

BETWEEN:

DIANNE CONWAY

Applicant

and

CERTAS DIRECT INSURANCE COMPANY

Insurer

DECISION ON A MOTION

Before: John Wilson

Heard: September 24, 2004, by telephone conference call

Appearances: David Hayward for Mrs. Conway
Ralph D'Angelo for Certas Direct Insurance Company

Issues:

The Applicant, Dianne Conway, was injured in a motor vehicle accident on May 19, 2001. She applied for and received statutory accident benefits from Certas Direct Insurance Company (“Certas”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mrs. Conway applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

This issues in this motion are:

1. Should Mrs. Conway's arbitration be stayed by reason of her failure to make herself reasonably available for a section 42 assessment?
2. Should the arbitration be adjourned *sine die* pending Mrs. Conway's attendance at the insurer's medical assessment?
3. Should either party receive their expenses in this motion?

Result:

1. Mrs. Conway is not required to make herself available for the section 42 assessment scheduled by the Insurer. Consequently, the arbitration shall not be stayed due to her non-attendance.
2. The arbitration shall continue as scheduled and will not be adjourned.
3. Mrs. Conway shall receive her expenses in this motion, which I fix at \$600.

EVIDENCE AND ANALYSIS:

The arbitration hearing is currently set to commence on October 12, 2004.

The Insurer, Certas, brought a motion returnable September 24, 2004 requesting that the arbitration be stayed pending Mrs. Conway's compliance with a requested examination pursuant to section 42 of the *Schedule*.

The Insurer also requested an adjournment *sine die* of the upcoming arbitration hearing.

Prior to the commencement of the motion hearing, counsel for Mrs. Conway also noted that one of her medical witnesses would not be available during the scheduled time for the arbitration but could be heard the following week. Mr. Hayward did not, however, request an adjournment of the arbitration, but rather that it proceed as scheduled with a resumption at a time to be ordered to hear the medical evidence.

At common law, no one, including insurers, had a right to compel an insured to make him or herself available for examination simply because a claim was being advanced. (See *Redly v. City of London et al.* (1891), 14 PR (Ont.) 171). Parties to civil actions may now move under section 105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, or Rule 33 of the *Rules of Civil Procedure* to obtain an order for a compulsory medical examination where the plaintiff's health is at issue in the matter.

In accident benefit matters before the Commission, insurer's examinations are permitted pursuant to section 42 of the *Schedule*.² Insurers in this arbitration scheme, however, do not have an absolute right to schedule examinations whenever they want.

Section 42 of the current *Schedule* provides further details of the insurer's obligations under such a request for examination. Section 42(2) provides for a notice provision to the insured while section 42(3) still provides for examinations as often as "reasonably necessary." Section 42(4) provides that an insurer shall make reasonable efforts to schedule the examination for a time that is convenient for the insured person.

Unlike the court rules which provide specifically for the medical examination of parties in the context of litigation, section 42 of the *Schedule* allows such examinations only in the context of the determination by the insurer of whether a benefit is payable; in other words as part of the adjustment of the file.

²Under the *SABS-1996*

There is no specific provision either in the *Schedule* or the *Dispute Resolution Practice Code*³ (the “*Practice Code*”) for litigation related examinations. This is consistent with an arbitration process that does away with much of the discovery process, with the exception of documentary discovery. Rule 33 of the court *Rules*, of course, is in the context of rules outlining examinations for discovery, the inspection of property, and examination of non-parties. These form part of the wider pre-trial discovery process of the courts. Because of the significant differences between the arbitration and court systems, caution must be exercised, therefore, in following too strictly court jurisprudence on the timing and reasonableness of medical examinations.

Mrs. Conway’s objections to her attendance at the proposed examination stem from the fact that the proposed examination is scheduled just before the arbitration date, and will necessitate an adjournment, that the Insurer has been aware of the post-104 week claim for well over a year and has neglected to schedule the appropriate examinations, and that the Insurer made no effort to contact her to find a time that was convenient to her for such an examination.

I will deal first of all with the issue of delay. At the pre-hearing held before me on July 9, 2003, the issue of post-104 week entitlement to income benefits was raised, and noted in the pre-hearing letter.

