Financial Services Commission of Ontario

Commission des services financiers de l=Ontario

Ontario

Neutral Citation: 2007 ONFSCDRS 167

FSCO A06-001588

BETWEEN:

LISA FAIZ

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Maggy Murray

Heard: July 4, 2007, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Jack Parsekhian for Ms. Faiz
Neil Colville-Reeves for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Lisa Faiz, was injured in a motor vehicle accident on July 10, 2003. She applied for statutory accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the *Schedule*.[1] Wawanesa refused to pay for weekly income replacement benefits. The parties were unable to resolve their disputes through mediation, and Ms. Faiz applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The preliminary issues are:

1. Is the medical examination requested by Wawanesa under s.42 (1) of the *Schedule* reasonably necessary?

2. Is Wawanesa entitled to an Order that the Applicant attend a medical examination to assess and evaluate her medical condition relating to her progressed multiple sclerosis ("MS") prior to the commencement of the arbitration proceedings?

3. Should this arbitration proceeding be stayed until Ms. Faiz has attended the proposed medical examination?

Result:

1. The medical examination requested by Wawanesa under s.42 (1) of the *Schedule* is not reasonably necessary.

2. I have no jurisdiction to Order that Ms. Faiz attend a medical examination.

3. This arbitration hearing is not stayed.

EVIDENCE AND ANALYSIS:

Legislation:

An insurer's right to examine its insured is set out in s.42 of the *Schedule* which states:

> 42(1) For the purposes of assisting an insurer determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made, an insurer may, as often as is reasonably necessary, require an insured person to be examined under this section by one or more persons chosen by the insurer who are members of a health profession or are social workers or who have expertise in vocational rehabilitation.

…

(4) Whenever the insurer requires an insured person to be examined under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,

(a) the reasons for the examination;

(b) the type of examination that will be conducted and whether the attendance of the insured person is required during the examination;

(c) the name of the person or persons who will conduct the examination, the regulated health professions to which they belong and their titles and designations indicating their specialization, if any, in their professions; and

(d) if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days.

The s.42 notice of examination ("Notice") must be in a form approved by the Superintendent of Insurance[2] and the insured must receive the Notice at least five business days before the examination.[3]

ANALYSIS:

Issue One:

a) Is the medical examination requested by Wawanesa under s.42 (1) of the *Schedule* reasonably necessary?

On April 3, 2007, Wawanesa couriered to Ms. Faiz a purported Notice of the proposed examination that Wawanesa scheduled for April 17, 2007.

[2] Section 69.10.1 of the *Schedule*.

[3] Subsection 42(5)(b) of the *Schedule*.

Wawanesa did not send a copy of this Notice to her counsel.[4] The hearing in this matter is scheduled for November 19, 2007.

Insurer's Submissions:

Following the accident, Ms. Faiz continued working until March 8, 2004. During the pre-hearing conducted on January 22, 2007, counsel for Ms. Faiz advised that Ms. Faiz was unable to attend the pre-hearing because her multiple sclerosis had progressed and she had difficulty commuting. According to Wawanesa, the pre-hearing was the first time it was made aware of the Applicant's "progressed" MS.[5] Wawanesa is requesting that Ms. Faiz undergo a s.42 examination with a neurologist because it has not yet had the opportunity to medically assess her MS complaint.

Applicant's Submissions:

According to Ms. Faiz, Wawanesa has known since July 17, 2004[6] that she was diagnosed with MS. Her position is that Wawanesa has known for years about her MS condition and Wawanesa is now trying to bolster its case for arbitration rather than adjust her claim.

Law and Analysis:

It is unreasonable to request an examination where circumstances indicate that its only apparent purpose is to acquire medical evidence to bolster the insurer's case at a hearing.[7] Consequently, a proposed insurer medical assessment must be for the purpose of adjusting the claim.[8]

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[4] When an Applicant retains a lawyer to act on his or her behalf, the insurer should communicate through the lawyer, not directly with the Applicant, which Wawanesa conceded during the motion (*Simms and Markel Insurance Co. of Canada*, QL at 4, para. 16 (FSCO P99-00002, September 20, 1999).

[5] Insurer's Motion Record, Tab 2, Affidavit of Miguel Maruski at para. 12; see also Tab 1, Notice of Motion, para. 9.

[6] Applicant's Responding Motion Record, Exhibit E, adjuster's note dated July 17, 2004.

