2014 CarswellOnt 8657
Financial Services Commission of Ontario (Arbitration Decision)

Beltrame v. Dominion of Canada General Insurance Co.

2014 CarswellOnt 8657

Nancy Beltrame, Applicant and Dominion of Canada General Insurance Company, Insurer

Suesan Alves Member

Judgment: June 13, 2014
Docket: FSCO A12-001522

Counsel: Frank Burns, for Ms Beltrame
Jane Cvijan, for Dominion of Canada General Insurance Company

Subject: Insurance

Table of Authorities

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s. 1 — considered

s. 2(1) "disability certificate" — considered

s. 24 — considered

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s. 32(2)(a) — considered

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s. 35(1) — considered

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s. 35(6) — considered

s. 35(6)(a) — considered

s. 37(1) — considered

s. 42 — considered

s. 42(1) — considered

s. 51 — considered

s. 69 — considered

***Suesan Alves Member*:**

Issues:

1 The Applicant, Nancy Beltrame, was injured in a motor vehicle accident on July 2, 2009. In this arbitration she claims non-earner benefits as well as medical, attendant care, cost of examinations, and housekeeping and home maintenance benefits from Dominion of Canada General Insurance Company payable under the *Schedule.* [1]

2 Dominion submits that Ms. Beltrame is precluded from proceeding to arbitration with her claim for non-earner benefits because she did not submit a disability certificate stating that she suffered a complete inability to carry on a normal life within 104 weeks of the accident.

3 Ms. Beltrame disagrees. She submits that Dominion failed to assist her in claiming statutory accident benefits because it failed to arrange a neuropsychological insurer examination under section 42 of the *Schedule*. She submits that through her present counsel, she has obtained neuropsychological reports which establish her entitlement to non-earner benefits.

4 Dominion disagrees that these reports establish such entitlement. Both parties seek their expenses of this hearing.

5 The preliminary issues are:

1. Is Ms. Beltrame precluded from proceeding to arbitration with her claim for non-earner benefits because she did not submit a disability certificate stating that she suffered a complete inability to carry on a normal life within 104 weeks of the accident?

2. Did Dominion owe Ms. Beltrame a duty to arrange a neuropsychological insurer examination in relation to her claims for non-earner benefits?

3. Which party is entitled to its expenses of this hearing?

Result:

6

1. Ms. Beltrame is not precluded from proceeding to arbitration with her claim for non-earner benefits.

2. Dominion should have arranged a neuropsychological insurer examination of Ms. Beltrame in relation to her claim for non-earner benefits.

3. If the parties are unable to agree on expenses, that issue may now be addressed.

Evidence and Analysis:

Overview and background

Overview

7 This arbitration raises two sets of interrelated questions. The first set deals with whether Ms. Beltrame applied for a non-earner benefit; whether Dominion denied her claim for those benefits; and whether her claim for non-earner benefits is out of time. The second set deals with whether, as a first party insurer, Dominion was obliged to arrange a neuropsychological insurer examination as part of a complete investigation and in order to assist Ms. Beltrame in applying for benefits. Answering these questions involves a consideration of the parties' obligations under the *Schedule* and at common law.

8 For the following reasons I find that Ms. Beltrame provided sufficient information to Dominion that it could begin adjusting the file. I find Dominion failed to respond to Ms. Beltrame's non-earner benefit claim in December 2009, and thus delayed crystallizing the dispute concerning her entitlement to that benefit. I also find that Dominion denied Ms. Beltrame's non-earner benefit in June 2011. I find that her applications for mediation and arbitration were timely and conclude that Ms. Beltrame can proceed with her claim for non-earner benefits.

9 In the event I am wrong and Ms. Beltrame failed to apply for the non-earner benefit, I find that Dominion should have arranged a neuropsychological insurer examination of Ms. Beltrame under section 42 of the *Schedule* as part of a proper investigation. I find that failure, coupled with Dominion's delay in crystallizing the dispute, provide a reasonable explanation for the delay in providing what her own neuropsychological evaluation, and what she submits was a completed application for the non-earner benefit. For these reasons Ms. Beltrame can proceed with her claim for non-earner benefits.