At the very least, at that date, the Insurer was well aware that the issue of Mrs. Conway’s entitlement to post-104 week benefits was live. Indeed, the Insurer presumably had considered itself knowledgeable enough about her condition post 104 weeks to issue a denial of that benefit on June 23, 2003.

While the legislation provides only that examinations may be ordered for the purposes of “determining whether a person is entitled to a benefit”, in practice, section 42 examinations sometimes appear to be requested in the context of the arbitration proceeding, rather than strictly the adjustment of the claims file.

³(4th Edition, Updated October 2003)

Even though an insurer has a presumptive right to a medical examination on the 104-week mark⁴, its ability to exercise that right may be lessened by delay and other factors such as compliance with the pre-conditions of section 42.

The coincidence of the timing of the application, on the eve of the arbitration, suggests that it was intended to be used as a medical-legal report in connection with the arbitration, which would be outside the parameters of section 42.

As Arbitrator Sampliner noted in *Nandkumar and Economical Mutual Insurance Company*:⁵

In my view, requests for the insurer medical examinations during the final stages of a legal dispute must be regarded as inherently linked to their interests in advocating their position, as opposed to normal adjusting investigation.

In this matter, the fact that the Insurer has applied for a stay of the arbitration, pending the examination, rather than the relief specified in section 42(8) of the *Schedule*, supports a linkage with the arbitration process.

Given the timing of the arbitration, the Insurer has an obligation to provide some evidence as to its intentions in ordering the examination. In the absence of this I cannot accept that it was for the purposes of determining whether a benefit is payable and hence properly within the domain of section 42.

Without accepting that a section 42 examination may be used as a litigation-related examination, I will examine the timing of the proposed examination in the context of the hearing of this arbitration.

⁴Since the test for disability changes at this point, a new examination including perhaps vocational assessments not relevant to the pre-104 test should normally be reasonable.

⁵(FSCO A03-000831, April 7, 2004).

Given that a three-day examination was scheduled for September 13 to 16, 2004, and the arbitration hearing was scheduled less than one month later, I accept it as a foregone conclusion that any report arising from this examination could not be completed and served within the times specified by the *Practice Code*. Nor could Mrs. Conway's own experts have time to examine and consider the report, let alone respond to any issues it raises, prior to the scheduled hearing.

The Insurer knew at least a year before the request that post-104 week benefits were in issue. It preferred not to exercise its option to have Mrs. Conway examined again. This could have been oversight by the Insurer, a strategy not to incur further expenses on the file or it could be categorized as "laches." *Laches* are defined by the Canadian Oxford Dictionary as:

unjustifiable, inexcusable, or unreasonable delay in performing a legal duty, asserting a right, claiming a privilege, etc.

The courts have recognized that for laches to apply there must be more than mere delay.

Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.⁶

What then is the prejudice or injustice suffered by Mrs. Conway? At the pre-hearing, the parties not only agreed to set the date for the hearing, but agreed that it could be conducted in four days. Barring the occurrence of circumstances such as those described in Rule 72 of the *Practice Code*, and *Practice Note 9, Adjournments*, they are expected to be able to proceed within the agreed time frame. This is consistent with a system that is designed to be "quicker, less expensive and less formal"⁷ than the courts.

⁶ *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221

⁷ *Practice Code* Introduction at p.10

According to the timelines set out in the *Practice Code*, an insured may reasonably expect a ruling on benefit entitlements in less than a year from the commencement of the arbitration process.⁸

Reports and responding reports are not produced in a matter of days. To allow a report without the opportunity for a response would be a patent injustice to the parties and the process.

I find that to grant the Insurer's request for an examination would result in an adjournment and unnecessarily prejudice Mrs. Conway's right to a prompt hearing of her claim.

As noted earlier, the Insurer knew as of June or July 2003 that any claim advanced by Mrs. Conway would turn on her ability to perform any work to which she was suited by training, education or experience: the post-104 week test. It did not choose to exercise its right to follow-up assessments during the period when such an assessment would not impinge on the agreed arbitration date.

