Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A14-007665

BETWEEN:

D.F.

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION ON PRELIMINARY ISSUES

Minor errors under "Heard" and on pgs. 4, 5, 6 and 7, corrected on February 28, 2017 in accordance with the *Dispute Resolution Practice Code* and section 21.1 of the *Statutory Powers Procedure Act.

Before: Deborah Pressman

Heard: September 22, October 14 and 16, 2015 at the offices of the Financial Services Commission of Ontario in Toronto and by written submissions received by October 13, 2016

Appearances: Andrew Kerr for Ms. D.F.
Ian D. Kirby for Wawanesa Mutual Insurance Company

Issues:

The applicant, D.F. did not succeed in her previous arbitration proceedings with Wawanesa arising from a motor vehicle accident on October 13, 2002.[1] Her current Application for Arbitration raises a catastrophic determination issue and a claim for medical benefits pursuant to the *Schedule.*[2] Wawanesa advanced affirmative defences as preliminary issues, which are the subject of this hearing.

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[1] *D.F. and Wawanesa Mutual Insurance Company* (FSCO A05-000779, August 23, 2006), upheld on appeal (FSCO P06-00029, April 15, 2008), *D.F. and Wawanesa Mutual Insurance Company* (FSCO A05-000779, June 20, 2008), upheld on appeal (FSCO P08-00024, December 15, 2011), *D.F. v. Wawanesa Mutual Insurance Company*, 2012 ONSC 194 (Expense Decision not listed)

[2] *The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996,* Ontario Regulation 403.96, as amended.

The preliminary issues are:

1. Whether Ms. F. failed to attend and submit to an insurer examination as set out in section 44(9)iii of the *Schedule*, and if so, is she precluded from proceeding with her arbitration?

2. Whether Ms. F. is estopped from proceeding to arbitration due to a previous arbitral decision?

3. Whether Ms. F. is estopped from arbitrating medical benefits claimed in this Application for Arbitration because they are identical to medical benefits already arbitrated?

4. Whether Ms. F. or Wawanesa are entitled to expenses incurred in respect of this preliminary issue hearing?

Result:

1. Ms. F. did not fail to attend and submit to an insurer examination as set out in section 44(9)iii of the *Schedule* and therefore, she is not precluded from proceeding with her arbitration.

2. Ms. F. is not estopped from proceeding with her arbitration due to a previous decision.

3. The decision on whether medical benefits claimed in this Application are identical to medical benefits already arbitrated is to be determined by the hearing arbitrator.

4. Ms. F. is entitled to her expenses incurred in respect of this preliminary issue hearing in the amount of $11,828.44 (inclusive of HST and disbursements).

EVIDENCE AND ANALYSIS:

Issue 1: Ms. F. did not fail to attend and submit to an insurer examination as outlined in section 44(9)iii of the *Schedule*[3]

Wawanesa argued that Ms. F. failed to attend and submit to a psychiatric examination it arranged as part of a multi-disciplinary catastrophic assessment. I disagree. Ms. F's behaviour and conduct on the day of the examination may have been challenging and difficult to handle, but it did not amount to non-compliance with section 44 of the *Schedule*.

Section 44 of the *Schedule* is an exhaustive rule that governs the process for Insurer Examinations (IEs). Relevant to this hearing is section 44(9)iii, which states:

> If the attendance of the insured person is required,
>
> ...
>
> iii. the insured person shall **attend the examination and submit** to all reasonable physical, psychological, mental and functional examinations requested by the person or persons conducting the examination. [Emphasis mine]

On the balance of the evidence, I find that Ms. F. did not fail to attend and submit to an examination as set out in section 44(9)iii of the *Schedule.*

Attendance at the Examination:

On June 27, 2013, Ms. F. arrived at Centric Health (Centric) for Wawanesa's psychiatric IE, which was scheduled for three hours with Dr. Tucker, a psychiatrist.

[3]The parties agreed that section 44(9)iii of the 2010 *Schedule* is the applicable legislation to this issue.

Ms. F. arrived late and soon after began arguing loudly with Centric's receptionist over signing Centric's consent form. When Dr. Tucker heard the commotion in the waiting area, she approached Ms. F. and asked that she follow her to an interview room.

Ms. F.'s and Dr. Tucker's interaction did not last very long, approximately 10-15 minutes at the most. In the interview room, Ms. F. continued to behave in an agitated and emotional manner and Dr. Tucker was unable to complete the patient identification stage of the examination. Dr. Tucker began to worry for her safety and called for an observer.[4] Mr. Marchetti, a Centric employee, got the call and arrived at the interview room fairly quickly. This was about 10 minutes into the examination.

Mr. Marchetti's presence in the interview room further agitated Ms. F. When Dr. Tucker and Mr. Marchetti attempted to leave the interview room together, Ms. F. insisted on joining them outside. At this point, Dr. Tucker left Mr. Marchetti with Ms. F. and about 10 minutes later, Dr. Tucker left Centric's premises altogether.

