



FSCO A07-000553

BETWEEN:

ROBERT MACKENZIE

Applicant

and

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: David Muir

Heard: September 14, 2007, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Kevin Wolf for Mr. MacKenzie
Nathalie Rosenthal for Royal & SunAlliance Insurance Company of Canada

Issues:

The Applicant, Robert MacKenzie, was injured in a motor vehicle accident on September 25, 2005. He applied for and received statutory accident benefits from Royal & SunAlliance Insurance Company of Canada (“Royal”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. MacKenzie 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 issue is:

1. Is Mr. MacKenzie entitled to Orders excluding various medical reports; and prohibiting their authors from giving evidence at the arbitration hearing scheduled to commence on November 26, 2007.

Result:

1. Mr. MacKenzie is not entitled to Orders excluding various medical reports and prohibiting their authors from giving evidence at the arbitration hearing scheduled to commence on November 26, 2007.

EVIDENCE AND ANALYSIS:

At a pre-hearing in April 2007, Mr. MacKenzie advised of his intention to argue, as a preliminary issue, that several reports of insurer's assessment conducted in December 2006 should be excluded from the upcoming hearing and their authors prohibited from testifying at the hearing. Mr. MacKenzie argued that these assessments were improperly constituted, not authorized by section 42 of the *Schedule* and therefore ought not to have taken place. That being the case, submitted Mr. MacKenzie, Royal ought not to be allowed to benefit from its wrongdoing and rely upon these reports in an arbitration hearing.

Mr. MacKenzie has raised a novel issue. However, for the reasons that follow I am not persuaded that these reports ought to be excluded and their authors prevented from testifying at the arbitration hearing.

There is a limited factual record surrounding the argument. Mr. MacKenzie relied upon the affidavit of Mr. J. Kimmel and oral submissions made at the hearing. Royal provided a written summary of its position and made oral argument at the hearing.

The background facts related to this issue are not complex or controversial.

Mr. MacKenzie was, as indicated, injured in a car accident on September 25, 2005. The initial diagnosis of his treating physician was that he had sustained WAD II injuries in the accident, and a number of disability certificates from several treating practitioners were subsequently provided to Royal so indicated.

Mr. MacKenzie applied for statutory accident benefits, amongst others, income replacement benefits. Royal paid those benefits for a time but terminated them after 16 weeks pursuant to section 5(2)(e) of the *Schedule* which provides that an insurer is not required to pay an income replacement benefit for more than 16 weeks “in the case of an insured person whose impairment comes within the Grade II Whiplash Guideline...” (WAD II). Royal advised Mr. MacKenzie of its position by OCF-9 and letter dated January 6, 2006. A subsequent disability certificate provided by Mr. MacKenzie continued to indicate that he had suffered WAD II injuries.

Mr. MacKenzie was referred to Dr. K. Prutis, a physiatrist, by his family physician, Dr. N. Stein, in early 2006. In a consultation note dated April 6, 2006, Dr. Prutis wrote that Mr. MacKenzie appeared to have suffered “moderately severe myofascial cervical strain, myofascial lumbar strain and bilateral shoulder sprain.” Mr. MacKenzie was referred for an MRI of the cervical spine and diagnostic ultrasound of both shoulders to investigate the possibility of a cervical and lumbar disc herniation and a rotator cuff tear.

In a further note dated July 6, 2006, Dr. Prutis noted that the MRI had confirmed a multi-level disc herniation in the thoracolumbar spine. In Dr. Prutis’ view, the disc herniations were likely caused by the car accident. In her view, Mr. MacKenzie’s pain was now chronic and he could not return to work. His prognosis was guarded. A note dated September 7, 2006 confirms Dr. Prutis’ earlier opinion.

These notes were each forwarded to Royal within a short period after their creation.

A final note from Dr. Prutis dated November 30, 2006 confirms the previous opinions offered. Dr. Prutis again recommends a course of physiotherapy and a chronic pain management program.

Mr. MacKenzie's then representatives filed for mediation of his claims in September 2006. Mediation occurred on November 23, 2006 but failed. There was some understanding reached at mediation, although it might be going too far to characterize it as an agreement. In any case, income replacement benefits were reinstated for two weeks and a series of insurer's examinations were scheduled. Mr. MacKenzie commenced an arbitration in March 2007.

The stated purpose of the December 2006 assessments was to determine whether or not Mr. MacKenzie had indeed suffered only WAD II injuries and if not, whether or not he was substantially unable to perform the essential duties of his pre-accident employment.

Mr. MacKenzie attended assessments with Dr. Sekyi-Otu, Dr. Debow and Mr. Ramos on December 5 and 6, 2006.

Mr. MacKenzie now seeks to have these reports excluded from the hearing. His argument is straightforward. An insurer is only entitled, pursuant to section 42 of the *Schedule*, to compel assessments of an insured person for the purposes of determining their entitlement to a benefit and only where such an assessment is reasonably necessary.