Background

10 Ms. Beltrame was injured in an accident on July 2, 2009. At the time of the accident she was aged 69. She was standing with both feet on a streetcar step, waiting to pay her fare, when the driver simultaneously began moving the streetcar forward and closing the street car doors. The doors pushed her and she fell backwards striking her head on the pavement. She was assisted by others, then re-boarded the streetcar and continued on her trip.

11 When she transferred to another TTC vehicle, Ms. Beltrame noticed that she had developed a bump on her head the size of a grapefruit. She spoke to the driver, who contacted a TTC supervisor. She was sent to hospital by ambulance. At the hospital, Ms. Beltrame was given a head injury routine.

12 Ms. Beltrame later saw her family physician who diagnosed her injuries and impairments as concussion, without loss of consciousness; anxiety; sleep disorder; injuries of her neck and shoulders; headaches and dizziness.

13 I infer from the documents filed at the hearing, that initially the Applicant was self-represented. This is because the section of the Application for Accident Benefits which asks for the details of the claimant's representative was completed "N/A", or Not Applicable, and because the claims examiner's notes indicate that she assisted Ms. Beltrame in completing the accident benefit forms. There is some suggestion in the submissions of counsel for the Applicant, that Ms. Beltrame was assisted by her daughter. Counsel for the Applicant made reference to Ms. Beltrame's former counsel in his submissions. It is not clear to me when Ms. Beltrame retained counsel, however, I find she did so at least by April 28, 2011, because on that day Dominion copied counsel with its correspondence to Ms. Beltrame for the first time in the documents filed at this hearing.

The non-earner benefit claim

14 On October 2, 2009, after receiving Ms. Beltrame's Application for Accident Benefits (OCF-1), and a disability certificate (OCF-3), Dominion identified non-earner and housekeeping benefits as some of the benefits to which Ms. Beltrame may be

entitled. Subsection 35(1) of the *Schedule* designates these as "specified benefits" and subsection 35(2) requires a claimant of a specified benefit to submit a disability certificate, with the Application for Accident benefits.

15 Dominion asked Ms. Beltrame to provide OCF-3s on July 27, 2009, December 2, 2009, and on April 28, 2011. On each occasion, Ms. Beltrame completed her portion of the OCF-3s, signed the forms and took them to her family physician for his completion. On three occasions, her family physician completed the OCF-3s to indicate that she met the test for housekeeping benefits due to headaches and dizziness. However, her family physician indicated that she did not meet the test for non-earner benefits on two occasions, and on a third, he indicated that the test was not applicable to Ms. Beltrame.

16 Given the definition of a disability certificate under the *Schedule*, I find that the OCF-3s submitted were not disability certificates in relation to her claim for non-earner benefits.

17 Section 1 of the *Schedule* defines a disability certificate as follows.

> "disability certificate" means, in respect of a person, a certificate from a health practitioner of the person's choice that states the cause and nature of the person's impairment and contains an estimate of the duration of the disability in respect of which the person is making or has made a claim for a benefit set out in this Regulation; ("certificat d'invalidité")

18 Thus, based on the definition contained in section 1 of the *Schedule*, even though the heading on the OCF-3 states Disability Certificate, and Ms. Beltrame filled out her portion of each of the certificates, and her physician completed his portions, the OCF-3s were disability certificates in respect of her claim for housekeeping benefits but were not disability certificates in respect of her claim for non-earner benefits.

19 This is because while the OCF-3s described the cause and nature of her impairments, and provided an estimate of the duration of the disability in relation to her claim for housekeeping benefits on two occasions, they did not provide an estimate of the duration of disability in relation to non-earner benefits.

