

2013 CarswellOnt 11691  
Financial Services Commission of Ontario (Arbitration Decision)

Quinones v. Unifund Assurance Co.

2013 CarswellOnt 11691, [2013] O.F.S.C.D. No. 108

**Kelly Quinones, Applicant and Unifund Assurance Company, Insurer**

Maggy Murray Member

Judgment: August 2, 2013

Docket: FSCO A12-000866

Counsel: Gary Mazin, for Mrs. Quinones  
Jacqueline Bunt, for Unifund Assurance Company

***Maggy Murray Member:***

**Issues:**

The Applicant, Kelly Quinones, was injured in a motor vehicle accident on September 15, 2010. She applied for various statutory accident benefits from Unifund Assurance Company ("Unifund"), under the *Schedule*<sup>1</sup> which Unifund refused to pay. The parties were unable to resolve their disputes through mediation, and Mrs. Quinones applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Is Mrs. Quinones 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 a scheduled insurer's examination?

**Result:**

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

**Evidence and Analysis:**

In my pre-hearing letter to the parties dated August 21, 2012, I outlined the following preliminary issue that the Insurer raised:

Whether the Applicant is 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.

Although the Insurer reframed the issue in its written submissions, the issue I will deal with is the one that was outlined in my pre-hearing letter.

No evidence was tendered by either party in support of their respective submissions. Several reports as well as some correspondence between the parties related to the request that the Applicant attend an insurer examination were 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 ... 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;
- (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.<sup>2</sup>

Subsection 55 of the *Schedule* 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.

**Background:**

Amongst other benefits, the Applicant seeks attendant care benefits in the amount of \$804.29 per month and housekeeping benefits at \$100 per week from September 16, 2010 to September 15, 2012.<sup>3</sup>

A Disability Certificate dated September 15, 2010<sup>4</sup> was sent to the Insurer on October 1, 2010 which indicated that the Applicant needed attendant care and housekeeping expenses for more than 12 weeks. An attendant care assessment report and Form 1 dated September 27, 2010 were completed on behalf of the Applicant and indicated that she required attendant care in the amount of \$804.29 per month.<sup>5</sup> These forms were submitted to the Insurer.<sup>6</sup>

The Insurer notified the Applicant that it required her to undergo an insurer examination to determine her eligibility to receive attendant care and housekeeping benefits because it needed, based on its review of medical and other information, "a second opinion"<sup>7</sup> in respect of her eligibility to receive these benefits.

In the first Insurer's Notice of Examination<sup>8</sup> there was a checkmark in the "yes" box under the question: "Are you required to attend the Examination". However, the box where the location of the examination was to take place was blank. And, it did not

state the day and time of the examination. This Notice of Examination did not state the name of the person who will conduct the examination. In addition, the boxes titled "Profession or Designation" and "Specialty" were blank.

In two subsequent Notices of Examinations<sup>9</sup> there was a checkmark in the "yes" box under the question: "Are you required to attend the Examination". The Notices of Examination also stated the name of the person who will conduct the examination, and noted that she is an "OT". They did not contain the name of any regulated health profession to which the assessor belonged. They also stated the day and time of the examination. However, in the box where the location of the examination is going to take place, although it stated "At Claimant's Residence", there was no check mark in the box beside that statement.

A letter dated January 6, 2011<sup>10</sup> from the Insurer to the Applicant referred the Applicant back to the Notice of Examination "which outlines the details". This letter stated that the purpose of the assessment is to obtain a second medical opinion to determine the Applicant's entitlement to attendant care and housekeeping benefits and that her attendance is required. It notified the Applicant of the date and time of the examination and that it would take place at her home.

On January 25, 2011, an occupational therapist attended at the applicant's home to conduct the assessment but the Applicant was not home and the assessment was not completed.<sup>11</sup>

*Submissions of the Insurer:*

The Insurer submitted that its Notices of Examination and correspondence dated January 6, 2011 complied with s.44(5) of the *Schedule*, the Applicant failed to attend the examination and this hearing should be stayed pending the Applicant's attendance at an insurer's examination.

*Submissions of the Applicant:*

According to the Applicant, the Insurer did not provide a medical reason for the examination.<sup>12</sup>

***Analysis:***

*Attendant Care Benefits:*

The Applicant submitted her own in-home assessment and Form 1 relating to attendant care expenses.<sup>13</sup>

The Insurer's statement that it required a "second opinion" complied with the requirements in ss.44(5)(a) of the *Schedule* that a medical reason be provided. However, the Insurer failed to inform the Applicant of other information as required by s.44(5) of the *Schedule*.

The Insurer's Notices of Examination dated November 4, 2010,<sup>14</sup> November 8, 2010<sup>15</sup> and November 12, 2010<sup>16</sup> did not notify the Applicant of the regulated health profession to which the assessor belongs. The boxes "Profession or Designation" and "specialty" on the November 4, 2010 Notice of Examination were blank. The insurer's Notices of Examination dated November 8, 2010 and November 12, 2010 stated in the box "Profession or Designation" that the assessor was an "OT". However, an OT is not a health professional within the meaning of the *Regulated Health Professions Act, 1991*.<sup>17</sup> Unifund's Notices of Examination dated November 8, 2010<sup>18</sup> and November 12, 2010<sup>19</sup> did not set out the regulated health profession to which the assessor belonged.

Insurers must "explicitly and unambiguously advise"<sup>20</sup> insureds in "straightforward and clear language, directed towards an unsophisticated person,"<sup>21</sup> the information set out in s.44(5) of the *Schedule*.<sup>22</sup> An unsophisticated person may not know what an "OT" is.

