Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A08-002135

BETWEEN:

TERRY MATTON

Applicant

and

INSURANCE CORPORATION OF BRITISH COLUMBIA

Insurer

REASONS FOR DECISION ON A MOTION[1]

Before: Jessica Kowalski

Heard: December 2, 2009, at the offices of the Financial Services Commission of Ontario in Toronto

Appearances: Katherine Cahill for Mr. Matton
Sandi J. Smith for Insurance Corporation of British Columbia

The Applicant, Terry Matton, was injured in a motor vehicle accident on October 31, 2003. He applied for and received statutory accident benefits from Insurance Corporation of British Columbia ("ICBC"), payable under the *Schedule*.[2] On or about May 8, 2007, ICBC terminated weekly income replacement benefits. On July 22, 2008, the parties participated in mediation but could not resolve their disputes, and in October 2008, Mr. Matton applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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[1]For the order issued on December 24, 2009

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

On December 2, 2009, ICBC brought a motion requesting, among other things, an order staying the arbitration scheduled to start February 1, 2010, until Mr. Matton attends a psychiatric assessment scheduled under s. 42.

Issue:

1. Should the arbitration proceeding be stayed until Mr. Matton makes himself reasonably available for a psychiatric assessment, scheduled pursuant to section 42 of the *Schedule*?

Result:

1. The Insurer's motion is denied.

2. Expenses of this motion are deferred to the hearing arbitrator.

The Motion:

ICBC seeks the following relief:

i. an order that Mr. Matton failed to make himself reasonably available for a section 42 psychiatric assessment scheduled by ICBC, and a finding that this assessment as scheduled was reasonable and necessary;

ii. an order staying the arbitration proceeding as a result of Mr. Matton's failure to make himself reasonably available for the psychiatric assessment and until Mr. Matton makes himself reasonably available for the assessment; and,

iii. an order that, as a consequence of his failure to make himself reasonably available for the psychiatric assessment, no benefit is payable.

THE RELEVANT FACTS:

As a result of this accident, Mr. Matton sustained, among others injuries, a serious fracture to his right femoral shaft. The parties acknowledge that the fracture did not heal in the usual course. It took a long time to heal solidly and was treated with an intramedullary rod. By May 2005, some 19 months after the accident, x-rays confirmed that the main fracture fragments had healed. In March 2006, however, Mr. Matton continued to complain of intermittent pain in his right hip and buttock area. Examination revealed a full range of motion. Despite objective indicia that the fracture had healed, Mr. Matton continued to complain of ongoing pain. Dr. David Harding, Mr. Matton's treating orthopaedic surgeon, and Dr. Stanislaw Tubin, another orthopaedic surgeon who had examined Mr. Matton, each suggested that Mr. Matton's pain and discomfort might resolve if the intramedullary rod were removed.

The rod was removed in June 2006. In September 2006 Mr. Matton's family doctor, Dr. Donald Davies, reported that Mr. Matton's pain was worse than ever. On examination, Dr. Davies could not demonstrate any swelling and reported good range of motion in the hip. He requested an opinion for pain management and expressed concern as to Mr. Matton's reliability with narcotics. Dr. Davies also expressed hesitation to increase Mr. Matton's narcotics dose feeling it would not help the situation.

On March 8, 2007, Dr. Davies completed a disability certificate in which he noted the right femur fracture and pain. He recommended further orthopaedic assessments, and wrote that it was unknown whether Mr. Matton could return to work, even if on modified hours or duties. He suggested that Mr. Matton needed to be reassessed by specialists, and that Mr. Matton complained of "chronic pain" and an inability to work despite a healed fracture and a removed pin. According to the disability certificate, Dr. Davies noted that he had referred Mr. Matton to a chronic pain specialist in September 2006 but that he was still waiting for an appointment. He concluded the certificate with the question, "?why is [Mr. Matton] so disabled??" [*sic*]

In April 2007, at ICBC's request, Dr. T.H. Wallace conducted another orthopaedic assessment, considering Mr. Matton's ongoing low back, left knee and right leg complaints. Based on that assessment, on or about May 8, 2007, ICBC terminated Mr. Matton's benefits.

In all, Mr. Matton attended numerous assessments at ICBC's request including a functional capacity assessment, a transferable skills assessment, an in-home functional reassessment, a functional abilities evaluation, orthopaedic examinations, and a vocational evaluation assessment. Among the assessments was a psycho-vocational assessment with a psychologist, Dr. Jeffrey Phillips, in September 2005. Dr. Phillips found that Mr. Matton had low cognitive function, weak verbal and reasoning skills, was not an appropriate candidate for formal education and did not have significant potential to upgrade his skills beyond the observed levels. He reported that Mr. Matton's potential was severely limited due to physical injury, intellectual limitations and functional illiteracy.

Mr. Matton has a long history of prior accidents. A Temiskaming Hospital Record from September 2000 indicates a prior history of thirteen accidents in total. Included in the history was the suggestion, as far back as 1998, that Mr. Matton ought to be on some low dose anti-depressants.[3]

Dr. Doxey's Report

On May 5, 2009 (after the April 1, 2009 pre-hearing, at which a February 1, 2010 hearing date was scheduled), Mr. Matton met with Dr. Neville Doxey, psychologist, for the purpose of conducting his own psycho-vocational assessment.

