



FSCO A13-013501

BETWEEN:

SHU NI

Applicant

and

TD HOME AND AUTO INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Maggy Murray

Heard: Written Submissions Completed February 9, 2017

Appearances: Philip Kai Kwong Yeung for Ms. Ni
Debbie Wong for TD Home and Auto Insurance Company

Issues:

The Applicant, Shu Ni, was injured in a motor vehicle accident on August 3, 2011. She applied for various statutory accident benefits from TD Home and Auto Insurance Company (“TD”), under the *Schedule*.¹ TD terminated income replacement benefits effective October 12, 2011 and refused to pay for other benefits. The parties were unable to resolve their disputes through mediation, and Ms. Ni 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 — Effective September 1, 2010, Ontario Regulation 34/10, as amended.

The preliminary issue is:

1. Is Ms. Ni prohibited from proceeding to arbitration pursuant to s.55(2) of the *Schedule* because she failed to comply with s.44 of the *Schedule* by failing to attend scheduled insurer's examinations?

Result:

1. The Applicant is not prohibited from proceeding to arbitration because she did not attend insurer's examinations.

EVIDENCE AND ANALYSIS:

No evidence was tendered by either party in support of their respective submissions. Correspondence between the parties related to the request that the Applicant attend insurer examinations was filed and provided a factual background.

Law:

Subsection 44(1) of the *Schedule* states:

For the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made, an insurer may require an insured person to be examined under this section by one or more persons chosen by the insurer who are **regulated health professionals** ... (emphasis added)

Subsection 44(5) of the *Schedule* states:

If the insurer requires an examination under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,

- (a) **the medical** and any other reasons for the examination (emphasis added);
- (b) whether the attendance of the insured person is required at the examination;
- (c) the name of the person or persons who will conduct the examination, **any regulated health profession to which they belong** and their titles and designations indicating their specialization, if any, in their professions (emphasis added); and
- (d) if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days.

An arbitrator has no authority to compel an insured person to submit to an insurer's examination that an insurer requested. However, an arbitrator may adjourn a hearing until the insured person attends such an examination.²

Subsection 55 of the *Schedule*³ states:

An insured person shall not commence a mediation proceeding under section 280 of the Act if any of the following circumstances exist:

...

- 2. The insurer has provided the insured person with notice **in accordance with this Regulation** that it requires an examination under section 44, but the insured person has not complied with that section (emphasis added).

² *Bogic and AXA Insurance (Canada)*, QL at para. 14 (FSCO A96-001192, April 30, 1999)

³ O. Reg 34/10, s. 55

Background:

The Applicant seeks income replacement benefits, attendant care benefits, medical benefits and cost of examination expenses.

A Disability Certificate dated August 9, 2011⁴ indicated that the Applicant was unable to work.

The Insurer notified the Applicant that it required her to undergo three insurer examinations to determine her continuing eligibility to receive income replacement benefits.⁵

In a letter dated October 5, 2011⁶ from the Applicant to the Insurer, the Applicant advised that she required a Mandarin interpreter who is accredited with the Ministry of the Attorney General.

Submissions of the Insurer:

The Insurer submitted that the Applicant has failed to comply with her obligation to attend insurer examinations pursuant to s.44 of the *Schedule* and therefore cannot proceed with her any of her claims for benefits.⁷

Submissions of the Applicant:

According to the Applicant, the Insurer did not comply with s.44(5) of the *Schedule* and is therefore not precluded from arbitrating her claims for benefits.⁸

⁴Tab B of Insurer's submissions, at 3

⁵Tab C of Insurer's submissions

⁶Tab D of Insurer's submissions

⁷Insurer's submissions, para. 3

⁸Applicant's submissions, para.'s 20-23 and 34

Analysis:

The Insurer's letter to the Applicant⁹ notifying her of three medical examinations that were scheduled for October 12, 13 and 17, 2011:

- i) Incorrectly identified the Disability Certificate assessor and the date of the Disability Certificate;
- ii) Did not provide a medical reason for the medical examinations;
- iii) Did not list the regulated health profession to which any of the three examiners belong;
- iv) Did not list the profession or designation of one of the three assessors, namely, Dr. Archer. In respect of Dr. Archer, the Insurer stated: "FAE", which is neither a profession or a designation.

The Insurer failed to inform the Applicant of information as required by s.44(5) of the *Schedule*.

Insurers must "explicitly and unambiguously advise"¹⁰ insureds in "straightforward and clear language, directed towards an unsophisticated person,"¹¹ of the information set out in s.44(5) of the *Schedule*.¹²

⁹Tab C of Insurer's submissions

¹⁰*Wahidpur and Unifund Assurance Company* at para. 25 (FSCO P08-00006, March 25, 2009)

¹¹*Smith*, QL at para. 14 as cited in *Wahidpur*, *ibid*.

¹²See also *Faiz and Wawanesa Mutual Insurance Company*, QL at 5, para.'s 22 and 23 (FSCO A06-001588, August 31, 2007)

In *Ives and Wawanesa Mutual Insurance Company*¹³ it was held that:

The legislature has set out information the insurer must give the insured if it seeks an examination, so that the insured can determine whether he or she wants to submit to the procedure. The parties cannot waive compliance with this section.

TD failed to provide the Applicant with all the particulars required by s.44(5) of the *Schedule*. Therefore, TD is not entitled to an Order that the Applicant is prohibited from proceeding to arbitration because she did not attend insurer's examinations.¹⁴

EXPENSES:

I exercise my discretion to award Ms. Ni her expenses incurred in this preliminary issue hearing. If the parties are unable to agree on the issue of quantum, they may make submissions in accordance with Rule 79 of the *Dispute Resolution Practice Code — Fourth Edition*.

Maggy Murray
Arbitrator

April 27, 2017

Date

¹³QL at 2-3, para. 9 (FSCO A05-002144, June 22, 2006)

¹⁴See also *Quinones and Unifund Assurance Company* (FSCO A12-000866, August 2, 2013)

Financial Services
Commission
of Ontario

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de l'Ontario



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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 Regulation 664, as amended, it is ordered that:

1. Ms. Ni is not prohibited from proceeding to arbitration because she did not attend insurer's examinations.
2. If the parties are unable to agree on the issue of the quantum of expenses, they may make submissions in accordance with Rule 79 of the *Dispute Resolution Practice Code — Fourth Edition*.

Maggy Murray
Arbitrator

April 27, 2017

Date