

BETWEEN:

MERG KONG

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Rosemary Muzzi

Heard: By telephone conference call on March 2, 2005.
Written submissions were received from the Insurer on February 24, 2005 and from the Applicant on February 28, 2005.

Appearances: Adam Wagman for Ms. Kong
Michael P. Taylor for Personal Insurance Company of Canada

Issues:

Merg Kong, the Applicant, was injured in a motor vehicle accident on February 13, 2003. She applied for and received statutory accident benefits from Personal Insurance Company of Canada (“Personal”), payable under the *Schedule*.¹ Personal terminated weekly income replacement benefits (“IRBs”) on June 25, 2003. An arbitration date has been set for April 18, 19, 20 and 21, 2005 to deal, in part, with the issue of Ms. Kong’s ongoing entitlement to IRBs. On January 17, 2005, through her lawyer

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

Mr. Wagman, Ms. Kong was asked to attend for section 42 insurer's examinations to address her entitlement to IRBs post 104 weeks. On January 24, 2005, Mr. Wagman advised Mr. Taylor that Ms. Kong would not attend these examinations. After some discussion between counsel, Mr. Taylor requested a date for this preliminary issue hearing.

The preliminary issue is:

Can the insurer require Ms. Kong's attendance at four insurer examinations before she can proceed to arbitration?

Result:

Ms. Kong is not required to attend the insurer's examinations and may proceed to arbitration as scheduled.

Facts

These are the significant facts in this case.

- Ms. Kong underwent three insurer's examinations on June 5 and 6, 2003, namely a musculoskeletal, functional abilities, and psychological examination.
- As a result of the examinations' findings, Personal ceased paying IRBs on June 25, 2003.
- Personal received a medical rehabilitation DAC report dated July 17, 2003 that raised the possibility that Ms. Kong was suffering from fibro myalgia.
- From July 2003 until December 1, 2004, Ms. Kong's doctors and treatment providers submitted medical reports and treatment plans to Personal, a number of which confirmed a diagnosis of fibro myalgia.
- On December 6, 2004 Ms. Kong and Personal participated in a pre-hearing discussion before me at which time they set an arbitration date for April 18, 19, 20 and 21, 2005.

- On January 17, 2005, the Personal requested that Ms. Kong undergo four more insurer's examinations, a musculoskeletal, functional abilities, and psychological examination, and a vocational assessment.
- The 104 weeks mark occurs on February 13, 2005.
- The arbitration hearing is scheduled to proceed on April 18, 19, 20 and 21, 2005.

Arguments

Personal argues that it has a presumptive right to an insurer's examination at the 104-week mark because the eligibility criteria for IRBs changes at that point. Personal also contends that an insurer's ability to exercise this right may be affected by a consideration of the particular circumstances and a balancing of the parties' interests. Personal urged me to consider these particular circumstances in its favour.

- Personal only has the benefit of one 22 month-old examination of Ms. Kong.
- There is no suggestion that there is a risk of harm to Ms. Kong in undergoing the proposed examinations.
- The examinations were scheduled with sufficient time to complete them and produce reports at least 30 days prior to the arbitration dates.
- Personal has not had an opportunity to evaluate Ms. Kong's claim post 104 weeks, which is significant given that the 104 week mark has arrived and the arbitration date occurs just two months after.

Personal submits that, on balance, it is entitled to the presumptive right to insurer's examinations.

Ms. Kong argues that Personal is not permitted to invoke section 42 to require examinations in these circumstances because:

- Personal has already determined that Ms. Kong is not entitled to IRBs, therefore its insistence on these examinations is only for the purpose of obtaining further medical information to bolster its case at the arbitration
- Personal has already had sufficient time within which it could have required these examinations allowing these examinations so close to the arbitration date would prejudice Ms. Kong's ability to prove her claim because she will not have had an opportunity to respond to this evidence

Law

Section 42(1), the provision under consideration, states:

For the purpose of determining whether an insured person is entitled to a benefit for which an application is made, an insurer may give the insured person notice requiring the insured person to be examined by one or more persons specified by the insurer, each of whom is a member of a health profession or a person with expertise in vocational rehabilitation. [Emphasis added]

Section 42(3) states that the insurer may require examinations as often as is reasonably necessary.

Taking these sections together, section 42 allows, in part, for an insurer to require as often as is reasonably necessary, an insured person to be examined for the purpose of determining whether a benefit is payable.

It is clear that the onus is on the insurer to prove that insurer's examinations are reasonably necessary. Many FSCO arbitrators have found that insurer's examinations are not reasonably necessary where their purpose is to bolster the insurer's case for the arbitration hearing rather than to adjust the claim for benefits. Generally, whether an insurer's examination is reasonably necessary is determined by a consideration of all of the circumstances and a balancing of the parties' interests. In some cases, arbitrators have instead considered these matters as a question of fairness, i.e. is it fair to let the arbitration proceed without the insurer having been able to require these examinations.