20 Dominion submits that because the disability certificates did not establish that Ms. Beltrame met the test for non-earner benefits, she failed to apply for the non-earner benefit. The caselaw, however, mandates an additional inquiry in relation to the question of whether an insured person applied for a benefit.

The question of application

21 The caselaw establishes that a consideration of the totality of the dealings between the insurer and the insured is required to determine whether there was an application for a benefit. *McIntosh v. Allstate Insurance Co. of Canada* [2005 CarswellOnt 2818 (F.S.C.O. App.).[2]

22 In *McIntosh*, Delegate Makepeace stated with approval, that while an application must provide "sufficient particulars to reasonably assist the insurer with the processing of the application and the assessment of the claim," ... an application "is not limited to a particular form. It may include additional information contained in a covering letter, and documentation enclosed or appended."[3] "... there seems little doubt the legislative intent was that claimants should complete the approved forms supplied by the insurer."[4]

23 In this case, I find the additional information the Applicant provided to Dominion is reflected in the claims examiner's notes which were filed at the hearing. Those notes reflect fulsome discussions between Ms. Beltrame and the claims examiner with respect to the circumstances of the accident, her injuries, her concerns and pending investigations and referrals by her family physician. On October 2, 2009, the note of the claims examiner states "*Head injury to be thoroughly investigated ... Clmt is NEB by definition¿ benefit to be addressed closer to 26 week mark.* [emphasis added]

24 In *McIntosh*, Delegate Makepeace went on to state:

> ...As has been stated in a number of decisions, the three-step process prescribed in s. 32 (the claimant contacts the insurer, the insurer provides the appropriate application forms, the claimant submits the forms) places an obligation on the party best positioned to provide the information and documents required at each step, triggering the other party's obligation at the next step. [5] In particular, a claimant's compliance with the application and information provisions in s. 32 — and the other provisions in Part X, "Procedures for Claiming Benefits" — triggers the insurer's obligation to pay benefits, request further information, or dispute the claim in accordance with the *SABS*. Strict time lines are set down for compliance, and remedies are provided for non-compliance....
>
> In summary, drawing a relatively firm boundary around the notion of an application for accident benefits provides for procedural clarity and tends to promote the remedial objectives of the *SABS*. However, these considerations must be balanced by others that support a fluid and flexible interpretation of s. 32(3). The *SABS* is consumer protection legislation. The application process is intended to be accessible to unsophisticated claimants despite literacy, language, information and other barriers. The focus on prompt benefit payment also informs the interpretation of s. 32(3); [6] some claimants may find it difficult to provide all the required information in time.

25 The *McIntosh* case involved a consideration of the 1996 *Schedule*. I find that the application process under this *Schedule* involves a similar series of reciprocal steps between the insured and the insurer. In my view, the provision of an "application process intended to be accessible to unsophisticated claimants, despite literacy, language, information and other barriers," similar considerations as those outlined in *McIntosh* by Delegate Makepeace, must also be balanced under the present *Schedule*.

26 In this case, I find that Ms. Beltrame provided sufficient information that Dominion was able to identify that she might be entitled to a non-earner benefit and to ask her to provide disability certificates in relation to this benefit. Since the disability certificates her physician provided did not show that Ms. Beltrame met the qualifications for the benefit, Dominion also had sufficient information to deny the benefit.

27 Based on the documentation filed at this hearing, I find Dominion failed to respond to Ms. Beltrame's non-earner benefit claim as required under the *Schedule* with respect to the OCF-3 submitted in December 2009. Thus, Dominion delayed crystallizing the dispute concerning Ms. Beltrame's entitlement to non-earner benefits until June 8. 2011.

28 On June 9, 2011, Dominion wrote to Ms. Beltrame "we also note as per the completed OCF-3 dated May 24, 2011 you do not suffer a complete inability to carry on a normal life and therefore do not qualify to receive the non-earner benefit for this claim."