In his assessment, Dr. Doxey diagnosed a pain disorder with a general medical condition, chronic. This diagnosis was based on the DSM-IV. Dr. Doxey noted a mild level of depression and opined that Mr. Matton was not likely to return to any kind of employment. Like Dr. Phillips before him, Dr. Doxey found low scores on intelligence and aptitude. His report dated May 5, 2009 was served on ICBC on May 11, 2009.

[3]Noted in Dr. Wallace's April 16, 2007 report for ICBC

One month later, on June 12, 2009, ICBC (via its independent adjuster Claimspro) asked Mr. Matton to provide an updated disability certificate (OCF-3). His solicitors refused on the grounds that one was not required, with income replacement benefits having been terminated some two years before.

On July 27, 2009, ICBC asked that the pre-hearing be resumed to deal with production issues and to discuss the issue of Dr. Doxey's report having been served after the April 1, 2009 pre-hearing at which no mention had been made of the pending appointment, or of Dr. Doxey as a potential witness.

On October 2, 2009, the parties participated in a resumed pre-hearing discussion in respect of ICBC's request to deal with production issues (that the parties advised had by then been resolved) and with ICBC's request that Mr. Matton attend a section 42 assessment with a psychiatrist to respond to Dr. Doxey's assessment.

On October 15, 2009, after the resumed pre-hearing, ICBC served Mr. Matton with its notice (required by section 42) requesting that Mr. Matton attend an insurer's examination with a psychiatrist in response to Dr. Doxey's May 5, 2009 report. The appointment was scheduled for November 17, 2009. The hearing is scheduled to start February 1, 2010.

LAW AND ANALYSIS

Section 42 of the *Schedule* provides that, for the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit, an insurer may, as often as is reasonably necessary, require an insured person to be examined by one or more persons chosen by the insurer who are members of a health profession. It is clear that the insurer bears the onus to prove that the insurer's examinations are reasonably necessary.

Whether an insurer's examination is reasonably necessary is determined by consideration of a number of factors, including the timing of the request; the number and nature of previous insurer's examinations; the number and nature of the examinations being sought; whether new

issues have been raised in the claim that require evaluation; whether there is a reasonable nexus between the examinations and the injuries; and the possible prejudice to the parties.[4]

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.[5] Requests for section 42 examinations should be made well in advance of the arbitration hearing date. Should an insurer fail to request examinations in a timely manner, it must provide a valid reason for its late request.[6]

In *F.S. and Belair Insurance Company Inc.*, Director's Delegate Naylor wrote that determining the appropriateness of a request for an examination requires a balancing of the interests of the parties in the context of the particular facts.[7] Arbitrators have ruled that the onus is on the insurer to prove that the medical examinations sought are reasonably necessary and that they have been requested to adjust the file in regard to an insured person's entitlement to benefits, rather than to serve as a means to obtain examinations to bolster the insurer's case for hearing.[8] Where a proposed examination appears to be part of preparation for hearing rather than an ongoing effort to adjust the file, arbitrators have not required applicants to attend.[9]

The Insurer has an obligation to continually adjust a claim – an obligation that survives the termination of benefits. In *Al-Shimasawi and Wawanesa*[10], Arbitrator Feldman stated that the question is whether the examination is being requested for brinksmanship or is it more

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[4]See *Al-Shimasawi and Wawanesa Mutual Insurance Company* (FSCO A05-002737, May 11, 2007) and *Fraser and Echelon General Insurance Company* (FSCO A04-000181, April 29, 2005)

[5]*Faiz and Wawanesa Mutual Insurance Company* (FSCO A06-001588, August 31, 2007), paragraph 10. See also *F.S. and Belair Insurance Company Inc.* (OIC P96-00039, June 11, 1996), Appeal

[6]*Howden and Pembridge Insurance Company* (FSCO A01-000333, October 5, 2001) paragraph 10

[7]See *F.S.*, supra

[8]*Eidt and Pilot Insurance Company* (FSCO A04-001277, February 11, 2005)

[9]*Bishop and Aviva Canada Inc.* (FSCO A04-000230, March 3, 2005)

[10]See *Al-Shimasawi*, supra

realistically a request to assess the claim, but that a mixed motivation is not sufficient to deny the insurer its section 42 request.

The Commission must also consider the possible prejudice to both sides when determining whether a section 42 examination is reasonably necessary. If there will be a delay to the start of the arbitration hearing in order for an insured person to attend an insurer's examination, it may be considered prejudicial to the applicant.[11]

Although I agree that mixed motivation – the adjusting of a file and trial brinksmanship – may not be sufficient to deny ICBC its section 42 request, I find that the facts of this case suggest that the examination is requested overwhelmingly for the purpose of hearing preparation.