Mr. Marchetti attempted to de-escalate the situation and tried to clarify Ms. F.'s concerns over signing the consent form. However, he was unable to have a rational discussion with Ms. F. as she continued to be very upset and emotional, crying at times. He stayed with Ms. F. for about 10 minutes until another Centric employee, Mr. Giesbrecht, got involved.

Mr. Giesbrecht's and Ms. F.'s interaction lasted for approximately 45 minutes. At first, Ms. F. continued to be emotional and unreasonable. But she soon calmed down as they discussed her concerns over signing the consent form and the list of medical documents that Centric received for her assessment. They also telephoned Mr. Kerr, Ms. F.'s lawyer, and included him in their discussion.

[4]Dr. Tucker raised safety concerns as justification for not continuing with the assessment but other Centric witnesses testified that they did not feel physically threatened by Ms. F.

Within the first hour of the examination, Ms. F. was prepared to sign Centric's consent form. But by this point, Dr. Tucker had already left Centric. As the psychiatric assessment could not take place, Mr. Giesbrecht arranged for a taxicab to take Ms. F. home.

On the balance of the evidence, I find that it cannot be said that Ms. F. did not attend the examination.

Submitting to the Examination:

I find that Ms. F.'s conduct and behaviour was not 'unreasonable' and it cannot be said that she did not submit to the examination conducted by the psychiatrist, Dr. Tucker

Wawanesa relied on Dr. Tucker's opinion and testimony to support its argument that Ms. F. did not "attend and submit" to the examination. But her evidence did not convince me that Ms. F. failed to "attend and submit" as required by section 44(9)iii of the *Schedule*. Dr. Tucker lacked insight into Ms. F.'s history with previous medical assessors and significantly, it was Dr. Tucker who terminated the examination after a fairly brief interaction with Ms. F.

Much of her testimony and opinions were not relevant to a determination of non-compliance under the *Schedule*. For example, she testified that there is no reason for claimants (including Ms. F.) to feel angry, upset, or hostile during the start of the assessment. She also opined that because the assessment experience, including the signing of the consent form, was not a new experience for Ms. F., having undergone multiple assessments, Ms. F. should have behaved better.

Notably, the test under the relevant section speaks to "attend" and "submit." It does not oblige a claimant being assessed under section 44(9)iii to exhibit good behaviour and suppress her anger or frustration during an examination.

I do not find that Ms. F.'s failure to sign the consent form at the start of the examination or her emotional agitation with Dr. Tucker at the preliminary stages of the examination amounted to a failure to "attend and submit." Given the strained relations and mistrust between Wawanesa and Ms. F., it was not unreasonable for Ms. F to question consent forms and ask about the medical disclosure of her information. Wawanesa did not provide me with any authority that demands an applicant sign a consent form prior to an examination under section 44(9)iii of the *Schedule*.

Mr. Tim Vatskos, Wawanesa's adjuster, has handled Ms. F.'s claim for the last 12 years. He testified to the many challenges in his dealings with Ms. F. and I agree that it has been difficult for Wawanesa to contend with the applicant.

The evidence presented confirmed that Ms. F. has had a long history of requiring accommodation at IEs and often demanded much patience from her medical assessors.[5] But Dr. Tucker admitted that she was not familiar with Ms. F.'s history and reviewed the medical brief after the assessment and not before.

Dr. Tucker testified that Ms. F.'s unusual behaviour was an intentional attempt to frustrate the examination and was not related to a psychological condition. However, Dr. Tucker admitted that she did not have enough time to form an opinion with respect to Ms. F.'s psychological or mental state and the existence of any psychological conditions. Therefore, I cannot accept her opinion as a basis for determining that Ms. F. failed to 'attend and submit' to the examination.

[5]Throughout her claim, Ms. F. insisted on female assessors, refused to sign consent and release forms, and often attempted to audio record examinations with her cell phone. In fact, Ms. F. made a late request to admit into evidence her own audio recording that she made on her cell phone during her attendance at Centric on June 27, 2013. Wawanesa objected and the parties made submissions. I did not admit this recording into evidence because both rules 39 and 40 of the *DRPC* state that evidence to be introduced at a hearing must be served on the other party at least 30 days before hearing. Significantly, this audio evidence was produced to Wawanesa's counsel on Friday October 9, 2015 (day 2 of the hearing) despite the fact that it has been in Ms. F.'s possession for over 2 years. Ms. F. did not satisfy me that any extraordinary circumstances existed to justify an exception under the rules at this late stage of the hearing.