[7] *Swanson and Wellington Insurance Company* (FSCO A98-000067, May 26, 1998).

[8] *M.S.D. and Citadel, supra* note 13; *Swanson, ibid*.

Determining the appropriateness of a request for a medical examination requires a balancing of the interests of the parties, in the context of the particular facts.[9] The following factors must be considered in determining whether a s.42 examination is "reasonably necessary":

> 1. *The timing of the insurer's request. The closer a request is made to a hearing, the more stringent the scrutiny of its reasonableness should be to ensure that there is no avoidable delay or that the insured's preparation for the hearing is not prejudiced.*[10] *Absent a clear explanation, examinations scheduled on the eve of a hearing suggest the kind of tactical brinkmanship that arbitrators have rejected as part of this system.*[11]

A medical/rehabilitation DAC assessment conducted on July 10, 2004 reported that Ms. Faiz was diagnosed with MS, complained of MS related symptoms for the past six months and that her symptoms are "getting worse."[12] In a report dated March 2, 2006, Dr. Marchetti (neurologist) opined that it is probable that the accident was the cause of Ms. Faiz's MS.[13] Wawanesa waited over one year between receiving Dr. Marchetti's report and requesting that Ms. Faiz undergo a s.42 examination.

> 2. *The possible prejudice to both sides. If there will be a delay of the start of the arbitration hearing in order for an insured to attend an insurer's examination,*[14] *that may be considered prejudicial to the Applicant.*

The arbitration hearing is scheduled to commence November 19, 2007, less than three months

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[9] *Belair Insurance Company Inc. and F.S.* (P96-00039A, June 11, 1006) (A*F.S.*@); *Scaffidi and State Farm Mutual Automobile Insurance Company* (FSCO A01-B000369, May 28, 2002).

[10] *F.S., supra* note 9; *Bogic and AXA Insurance (Canada)* (FSCO A96-001192; April 30, 1999).

[11] *M.S.D. and Citadel General Assurance Company* (FSCO A01-B 001561, February 19, 2003); *Nandkumar and Economical Mutual Insurance Company* (FSCO A03B 000831, April 7, 2004).

[12] Applicant's Responding Motion Record, Exhibit G, DAC report at 6.

[13] Applicant's Responding Motion Record, Exhibit M, at 1.

[14] *Shannahan and Optimum Frontier Insurance Co.* (FSCO A04-000965, April 14, 2005).

from now. Other than Wawanesa's blanket statement that its request is made in a "timely manner,"[15] I have no evidence that the arbitration hearing will proceed as scheduled if Wawanesa's request for a medical examination is granted. By the time the insurer schedules an appointment, the report is completed and the report is serviced on the Applicant, this would afford Ms. Faiz little, if any, opportunity to provide a responding report and comply with Rule 39.1 of the *Dispute Resolution Practice Code – Fourth Edition* (the "*Code*"), which provides that all documents, including reports, must be served on the other party at least 30 days before the first day of the hearing.

3. The number and nature of previous insurer's examinations.[16]

Ms. Faiz has not undergone any s.42 examinations.

4. The nature of the examinations being requested.

There is a reasonable nexus between the neurological examination requested and the Applicant's complaint of MS.

5. Whether there are any new issues raised in the applicant's claim that require evaluation. Where there are changes in the nature of an insured person's medical or psychological condition which are relevant to a disability claim, further examinations are reasonable.[17]

There are no new issues raised by Ms. Faiz. In a treatment plan dated March 16, 2004,[18] Dr. Kevin Hue-Fah reported that Ms. Faiz was having difficulty walking (limping), balance

[15] Insurer's Motion Record, Tab 2, Affidavit of Miguel Maruski at para. 16.

[16] *J. and Allstate Insurance Co. of Canada*, QL at 7, para. 20 (FSCO February 18, 2005, A03-001129); *Martucci and Economical Mutual Insurance Co.* at 4 (FSCO May 8, 2007, A06-000207); *Al-Shimasawi and Wawanesa Mutual Insurance Co.* at 7 (FSCO May 11, 2007, A05-002737).

[17] *F.S., supra* note 9.

