion.”

Although Ms. Anton's legal representative apparently sent a letter to Economical on the same day as the telephone conversation described above, that letter only asked that Economical cancel the upcoming assessments. The letter made no mention of any request for re-scheduling or desire to re-attend at a later date.

After May 25, 2009, Economical did not receive any correspondence or indication from Ms. Anton or her legal representative that there had been any confusion or miscommunication with respect to the content of Economical's registered letter dated May 25, 2009. In addition, Economical received no further correspondence from Ms. Anton that she wished to re-attend the canceled examinations.

With respect to these examinations, Ms. Anton testified during her examination-in-chief as follows:

Gula [Esipov] told me I had to go again. She told me I had to be more disabled. I was scared to go to these assessments.

During her examination-in-chief, Ms. Anton testified as follows regarding her reaction to Economical's rejection of her claims for caregiving, attendant care and housekeeping:

I could go for all these assessments and pretend that I am in pain and keep getting money from the insurer. But I am not in enough pain to show disability in the assessments.

In December 2009, Ms. Anton submitted a further Application for Expenses for caregiver, attendant care and housekeeping benefits for the time period April 14, 2009 through to November 30, 2009. Economical responded to this application with a letter dated December 15, 2009. This letter reiterated Economical's position with respect to these benefits. It indicated that they were not payable because Ms. Anton did not attend her scheduled insurer's examinations pursuant to section 42.

Economical received no reply from Ms. Anton or her legal representative to the letter dated December 15, 2009. It also had no reason to believe that this letter, or the May 25th 2009 letter, had not been received by Ms. Anton. In cross-examination, Ms. Anton agreed that after December 15, 2009, she did not contact Economical to re-attend at any insurer's examinations, and that there were no written requests submitted on her behalf to request a re-scheduling of those examinations.

Ms. Anton also admitted in cross-examination that she did not attend the scheduled assessments because she did not think that she was sufficiently disabled. Ms. Anton further admitted that if she thought that she was sufficiently disabled, she would have attended a given assessment, but she did not attend any of the four assessments scheduled by Economical in May and June 2009 to address her entitlement to caregiving, housekeeping and attendant care benefits.

On July 22, 2009, Dr. Andrew Bigness completed a disability certificate which indicated that Ms. Anton was substantially unable to perform the essential tasks of her caregiving activities and required another 5-8 weeks of benefits. In addition, the disability certificate explained that

Ms. Anton also required 5-8 weeks of housekeeping and home maintenance benefits because she suffered a substantial inability to complete those tasks.

During cross-examination, Ms. Montgomery-Slaby testified that although a new disability certificate was submitted, Economical did not re-schedule a new insurer's examination to determine whether Ms. Anton was entitled to benefits.

Regarding Ms. Anton's attendance at an insurer's examination (which related to a treatment plan on August of 2009), Ms. Montgomery-Slaby testified that she relied on the conversation she had with Ms. Esipov, counsel for Ms. Anton, to determine Ms. Anton's willingness to attend an insurer's examination regarding caregiving, attendant care and housekeeping benefits.

Findings of Fact:

It is not contested that Ms. Anton did not attend the section 42 examinations that Economical had arranged in connection with caregiver, attendant care and housekeeping benefits.

Ms. Anton submitted no medical documentation to support her explanation of "exhaustion" as an excuse for non-attendance. In addition, she tendered no evidence of any extenuating circumstances, family or personal emergency, or a conflicting appointment of importance. As a result, I do not find her explanations reasonable, as required by paragraph 37(8)(c) of the *Schedule*.

Ms. Anton's other explanation for her failure to attend at the scheduled insurer's examinations was that she did not feel that she would meet the requisite disability tests in order to qualify for the very benefits that she claimed.

What are the Legal Implications of my Findings of Fact?

Insurer's Submissions:

Economical relies upon Ms. Anton's failing or refusing to attend scheduled insurer's examinations¹⁰ with respect to stopping Ms. Anton's claims for caregiver, attendant care, and housekeeping benefits.