In fact, Dr. Rennie, Ms. F.'s treating doctor, testified that Ms. F. has been exhibiting symptoms of paranoia, depression and other difficult behaviour for many years.[6]

When asked why Dr. Tucker did not allow Ms. F. a break before terminating the assessment, she testified that a break was not necessary and would not change the prospects of continuing the assessment. She explained that a break is reserved for situations of true psychotic episodes in order to allow patients to receive treatment and calm down before resuming an assessment.

Surely a claimant like Ms. F., with a history of difficulties participating in assessments could have been afforded an opportunity for a break so she could calm down and then attempt to continue with the assessment.[7] The examination had been scheduled for three hours and Ms. F. was, in fact, willing to continue her examination within an hour after she had an opportunity to calm down.

I find that Ms. F. consented to participate in the assessment and submitted to the best of her ability. She showed up at Centric and stayed for about an hour. She had discussions, albeit emotional and loud, regarding the consent form and the disclosure of her medical information. Eventually, she was ready to proceed, but by that point the examination had already been terminated by Dr. Tucker and Ms. F. was not afforded another opportunity to re-attend.[8]

I find that Centric did not make reasonable efforts to allow Ms. F. more time to complete the examination and that Dr. Tucker's abrupt exit from Centric, prior to the scheduled end time of the examination, prevented the examination from taking place.

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[6]Dr. Rennie is a general practitioner with a practice restricted to psychotherapy. He provided counselling to Ms. F. between 2002 and 2014. In the first few years, the treatment was fairly consistent and regular and became more intermitted after 2005.

[7]Ms. F. cooperated with other assessors who took their time to explain the nature of the examination (see for example, Dr. Kirkpatrick's psychiatric IE in 2012, at Tab 14 of Exhibit 4)

[8]Centric's multidisciplinary medical team decided not to reschedule or proceed with Ms. F.'s catastrophic assessment (at Tab 39 of Exhibit 1). Dr. Tucker authored her own incomplete report stating that she will not be assessing Ms. F. due to her hostility and lack of cooperation (at Tab 40 of Exhibit 1)

On the balance of the evidence, it cannot be said that Ms. F. did not attend or submit to the examination. Her behaviour and conduct, although challenging, was not entirely unreasonable given the circumstances of her case and history.

Issue 2: Ms. F. is not estopped from proceeding to arbitration due to a previous decision

The issue before me is whether Ms. F. is barred from proceeding with her arbitration by the principle of issue estoppel due to a previous arbitral decision that included a finding on causation.

Issue estoppel means "that a litigant is estopped because **the issue has clearly been decided in the previous proceeding**." [emphasis mine][9] While it may apply in certain situations, I find that it is not appropriate to apply it to this arbitration and that Ms. F. is entitled to have the merits of her catastrophic determination claim put before an arbitrator.

The finding at issue arose from a previous arbitration hearing and decision dated June 20, 2008. There were several benefits in dispute; medical/rehabilitation, housekeeping expenses and attendant care benefits. Ms. F. represented herself.

At page 10 of his decision, the Arbitrator noted that Ms. F.'s psychological condition was complicated and determined that the motor vehicle accident of October 13, 2002 did not cause Ms. F.'s psychological or physical condition. He stated:

> [Ms. F.] may very well believe that the accident caused her to significantly deteriorate, but I base my decision on the lack of compelling medical evidence and that [Ms. F.] did most of the same activities before and after the accident. I find, on a balance of probabilities, that the accident did not cause or significantly contribute to [Ms, F.'s] psychological or physical condition, and that she is not entitled to her claimed accident benefits under the *Schedule*.[10]

[9] *Penny v. Royal & Sun Alliance Insurance Company of Canada*, 2006 CanLII 23942 (ON S.C.)

[10] *D.F. and Wawanesa Mutual Insurance Company* (FSCO A05-000779, June 20, 2008) at page 10

In my opinion, the issue in this Application for Arbitration, namely, catastrophic impairment, has not been clearly decided in the previous proceeding. It was never an issue in the previous proceeding.

I also note that causation was not listed as an issue in dispute in the Arbitrator's decision and it is not clear whether causation was anticipated as a central issue in the hearing. In addition, the arbitrator's determination was not based on an assessment of the validity of the underlying issue of causation, but rather on the basis of D.F's failure to meet an evidentiary onus and the "lack of compelling medical evidence…" It is not clear whether Ms. F., who was self-represented, understood that she would need to satisfy the test for causation, in addition to the burden of proving her claimed benefits in that arbitration.

It is also not entirely clear whether the arbitrator's comments with respect to causation were made "in the alternative" or if they amount to an "opinion." Regardless, the application of issue estoppel is discretionary.[11]

Generally, the rule of estoppel is not an easy fit in the world of accident benefits. The rule is grounded upon two principles of public policy: first, an interest that there should be an end to litigation and, secondly, that no individual should be sued more than once for the same cause.[12] While these principles also apply in the statutory accident benefits scheme, so do other important policy concerns such as consumer protection, compensation of accident victims, and allowing a dispute to be heard on its merits.