Although the Insurer's letter of January 6, 2011 notified the Applicant that the examination was taking place at her house, its Notices of Examination dated November 8, 2010<sup>23</sup> and November 12, 2010<sup>24</sup> did not have a checkmark in the box beside the statement "At Claimant's Residence." The Insurer's Notices of Examination are confusing. "Requiring an Applicant to piece together information from scattered documents"<sup>25</sup> is contrary to *Smith* "and arbitrators have rejected the piecemeal approach."<sup>26</sup>

In *Ives v. Wawanesa Mutual Insurance Co.* [2006 CarswellOnt 4122 (F.S.C.O. Arb.)] 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.<sup>27</sup>

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

#### *Housekeeping and Home Maintenance Benefits:*

All my comments above apply to the Applicant's requirement to attend an insurer's examination relating to housekeeping and home maintenance benefits. In addition, though, the Insurer obtained two reports which assessed the Applicant's entitlement to the housekeeping and home maintenance benefit. The first report was a chiropractic assessment of the Applicant. The chiropractor reported on November 30, 2010 that he could not identify any accident related impairment which prevented the Applicant from performing her housekeeping and home maintenance duties.<sup>28</sup> The insurer states in its submissions that this report is deficient because it does not address the Applicant's pre-accident housekeeping responsibilities.<sup>29</sup>

The second report was by a psychologist.<sup>30</sup> The insurer states in its submissions that this report is also deficient because it does not address the Applicant's pre-accident housekeeping responsibilities or how her injuries affect her ability to do her housekeeping.<sup>31</sup>

The insurer had two opportunities to assess the Applicant's ability to complete her housekeeping and home maintenance tasks. A medical examination is "inherently intrusive and an invasion of individual privacy."<sup>32</sup> If the assessors the Insurer chose to conduct the assessments did not conduct an assessment that accurately assessed the Applicant's ability to conduct those tasks, it is not reasonable for the Insurer to request that the Applicant attend a third assessment.

#### **Expenses:**

I exercise my discretion to award Ms. Quinones 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*.

#### ***Maggie Murray Member:***

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

1. Mrs. Quinones is not prohibited from proceeding to arbitration because she did not attend an insurer's examination.
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*.

#### Footnotes

1 *The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

2 [Bogic v. AXA Insurance \(Canada\)](#) [1999 CarswellOnt 5479 (F.S. Trib.)] at para. 14 (FSCO A96-001192, April 30, 1999)

3 Note that, pursuant to s. 68 of the *Schedule*, certain accident benefits are *deemed* to be included in a motor vehicle liability policy that is in effect on September 1, 2010, if an accident occurs on or after September 1, 2010 and before the earlier of: (a) the first expiry date under the policy and (b) the day on which the policy is terminated by the insurer or the insured.

4 Tab 1A of Insurer's submissions, at 3

5 Tab 1B of Insurer's submissions, Form 1, at 6

6 Insurer's submissions, para. 9

7 Notice of Examination dated November 8, 2010, tab 1E of Insurer's submissions; Notice of Examination dated November 12, 2010, tab 1F of Insurer's submissions; Notice of Examination dated January 6, 2011, tab 1H of Insurer's submissions; and tab 1A of Insurer's responding submissions.

8 Notice of Examination dated November 4, 2010, tab 1D of Insurer's submissions.

9 Notice of Examination dated November 8, 2010, tab 1E of Insurer's submissions; Notice of Examination dated November 12, 2010, tab 1F of Insurer's submissions.

10 Tab 1G of the Insurer's submissions

11 Paragraph 15 of the Insurer's submissions

12 Applicant's submissions, para. 2

13 Insurer's submissions, tab 1 B

14 Insurer's submissions, tab 1D

15 Insurer's submissions, tab 1E

16 Insurer's submissions, tab 1F

17 Schedule 1. According to s.1 of the *Regulated Health Professions Act, 1991*, a "health profession" means a health profession set out in Schedule 1 of the *Regulated Health Professions Act, 1991*.

18 Insurer's submissions, tab 1E

19 Insurer's submissions, tab 1F

20 [Wahidpur v. Unifund Assurance Co.](#) [2009 CarswellOnt 1952 (F.S.C.O. App.)] at para. 25 (FSCO P08-00006, March 25, 2009)

21 [Smith v. Co-operators General Insurance Co.](#) [2002 CarswellOnt 914 (S.C.C.)] at para. 14 as cited in [Wahidpur](#), *ibid.*

22 See also [Faiz v. Wawanesa Mutual Insurance Co.](#) [2007 CarswellOnt 11197 (F.S.C.O. App.)], at 5, para.'s 22 and 23 (FSCO A06-001588, August 31, 2007)

23 Insurer's submissions, tab 1E

24 Insurer's submissions, tab 1F

25 [Yee v. Lambton Mutual Insurance Co.](#) [2003 CarswellOnt 5528 (F.S.C.O. Arb.)], at 5, para. 31 (FSCO A02-001550, September 16, 2003)

- 26 *Yee v. Lambton Mutual Insurance Co.*, at 5, para. 31 (FSCO A02-001550, September 16, 2003)
- 27 QL at 2-3, para. 9 (FSCO A05-002144, June 22, 2006)
- 28 Insurer's submissions, tab L at p. 8
- 29 Insurer's submissions, para. 47
- 30 See para.'s 48 and 50 of the Insurer's submissions
- 31 Insurer's submissions, para. 49
- 32 *Scott and Toronto Transit Commission (Markel Insurance)* (OIC A-001116, September 4, 1992).