29 I find the *Schedule* contemplates that an application for a benefit may be unsigned, otherwise incomplete or complete. In my view, Dominion considered her application to be incomplete. The *Schedule* prescribes the ways in which an insurer may respond to an incomplete application for accident benefits. Under the *Schedule*, Dominion's options were to place her application for non-earner benefits in abeyance under subsection 35(3.1), identify to her what was needed, or to deny the benefit under subsection 35(6) of the *Schedule*.

30 If Dominion chose to place her application in abeyance, it was obliged to notify Ms. Beltrame within 10 days, tell her specifically what it required and place the application in abeyance until the information was received. However, subsection 35(3.2) of the *Schedule* states an insurer is only permitted to treat the application in this manner, if "after a reasonable review of the incomplete application, it is unable to determine entitlement to the benefit without the missing information."

31 Subsection 35(6) of the *Schedule* expressly permits an insurer to deny the benefit where a claimant does not provide a completed disability certificate. That subsection states that "An insurer may make a determination that an insured person is not entitled to a specified benefit if, (a) the insured person failed or refused to submit the completed disability certificate required under subsection (2)." Since the disability certificates failed to show that she met the qualifications for the benefit, Dominion had sufficient information to determine that Ms. Beltrame was not entitled to the benefit.

32 When Dominion denied the claim for non-earner benefits, it sent her a covering letter as well as an OCF-9, an Explanation of Benefits. Both documents stated that if she disagreed with Dominion's assessment of her claim, she could apply for mediation and arbitration or mediation and court. Dominion provided Ms. Beltrame with the information on the dispute resolution process which *Smith v. Co-operators General Insurance Co.*, requires an insurer to provide when it denies a benefit. [7]

33 I find that in denying the benefit Dominion triggered the running of a limitation period under section 51 of the *Schedule*. I find Ms. Beltrame applied for mediation and arbitration within the required time frames following Dominion's denial. Dominion did not object to her application for mediation or object to the arbitration application in its Response. It was at the arbitration pre-hearing that Dominion first took the position that she failed to apply for the non-earner benefit and for that reason could not proceed to arbitrate the claim.

34 The Applicant retained counsel who obtained neuropsychological reports. Her counsel submits that those reports establish that she was entitled to the non-earner benefit during the 104 week period post-accident. Dominion disagrees that those reports establish such entitlement. My role at this hearing is not to determine if Ms. Beltrame qualifies for the non-earner benefit.

35 I reject Dominion's submission that Ms. Beltrame was required to make a further application for the non-earner benefit for the reasons given by the Ontario Court of Appeal in *Haldenby v. Dominion of Canada General Insurance Co.* [2001 CarswellOnt 2865 (Ont. C.A.)], 2001 CanLII 16603.

36 I also reject the submission that she could only apply for the non-earner benefit within 104 weeks of the accident. Section 31 of the *Schedule* expressly permits late notification and late applications where the claimant has a reasonable explanation.

37 For these reasons I conclude that Ms. Beltrame may proceed to arbitration with her claim for non-earner benefits.

Was Dominion obliged to arrange a neuropsychological IE?

38 In the event I am wrong, and the Applicant failed to apply for the non-earner benefit, I now deal with her alternative submission, that Dominion should have arranged a neuropsychological insurer examination under section 42 of the *Schedule* as part of a proper investigation because of its good faith obligations and its obligation under the *Schedule* to assist her in applying for benefits. Counsel for the Insurer submits that because Ms. Beltrame failed to apply for the non-earner benefit, it could not arrange an insurer examination in respect of that benefit under section 42 of the *Schedule*.

39 In determining that question, I consider the insurer's duty of good faith; Dominion's knowledge as the 26 week mark approached, as Dominion would have been required to begin paying non-earner benefits at that point if Ms. Beltrame established she qualified for those benefits. I consider the requirements of section 42 of the *Schedule*, and conclude that Dominion should have arranged a neuropsychological examination as part of a proper investigation by December 31, 2009.