I agree with the need to encourage finality but unlike litigation, the accident benefits process and its governing legislation tolerate multiple proceedings. It is not a "one time only" situation. The dispute resolution process for accident benefits does not lend itself to one hearing or one

[11]*Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44 (CanLII), *Sibley v. Rizzuto*, 2008 CanLII 20347 (ONSC), *Schneider's Employees Association v. Maple Leaf Consumer Foods Inc*., 2009 CanLII64527 (ON LRB), *Minnot v. O'Shanter Development Company Ltd.*, 1999 CanLII 3686 (ONCA), Zurich North America Canada and Stelzer (FSCO P02-00035, February 6, 2004) and *Machin v. Tomlinson* [1999] O.J. No. 5062 (S.C.J.)

[12]*Ibid*.

decision. In fact, claimants have a right to dispute and arbitrate many insurer denials of medical and rehabilitation benefits. Significantly, the *Schedule* contemplates that a catastrophic determination issue may arise several years after the accident. Practically, accident benefits may be available to an individual over a lifetime and changes in his or her entitlement may occur after multiple arbitrations and decisions.

Therefore, when balancing the need of finality against the rights and needs of Ms. F. in the context of statutory accident benefits, I am compelled to exercise my discretion in favour of Ms. F.

Issue 3: The issue of *res judicata* with respect to medical benefits previously arbitrated is deferred to the hearing arbitrator

I was not presented with enough evidence to determine if the issues in dispute in this current Application for Arbitration are identical to previous issues already adjudicated and are therefore *res judicata*.

Although I was provided with previous decisions, the current Application for Arbitration, and previous pre-hearing letters outlining issues in dispute, I was not provided with the original Application for Arbitration outlining these benefits, original treatment plans or OCF-6s, previous Reports of Mediator, or original denials. Therefore, I am not able to adequately compare or adjudicate this issue.

I find that this issue may be more appropriately dealt with by the hearing arbitrator who will have all the evidence to make this determination.

EXPENSES:

I find that Ms. F. is entitled to her expenses of the arbitration in the amount of $11,828.44 (inclusive of HST and disbursements) for the following reasons.

When assessing legal expenses, arbitrators at FSCO determine entitlement and quantum by applying the criteria dictated by the legislation and bearing in mind the overriding principle of reasonableness.

The Expense Regulation requires an arbitrator to consider seven criteria in awarding all or part of the expenses incurred in respect of arbitration.[13] Relevant to this decision is: "Each party's degree of success in the outcome of the proceeding."

Ms. F. is entirely successful and there are no other relevant criteria to consider. Therefore, the analysis is fairly simple and Ms. F. is entitled to her reasonable expenses.

With respect to quantum, arbitrators often make a global assessment of reasonable expenses taking into account that the overriding consideration in fixing arbitration expenses is reasonableness and that a line-by-line assessment of the expenses claimed is not appropriate.[14]

Ms. F. requested $10,190.34 (inclusive of HST) for her fees (inclusive of HST) and $1,638.10 for her disbursements for a total of $11,828.44. I find her request to be an appropriate and reasonable amount considering the length of the preliminary issue hearing, the hourly rate, and the necessary prep time. I also find her disbursements to be proper and reasonable charges.

Significantly, Wawanesa claimed a somewhat similar amount of $11,677.87, for its total fees, disbursements and HST, thus providing further support to the reasonableness of the quantum requested by Ms. F.

[13]Under subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, an arbitrator may award expenses to either party according to criteria prescribed in subsection 12(2) of the Expense Regulation, R.R.O. 1990, Regulation 664, made under the *Insurance Act*, as amended.

[14]*Henri and Allstate Insurance Company of Canada* (OIC A-007954, August 8, 1997)

Pursuant to section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, I am fixing Ms. F.'s expenses in this proceeding at $11,828.44 (inclusive of HST and disbursements).

Deborah Pressman Arbitrator	February 3, 2017 Date

Financial Services Commission of Ontario

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Ontario

FSCO A14-007665

BETWEEN:

D.F.

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario Regulation 664, as amended, it is ordered that:

1. Ms. F. did not fail to attend and submit to an insurer examination as set out in section 44(9)iii of the *Schedule*, and therefore, she is not precluded from proceeding with her arbitration.

2. Ms. F. is not estopped from proceeding with her arbitration due to a previous arbitral decision.

3. The decision on whether medical benefits claimed in this application are identical to medical benefits already arbitrated is deferred to the hearing arbitrator.

4. Wawanesa shall pay Ms. F. her expenses incurred in respect of this preliminary issue hearing in the amount of $11,828.44 (inclusive of HST and disbursements).

February 3, 2017

Deborah Pressman
Arbitrator

Date