Analysis

I find that Personal has not proved that the examinations are reasonably necessary for a determination of whether IRBs are payable or to ensure fairness for the following reasons.

Personal argues that it has a presumptive right to an insurer's examination at the 104-week mark because the eligibility criteria for IRBs changes at that point. It asserts that it has been unable to assess whether Ms. Kong meets the post 104 weeks eligibility criteria. While it is true that the eligibility criteria changes at the 104 weeks mark, Personal has already decided that Ms. Kong is not entitled to pre-104 weeks IRBs. It has never wavered from this conclusion, despite the significant medical information provided it by Ms. Kong. In order to qualify for IRBs post-104 weeks, Ms. Kong must meet a more onerous test. If Personal has been able to conclude that Ms. Kong cannot meet the easier test of eligibility, then I fail to see how can it require another test in order to assess whether she can meet the more onerous test.

Moreover, when I look at the nature and parameters of the examinations sought by Personal, I find that the purpose of the examinations does not appear to be, in fact, to address the post-104 weeks test. I agree with Ms. Kong in this regard. Only one of the required examinations has never been conducted before and the questions to be addressed by the examiners include questions of causation, diagnosis and the impact of pre-existing conditions on recovery. It would appear that Personal wants more information than simply whether Ms. Kong meets the post 104 weeks test.

The timing of the examinations, two months before the arbitration, in conjunction with the other considerations, would also suggest that their purpose is to provide Personal with further evidence for the purposes of the arbitration.

I am not persuaded in these circumstances that Personal genuinely wishes to further adjust Ms. Kong's claim.

Furthermore, I am not satisfied that these examinations must proceed before the arbitration dates in order to ensure fairness at the arbitration hearing.

Personal argues that Ms. Kong has been able to produce evidence that she is entitled to benefits post-104 weeks to which Personal will have been prevented from responding. I find that any inability on the part of Personal to respond to Ms. Kong's evidence has more to do with its own failure to act sooner rather than it does with the natural passage of time and a concomitant change in the eligibility test.

First, it must be recognized that Ms. Kong has the onus of proving that she is entitled to IRBs because Personal stopped paying her these benefits many months ago. From the beginning, she has claimed an entitlement to *ongoing* IRBs. Surely, it cannot come as a surprise to any party in this proceeding that time would have passed and that the test for entitlement over the course of time would be changing. Personal cannot argue that it has been surprised by arrival of the 104 weeks mark.

Second, the evidence before me suggests that the opportunity to respond to Ms. Kong's evidence is one Personal simply failed to seize. There was no evidence before me that Personal was precluded from requiring examinations at any other point in the process. As well, Ms. Kong's evidence has been delivered to Personal with regularity since the beginning of this proceeding. Her evidence has been served with much notice to Personal. In fact, Ms. Kong's entire documentary case was served upon Personal *before* the pre-hearing discussion of December 2004. Personal cannot argue that it has been surprised by the nature of Ms. Kong's claim or the evidence in support of it.

Third, the pre-hearing discussion was conducted on December 6, 2004. Personal did not indicate then that it was to require further examinations even though that was just two months before the 104 weeks mark. The purpose of the pre-hearing is to identify the issues for arbitration. If Ms. Kong's entitlement to IRBs post 104 weeks was to be an issue for Personal – it clearly was an issue for Ms. Kong as revealed in her evidence – then, it was for Personal to raise that issue and allow it to be canvassed. A hearing date could then have been set to allow time for Personal to obtain evidence, presumably

through insurer's examinations, and for Ms. Kong to receive those reports with sufficient time to respond to them if necessary. In the circumstances, Personal has had sufficient time to respond to Ms. Kong's case.

Having considered all of the circumstances and the interests of the parties, on balance I find that Personal has failed to show that the insurer's examinations are reasonably necessary for a determination of whether IRBs are payable or to ensure fairness at the upcoming arbitration.

Expenses:

I exercise my discretion to award Ms. Kong her expenses incurred in this preliminary issue hearing. If the parties are unable to agree on quantum, they may apply to me for an expense hearing, in accordance with the provisions of the *Dispute Resolution Practice Code* (4th Edition, updated October 2003).

Rosemary Muzzi
Arbitrator

March 15, 2005

Date

FSCO A04-001188

BETWEEN:

MERG KONG

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. Ms. Kong is not required to attend the insurer's examinations and may proceed to arbitration as scheduled.

Rosemary Muzzi
Arbitrator

March 15, 2005

Date