The history of this case suggests that Mr. Matton's complaints of pain were nothing short of chronic. ICBC knew, by at least July 22, 2008 (the date of mediation) that any claim advanced by Mr. Matton for income replacement benefits would turn on his ability to perform any work for which he was reasonably suited by training, education or experience. Similarly, if ICBC felt that psychological investigation was not warranted between 2005 and 2009 (during which time Mr. Matton's complaints of chronic pain are well documented) ICBC had notice by as early as May 11, 2009 of Dr. Doxey's report. It was not, however, until October 15, 2009 (and after the resumed pre-hearing on October 2, 2009), that ICBC served notice on Mr. Matton in compliance with section 42 that he attend the psychiatric assessment, even though a hearing had already been scheduled to proceed on February 1, 2010. ICBC has offered no compelling reason for the intervening delay.

[11] See *Faiz*, supra

The Supreme Court of Canada, in *Nova Scotia (Workers' Compensation Board)* v. *Martin*, wrote that chronic pain, although lacking an authoritative definition, was "generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques."[12]

ICBC had ample opportunity to investigate the underlying causes for Mr. Matton's persistent complaints of pain but did not choose to exercise its right to follow-up assessments during a time when such an assessment might not interfere with a pending arbitration date.

That said, the hearing might not have been delayed had Mr. Matton attended even as late as November 17, 2009. However, even if the assessment could be completed in sufficient time to allow Mr. Matton a right to reply and comply with the procedural filing requirements as set out in FSCO's *Dispute Resolution Practice Code*, the facts of this case suggest that the primary, if not exclusive goal, of the proposed assessment was to respond to Dr. Doxey's report in preparation for the upcoming hearing.

Mr. Matton's psycho-vocational and low cognitive abilities as a barrier to his ability to work were well documented and assessed repeatedly by ICBC, namely in Dr. Jeffrey's psycho-vocational assessment in September 2005, by its transferable skills analysis in November 2005, and by a vocational evaluation assessment in February 2007.

In November 2008, Mr. Matton provided ICBC with Dr. Davies' clinical notes and records. In a letter dated November 3, 2008, Dr. Davies wrote that Mr. Matton has suffered from chronic pain since the subject (2003) accident, and diagnosed Mr. Matton with chronic pain syndrome.

[12] *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] 2 SCR 504

Dr. Doxey's report refers to a February 24, 2009 report of another orthopaedic surgeon, Dr. Rick Zarnett, who he suggested diagnosed Mr. Matton with Chronic Pain Syndrome and recommended a referral to a multidisciplinary chronic pain management program to address physical and emotional aspects of the injury as well as Mr. Matton's use of narcotics to treat the pain.

The chronology that pre-dates Dr. Doxey's report suggests that there were many steps along the way that ICBC could have considered whether to have any number of specialists assess Mr. Matton's reported complaints of chronic pain in the absence of objective findings. Certainly, if not before Dr. Doxey's report in May 2009, then at least shortly after his report, ICBC could have taken serious steps to procure a response. It did nothing for some five months. Where ICBC has had ample time and opportunity to request this assessment, but chose to delay its request for no compelling reason, I find that the request is unreasonable. Similarly, had ICBC felt that Dr. Doxey's report disclosed something new, that changed the complexion of Mr. Matton's claim and that led ICBC to believe it needed to assess Mr. Matton for further adjusting purposes, the delay after ICBC received Dr. Doxey's report suggests that ICBC did not see Dr. Doxey's report as disclosing something so new that it required further adjusting of the file. By waiting as long as it did, ICBC's conduct suggests the opposite: that it needed a report to respond to Dr. Doxey's report for the arbitration hearing.

ICBC has not acted in a way to persuade me that it viewed this assessment as disclosing a new issue that changed the complexion of Mr. Matton's claim and that a psychiatric examination was reasonably necessary, at the stage at which it was requested, to assess and adjust the file. Further, ICBC's right to request an examination on receiving new information must be balanced against the right to a fair process. In the same way that a new disability certificate was not required, a resumed pre-hearing was not required for ICBC to be able to send a notice under section 42. Given this chronology, the timing of the October 15, 2009 notice for a November 17, 2009 assessment speaks far more to ICBC's desire to respond to Dr. Doxey's report in advance of a hearing rather than to adjust Mr. Matton's claim. In considering the history of this case, including the consistent reports of Mr. Matton's ongoing complaints of pain, and the delay incurred for no compelling reason, I find that ICBC's request is not reasonably necessary and

that the arbitration hearing ought not be stayed in order for Mr. Matton to attend the section 42 assessment.

EXPENSES:

Expenses of this motion are deferred to the hearing arbitrator.

Jessica Kowalski
Arbitrator

January 27, 2010
Date

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FSCO A08-002135

BETWEEN:

TERRY MATTON

Applicant

and

INSURANCE CORPORATION OF BRITISH COLUMBIA

Insurer

ORDER ON A MOTION

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

1. The motion to stay the arbitration pending Mr. Matton's attendance at a psychiatric assessment is denied.

2. Expenses of this motion are deferred to the hearing arbitrator.

Jessica Kowalski
Arbitrator

December 24, 2009
Date