The first party insurer's duty of good faith

40 The first party insurer's duty of good faith is part of its common law obligations. The caselaw establishes that as part of its duty of good faith, an insurer has an obligation to carry out a proper investigation of a claim, and to carefully consider all of the available information, giving appropriate weight to that information in a fair and even-handed manner. An insurer is also required to identify information needed which would assist in assessing the claim properly. The caselaw also establishes that a first party insurer is obliged to prefer the claimant's interests at least as much as its own.

41 In *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* [2000 CarswellOnt 904 (Ont. C.A.)]: 2000 CanLII 5684, O'Connor J.A, defined good faith in the context of a claim under a policy of fire insurance in the following manner:

> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the

> insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith."

42 In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 (S.C.C.), the Supreme Court of Canada adopted that definition in a claim for long term disability benefits under a group life policy.

43 In an accident benefits context, in the case of *Melchiorre v. Wawanesa Mutual Insurance Co.* [2006 CarswellOnt 8426 (F.S.C.O. Arb.)], (FSCO A05-000491 and A05-000492, Arbitrator Feldman held that the duty to act in a reasonable and fair manner in responding to a claim for accident benefits places a responsibility upon an insurer to (amongst other things):

> • Understand the legal "tests" or "criteria" that apply in the particular case so that the insurer can ask the right questions and identify the information it requires in order to properly assess the claim;
>
> • Approach the claim with an open mind, treating the insured person in a fair manner and not as a potential adversary;
>
> • Carefully consider all of the available information, giving appropriate weight to that information in a fair and even-handed manner;
>
> • Identify what additional information may exist that would assist in assessing the claim and notify the insured of any additional information the insurer reasonably requires to assess the claim;
>
> • Ensure that the person (or persons) responsible for assessing the claim for accident benefits make their own decision, free from undue influence by others who may not owe the same duty of care to the insured; and
>
> • Reassess the validity of the claim as new information is received

44 Arbitrator Feldman's decision was upheld on appeal in *Melchiorre v. Wawanesa Mutual Insurance Co.* [2008 CarswellOnt 2978 (F.S.C.O. App.)] (FSCO P07-00014, April 25, 2008).

Dominion's information

45 As stated earlier, the claims examiner concluded that Ms. Beltrame's head injury needed to be thoroughly investigated on October 2, 2009. The claims examiner's notes, particularly those of October 2, 2009 and December 11, 2009, provide ample grounds to support her conclusion.

46 Dominion informed Ms. Beltrame that it would assess her entitlement to the non-earner benefit closer to the 26 week mark, which it calculated to be January 8, 2010. As that date approached, I find that Dominion knew the circumstances of the accident — that Ms. Beltrame struck her head on the pavement and shortly afterwards developed a lump on her head the size of a grapefruit and the lump remained 2 $^{1}/_{2}$ months post-accident; that Ms. Beltrame described her neck as looking like a piece of liver on the day following the accident, which caused the claims examiner to question whether there was blood pooling in her neck.

47 Dominion knew that Ms. Beltrame was not certain whether she lost consciousness after she struck her head. This contrasted with the information in the OCF-3 from her family physician that she suffered a concussion, without loss of consciousness. Dominion knew that she had been taken to hospital by ambulance, discharged with a head injury routine and that she was concerned about the lack of imaging studies at the hospital.

48 Dominion knew that Ms. Belrame was suffering from vision problems following the accident; that her family physician attributed this to having struck her head on the pavement. He referred her to an ophthalmologist, with an appointment scheduled for October 29, 2009.

49 Dominion knew that Ms. Beltrame had significant complaints of anxiety, sleep disturbance, as well as neck and shoulder pain. Dominion knew that her family doctor had identified her headaches and dizziness as the impairments which prevented her from doing her housekeeping.