Economical submits that it made a reasonable attempt to offer Ms. Anton an opportunity to re-schedule the examinations in its letters of May 25 and December 15, 2009, but she declined to do so.

Because Ms. Anton has never attended these insurer's examinations with respect to her claims for housekeeping, caregiving and attendant care benefits, Economical submits that it is not obligated to pay any amounts withheld during the period of non-compliance.¹¹

Applicant's Submissions:

Ms. Anton submits that while she does not deny that she did not attend the insurer's examinations in question, no attempts were made by Economical to re-schedule the examinations to a future date.

Economical is now asking that Ms. Anton's caregiving, attendant care, and housekeeping and home maintenance benefits be denied and removed as issues in dispute. Ms. Anton submits that to prevent her from pursuing these benefits would be prejudicial to her and would not allow her to recover for certain benefits, even if she were entitled to them.

¹⁰Under subsections 37(7) and 39(13) of the *Schedule* as set out above.

¹¹Under subsection 37(8)(c) of the *Schedule*.

Conclusion:

I emphasize that the facts of this particular case are highly unusual, and that my conclusion is based on these unique facts.

The uncontroverted evidence is that Ms. Anton did not attend scheduled insurer's examinations relating to her claims for caregiving, attendant care, and housekeeping and home maintenance benefits. She did not contest the notice she received regarding these insurer's examinations. Therefore, the insurer was entitled to terminate benefits up to that point.

The question then becomes what might happen if Ms. Anton subsequently complies by attending these examinations? For the sake of efficiency, I am being asked to determine whether she would have a reasonable explanation for not attending these insurer's examinations.

Ms. Anton submits that Economical had not met its duty to re-schedule an insurer's examination, as required by the *Schedule*. However, the only requirement that Ms. Anton's counsel referred me to is the necessity for an insurer to make reasonable efforts to schedule examinations on days and times that are convenient for the insured person.¹²

Ms. Anton did not say she was unwilling to attend because the days and times were inconvenient for her. She testified both in examination-in-chief and during cross-examination that she was unwilling to attend because she would not meet the disability test for caregiving, attendant care and housekeeping benefits. In addition, Economical's letters dated May 13 and 14, 2009 to Ms. Anton, (which were copied to her representative), specifically stated:

We will also require written confirmation that you will attend and participate in a rescheduled assessment, prior to us making any arrangements to reschedule the missed assessment.

¹²Under paragraph 42(9)1 of the *Schedule*.

In this case, Ms. Anton did not seek to re-schedule the examinations that she failed to attend, despite receiving letters from Economical informing her of

- the scheduled insurer's examinations
- the benefit entitlement that they were arranged to assess
- the consequences for non-attendance
- the process by which she could participate in a rescheduled assessment if she failed to attend.

Ms. Anton did attend an insurer's examination in connection with an August 2009 treatment plan. However, her attendance at that insurer's examination to determine the reasonableness and necessity of that treatment plan does not excuse her previous failure to attend duly scheduled insurer's examinations to determine her entitlement to other benefits.

Under these particular circumstances, and given the expense of more missed examinations, it was reasonable for Economical to not attempt to re-schedule the examinations, without an indication that Ms. Anton was willing to attend them.

Accordingly, for the reasons set out above, I find that Ms. Anton did not attend the originally scheduled insurer's examinations in connection with her claim for caregiving, attendant care, and housekeeping and home maintenance benefits. In addition, if she were to subsequently attend these examinations, she would not have a reasonable explanation for not attending them. As a result, I find that Mrs. Anton is precluded from seeking entitlement to these benefits during the period that she did not submit to the missed insurer's examinations after May 25, 2009.

Anne Sone
Arbitrator

December 2, 2013
Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



Neutral Citation: 2013 ONFSCDRS 154

FSCO A12-000077

BETWEEN:

ELIANA ANTON

Applicant

and

ECONOMICAL 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. Mrs. Anton is precluded from seeking entitlement to benefits for caregiving, attendant care, and housekeeping and home maintenance benefits during the period that she did not submit to the missed insurer's examinations after May 25, 2009.

Anne Sone
Arbitrator

December 2, 2013
Date