In Mr. MacKenzie's submission, the assessments undertaken in December 2006 were not authorized by section 42 of the *Schedule* for a number of reasons. Primarily, Mr. MacKenzie relied upon the fact that Royal had made its determination many months earlier and had taken the position that Mr. MacKenzie had suffered WAD II injuries and, accordingly, his entitlements were time limited. It was therefore not entitled to further assessments and, in particular, having staked its position on the WAD II injuries, it was not entitled to an assessment of Mr. MacKenzie's ability to perform his pre-accident job duties. According to Mr. MacKenzie, the only reasonable explanation for Royal's decision to require these assessments was to bolster its case at an anticipated arbitration and this is not an appropriate basis for a section 42 assessment. If the assessments in question were not properly obtained by Royal, it follows in Mr. MacKenzie's submission that Royal ought not to be able to benefit from its wrongdoing by introducing these expert reports in the hearing.

I do not accept Mr. MacKenzie's position. While there may be circumstances which justify an Order prohibiting the introduction of a report obtained pursuant to section 42, there is nothing here that would justify such an order.

Royal was told by Mr. MacKenzie's treating practitioners in the weeks after the accident that he had sustained WAD II injuries. Royal not unreasonably advised Mr. MacKenzie of its intention to terminate his benefits on that basis and invited him to advise them otherwise. Nothing contradicting that view was forthcoming from Mr. MacKenzie for several months. As noted above, Dr. Prutis, beginning in April 2006 but most expressly in July 2006, reported to Mr. MacKenzie's family physician that his injuries may be more complex and severe than initial assessments seem to have indicated. These reports were forwarded to Royal so that by June or July 2006 at the latest, Royal had information that called into question its reliance on the disability certificates provided to it.

At the hearing, I queried whether Mr. MacKenzie would be making this same argument if Royal, in response to Dr. Prutis' reports, had sought its assessments at that time. Mr. MacKenzie responded that his position would be the same. Essentially, the position is that once having decided that Mr. MacKenzie's entitlement to benefits terminated after 16 weeks because his injuries came within the WAD II Guideline, Royal was bound to stick with that position and could not alter its position whatever may follow as the claim progresses. It was submitted that if Royal thought that there was some basis for a change of heart about Mr. MacKenzie's entitlement, what Royal ought to have done was to reinstate benefits when it gave notice of its request for further assessments.

To my mind, Mr. MacKenzie's position is at odds with what arbitrators have consistently held are the obligations of insurers to continue to assess a claim as it moves forward. It is clear in the cases that the right, indeed it is often described as an obligation, to continue to assess the claim is an ongoing obligation that subsists beyond the termination of benefits and an application for mediation brought by an insured person.² The failure to respond to new information provided by an applicant is often considered by arbitrators in determining the appropriateness and

² See for example *F.S and Belair Insurance Company Inc.*, (OIC P96-00039A, June 11 1996).

quantum of a special award. To my mind, the only possible issue as regards Royal's response to the Prutis reports is why did it take from July to November to request new assessments?

It is in the nature of these types of claims that an individual's level of disability will fluctuate. Most often, it is anticipated that insured persons suffering WAD I and WAD II do get better in accordance with the assumptions of the *Schedule*. Plainly, however, some individuals do not. The introduction of provisions such as section 5(2)(e) have highlighted the unpredictability of health outcomes for certain individuals who, when initially assessed in the first weeks after the accident, are said to have suffered impairments within the WAD II Guideline for example, but who later on begin to exhibit new symptoms and impairments. Assuming for the moment, without deciding, that Mr. MacKenzie has suffered more serious injuries than initially understood does not make these circumstances in the least unusual.

Mr. MacKenzie's argument boils down to this – once the insurer makes a determination respecting entitlement it must hold to that position, in particular the reasons for the determination and it can never re-assess that position in light of new information unless it reinstates benefits. I do not agree that this is what the *Schedule* requires, but in any event I do not believe that even assuming there has been some technical failure on Royal's part, that this would require the exclusion from the hearing of the reports in question.

If Royal was wrong in what it did and if it acted unreasonably in the process, the *Schedule* and the *Insurance Act* both provide responses, remedial and punitive, to police insurer conduct. In the administrative law context, the exclusion of evidence must be seen as an extraordinary remedy available only in the most extreme of circumstances. The circumstances of this case are neither extreme nor even unusual. In the normal course, the time for objecting to a request for a section 42 assessment is at the time the assessment was requested.

For these reasons the Motion for an Order excluding the impugned reports and prohibiting the assessors in question from giving evidence at the hearing is dismissed. The effect of my Orders in this regard is confined to the arguments advanced in this preliminary issue hearing.

Other grounds for the exclusion of the reports in question may exist and are matters for the hearing arbitrator.

EXPENSES:

The issue of expenses is deferred to the hearing arbitrator.

David Muir
Arbitrator

October 5, 2007

Date



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and

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ARBITRATION ORDER

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

1. Mr. MacKenzie is not entitled to an Order excluding the medical reports of Dr. Sekyi-Otu, Dr. Debow and Mr. Ramos from the arbitration hearing scheduled to commence on November 26, 2007.
2. Mr. Mackenzie is not entitled to an Order prohibiting Dr. Sekyi-Otu, Dr. Debow and Mr. Ramos from giving evidence on these reports at the arbitration hearing scheduled to commence on November 26, 2007.

David Muir
Arbitrator

October 5, 2007

Date