[18] Applicant's Responding Motion Record, Exhibit F, at 4.

difficulties and fell twice since the accident. Although her counsel advised during the pre-hearing that her condition has "progressed," Wawanesa has known since July 10, 2004 that Ms. Faiz's MS symptoms were "getting worse."[19]

As stated above, in Dr. Marchetti's report dated March 2, 2006,[20] he opined that it is probable that the accident was the cause of Ms. Faiz's MS.[21]

Conclusion:

Wawanesa was aware of Ms. Faiz's limitations caused by MS as early as July 2004.[22] Moreover, the report of Dr. Marchetti dated March 2, 2006 was served over one year before Wawanesa requested that Ms. Faiz undergo a s.42 examination. Wawanesa also waited over two months following the pre-hearing to request a s.42 examination. Therefore, I find that Wawanesa has not met its onus of establishing that the s.42 examination is reasonably necessary because of the delay in requesting one. Wawanesa, in its submissions for this motion, stated that it required "evidence" for the upcoming hearing. Consequently, I also find that Wawanesa is trying to bolster its case for arbitration rather than adjust Ms. Faiz's claim.

Even if I found that Wawanesa's request to have Ms. Faiz undergo a s.42 examination was reasonably necessary, I would have denied Wawanesa's request because it did not comply with the Notice requirements in s.42(4) of the *Schedule*, as outlined below.

b) Deficiency of Notice:

Section 42 of the *Schedule* requires an insurer to provide the insured with Notice of an examination. The Notice must include the particulars contained in s.42(4) of the *Schedule* set

[19] Applicant's Responding Motion Record, Exhibit G, DAC report at 6.

[20] Which was forwarded to Wawanesa on March 24, 2006.

[21] Applicant's Responding Motion Record, Exhibit M, at 1.

[22] Applicant's Responding Motion Record, Exhibit G, DAC report at 6.

out above. Wawanesa conceded during this motion that its Notice incorrectly referred to the doctor's specialty[23] as "opthalmology" rather than neurology.

The Applicant's counsel wrote to Wawanesa on April 11, 2007 and advised that the Applicant is not disabled because of her vision. On April 16, 2007, Wawanesa wrote directly to the Applicant's counsel and advised that the doctor "is a neurologist." Wawanesa did not advise that its Notice dated April 3, 2007 incorrectly referred to the doctor's specialty as ophthalmology.

In Part 2 of the Notice, "Income Replacement Benefits" is checked off under the heading "Type(s) of Examination." This is not in compliance with s.42 (4) (b) of the *Schedule,* which refers to "the type of examination that will be conducted." An "income replacement benefit" is not an examination that is conducted. It is a benefit. An "examination that will be conducted" is, for example, a functional abilities evaluation, an in-home assessment, an orthopedic examination, a neurological examination, to name only a few types of examinations. Indeed, all the items under "Type(s) of Examination" refer to various benefits under the *Schedule.* As it was stated in *Smith v. Co-operators*:

> The use by the insurer of a prescribed form does not detract from its obligations under (*the Schedule*).
>
> The industry practice of using a form prescribed by the (Superintendent) cannot somehow be a substitute for conformity with … the SABS. There is no indication that insurers are legally prevented from adding to the prescribed form so that it is in conformity with the legal requirements.[24]

Wawanesa's position regarding the Notice was that: (a) the reference in the Notice to the doctor's specialty as ophthalmology was merely a "technical deficiency" that was rectified by its letter of April 16, 2007 to the Applicant's counsel; and (b) the "type of examination" that indicated "Income Replacement Benefits" is a reference in the Notice, which information was clarified in its letter of April 16, 2007 by Wawanesa's reference to the doctor who "is a

[23] Which is required pursuant to s.42(4)(c)of the *Schedule*

[24] [2002] S.C.J. 34, QL at 7, para.'s 18 and 19.

neurologist." I disagree with both these submissions. As it was stated in *Ives and Wawanesa Mutual Insurance Co.*:[25]

> The legislature has set out information the insurer must give the insured if it seeks an examination, so that the insured can determine whether he or she wants to submit to the procedure. The parties cannot waive compliance with this section.

Wawanesa did not indicate in its Notice or letter of April 16, 2007 that the s.42 examination was a neurological examination which is also non-compliant with s.42 (4) (b) of the *Schedule*. Although in many instances "the type of examination that will be conducted"[26] can be inferred from an individual's "specialization,"[27] this is not always the case. Additionally, the legislature has set out the two as distinct pieces of information that an insurer is required to provide in its Notice.