The Insurer's explanation for its procrastination is that it believed that the matter would settle, and wished to improve the climate for settlement by refraining from any actions while attempts at a global settlement were taking place. While no one can dispute the Insurer's good intentions in entering into settlement discussions, it is hard to accept that such ongoing discussions somehow constituted a waiver by the Applicant of her right to a timely hearing, if settlement was not reached.⁹

⁸ Historically, arbitration has been seen as an efficient, time-sensitive alternative to the courts. In 1856 Lord Campbell, in *Scott v. Avery* 5 H.L. Cas. 811, remarked: "Is there anything contrary to public policy in saying that the company shall not be harassed by actions to be brought against them, the costs of which might be ruinous, but that any dispute that arises shall be referred to a domestic tribunal, which may speedily and economically determine the dispute?"

⁹ Although section 11 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, provides for a suspension of time limits during mediation, I do not accept that the concept can be transferred to the internal deadlines of the arbitration process. It is clear from the evidence that the Applicant continued to provide and serve medical reports in April and May 2004. In the absence of agreement to the contrary, this should have signalled to the Insurer that, notwithstanding mediation, the claim was proceeding normally to a hearing.

The Insurer had to be aware that not all discussions end in settlement, and that there is always a risk that a matter will proceed to its scheduled hearing date. This is one of those occasions.

Just as an insured cannot justify ignoring statutory time limits based on ongoing discussions with an insurer, so the insurer cannot use the same rationale to ignore the time requirements of the arbitration process.

As Director's Delegate Naylor has held¹⁰, the scheduling of examinations involves a balancing of the interests of the parties, with the timing of the examination as an important consideration. Absent a clear explanation, examinations scheduled on the eve of the hearing suggest the kind of tactical brinkmanship that arbitrators have properly rejected as part of this system.

I note as well the objection raised by Mrs. Conway that the Insurer had made no effort to schedule the examination at a time that was convenient for her. Indeed, I find that there was no evidence before me that the Insurer made any effort to comply with the obligations of section 42(4) of the *Schedule*.

Certas had the onus of proving that its proposed examination met the criteria of section 42 of the *Schedule*, and that it was reasonable for it to ask for the examination. I find that it has not satisfied the burden of proof on either issue.

Consequently, Mrs. Conway's non-attendance at the proposed assessment should not be a bar to her proceeding with her arbitration.

Dealing with the request for a stay due to non-compliance with the section 42 examination, a stay is an exceptional remedy that is not provided for in the *Schedule*. Since I have found that the request for the

¹⁰See *F.S. and Belair Insurance Company Inc.*, (OIC P96-00039, June 11, 1996)

examination was not reasonable or in conformity with section 42, I do not accept that the Insurer has made a case for this remedy. Therefore, the arbitration will not be stayed.

With regard to the availability of Mrs. Conway's medical witness, it is clearly within the power of the hearing arbitrator to schedule the arbitration in the manner he or she finds appropriate. I find that, at this late stage in the procedure, it is up to the hearing arbitrator to decide whether to proceed in the absence of the medical witness, to bifurcate the hearing to permit the medical evidence to be heard at a later time or to order a further adjournment. Consequently, I make no order as to the manner that Mrs. Conway's medical witness will be heard, if at all.

EXPENSES:

Mrs. Conway was successful in this motion. The jurisprudence is clear that insurers do not have an untrammelled right to schedule examinations on the eve of the hearing, barring extraordinary circumstances. In the absence of such circumstances, Certas should have realized that its motion had no chance of success.

Consequently, I exercise my discretion to award Mrs. Conway her expenses in this preliminary issue hearing which I fix at \$600.

John Wilson
Arbitrator

September 30, 2004

Date

BETWEEN:

DIANNE CONWAY

Applicant

and

CERTAS DIRECT 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. Conway is not required to make herself available for the section 42 assessment scheduled by the Insurer. Consequently, the arbitration shall not be stayed due to her non-attendance.
2. The arbitration shall continue as scheduled and will not be adjourned.
3. Mrs. Conway shall receive her expenses in this motion, which I fix at \$600.

John Wilson
Arbitrator

September 30, 2004

Date