There was no clarification in Wawanesa's letter dated April 16, 2007 that its Notice incorrectly referred to the doctor's specialty as ophthalmology rather than neurology. Wawanesa's Notice, combined with its letter, "would tend more to confuse."[28] Even if it is accepted that Wawanesa's letter of April 16, 2007 corrected the Notice, it was given to the Applicant's lawyer the same day[29] as the proposed examination, rather than at least five business days before the examination, in contravention of s.42(5)(b) of the *Schedule*.

I raised the issue with the parties of whether the Notice was deficient, and they were given an adequate opportunity to argue the issue. Wawanesa's position was that the deficiency of the Notice is not an issue in this motion because it was not raised by the Applicant. I disagree. It is

[25] QL at 2, para. 9 (FSCO A05-002144, June 22, 2006).

[26] S.42(4)(b) of the *Schedule.*

[27] S.42(4)(c) of the *Schedule.*

[28] *Simon and Co-Operators*, QL at 8-9, para. 40 (FSCO A00-000998, August 30, 2001).

[29] Rules 7.3(d) and 8.1(a) of the *Dispute Resolution Practice Code – Fourth Edition*, deal with various methods of service and the calculation of time.

always open to an adjudicator to raise a legal issue on the facts before him or her and give the parties an opportunity to respond.[30]

Wawanesa failed to provide the particulars required by s.42 (4) of the *Schedule* within the time required[31] under the *Schedule*. Because Ms. Faiz was not provided with the proper Notice from Wawanesa that complies with s.42 of the *Schedule*, Wawanesa is not entitled to an Order that a proposed examination of the Applicant is reasonably necessary.[32]

Issue Two:

I have found that the examination is not reasonably necessary. However, I note that it has previously been held that an arbitrator does not have jurisdiction to order an insured to attend a medical examination.[33]

Issue Three:

Because Wawanesa's request that Ms. Faiz undergo a s.42 examination is not reasonably necessary, and because it did not serve her with a Notice that complied with s.42 of the *Schedule*, Wawanesa is not entitled to an Order staying this arbitration proceeding.

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[30] *Praxair Canada Inc. v. City Centre Plaza Ltd.*, QL at 5, para. 12, QL at 6, para. 13 [2000] O.J. No. 4298 (Ont. S.C.J.)

[31] At least five business days before the proposed examination.

[32] For cases dealing with the notice provisions of s.42 of the *Schedule*, see*: M.S.D. and Citadel General Assurance Company* at 5 (FSCO A01-001561, February 19, 2003); *Shirkhodaei and Wawanesa Mutual Automobile Insurance Company* at 4-5 (FSCO A04-000523, February 21, 2005); *Ramalingam and Wawanesa Mutual Automobile Insurance Company* at 5 (FSCO A02-001646, December 17, 2004); *Kathiresapillai and ING Insurance Co. of Canada* at 8 (FSCO A04-002101, December 22, 2005); *Ives and Wawanesa Mutual Insurance Co.* (FSCO June 22, 2006, A05-002144); *Vellipuram and State Farm Mutual Automobile Insurance Company*, (FSCO A05-002629, June 15, 2006).

[33] *Granic and Allstate Insurance Company of Canada* at 10 (OIC A-006615, January 30, 1995); *Nirwan and Kingsway General Insurance Company* at 4 (FSCO A04-001704, October 4, 2005); *Vellipuram and State Farm Mutual Automobile Insurance Company*, QL at 3, para. 10 (FSCO A05-002629, June 15, 2006).

EXPENSES:

I exercise my discretion to award Ms. Faiz her expenses incurred in this preliminary issue hearing. If the parties are unable to agree on the issue of quantum, they may make submissions in accordance with Rule 79 of the *Dispute Resolution Practice Code - Fourth Edition*.

	August 31, 2007
Maggy Murray Arbitrator	Date

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FSCO A06-001588

BETWEEN:

LISA FAIZ

Applicant

and

WAWANESA 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 medical examination requested by Wawanesa under s.42 (1) of the *Schedule* is not reasonably necessary.

2. I have no jurisdiction to Order that Ms. Faiz attend a medical examination.

3. This arbitration hearing is not stayed.

4. If the parties are unable to agree on the issue of the quantum of expenses, they may make submissions in accordance with Rule 79 of the *Dispute Resolution Practice Code - Fourth Edition*.

August 31, 2007

Maggy Murray
Arbitrator

Date