50 Dominion knew that this was a recent family doctor who had taken over when her previous one of 37 years had retired; that Ms. Beltrame was concerned because he did not appear to her to be responding to her complaints. Her family doctor had instructed Ms. Beltrame to return to see him in two months for referrals for a CAT-Scan, MRI, and a referral to a neurologist if her symptoms persisted. The claims examiner encouraged Ms. Beltrame to follow through with these referrals.

51 In *Plowright v. Wellington Insurance Co.* [1993 CarswellOnt 4786 (Ont. Insurance Comm.)], (OIC A-003985, October 29, 1993), Arbitrator Palmer held that the standard expected of an insurer's claims examiner and her supervisors is one of "sound and moderate judgment." I agree with Arbitrator Palmer.

52 While Ms. Beltrame did not complain of cognitive impairments, a claims examiner of sound and moderate judgment would be alert that such impairments can be a feature of a traumatic brain injury; and that by their nature such impairments may prevent a claimant from being able to identify the impairment. Further, such impairments might not be readily apparent to someone who did not know her well, such as her family physician.

53 On December 11, 2009, the claims examiner received a report of a section 24 functional abilities assessment of Ms. Beltrame by a chiropractor. The claims examiner's notes of that report state in part "Due to pre-accident diagnosis of a brain tumor (operation many years ago) assessor notes there is a risk of re-injury to the same region induced by head trauma and it should be a priority to ensure no cranial complications arise from the current accident." Thus Dominion knew of her pre-accident history of a brain tumor.

54 The claims examiner faxed the chiropractor's report to Vista Disability Management for a pending attendant care insurer examination scheduled to take place with an occupational therapist on December 29, 2009. Among the questions posed by the claims examiner to the occupational therapist was "Do you recommend any further medical evaluations, tests or investigations?" I was not provided with the answer given by the occupational therapist. However, the caselaw is clear, that a claims examiner cannot delegate the adjusting decision to a third party. [8]

55 Dominion did not arrange a neuropsychological examination of Ms. Beltrame.

The need for a neuropsychological examination

56 I find that a claims examiner of sound and moderate judgement would appreciate that a traumatic brain injury may give rise to cognitive, emotional and behavioural impairments, which may impact on an insured person's need for statutory accident benefits, and that the input of experts would be required in order to assess Ms. Beltrame's entitlement to benefits.

57 I find that a claims examiner of sound and moderate judgment who intended a thorough investigation of her head injury and knew the circumstances of Ms. Beltrame's injury, her symptoms, complaints and concerns, and who was alerted to a pre-existing brain tumor, would appreciate that she required the input of a neuropsychologist to address Ms. Beltrame's entitlement to statutory accident benefits identified by the claims examiner on October 9, 2009.

58 A claims examiner of sound and moderate judgment would appreciate that Dominion needed an opinion on whether Ms. Beltrame sustained a traumatic brain injury; the role if any of her pre-accident brain tumour, whether anxiety was a feature of a brain injury or due to other causes; whether her headaches and dizziness which prevented her from doing her housekeeping stemmed from a traumatic brain injury and if so whether there were treatment recommendations and strategies to assist her, in addition to paying her housekeeping benefits and any physiotherapy or chiropractic treatment.

59 If her anxiety was a feature of a traumatic brain injury, a neuropsychologist could identify why the dysfunction was happening and the implications for the types of therapy which would be appropriate. A neuropsychologist could also provide

recommendations to family members and other health practitioners to assist in managing that anxiety. The December 2009 OCF-3 indicated that her family physician was now prescribing medication for Ms. Beltrame's anxiety and for her pain. A claims examiner of sound and moderate judgment would infer that if the family physician had been taking a "wait and see approach" in the hope that Ms. Beltrame's symptoms would resolve two months following the accident; her symptoms were persisting.

60 While the imaging studies the family physician planned — the Cat Scan and MRI — would show visible damage to brain structures, and the planned neurological examination would involve an examination of Ms. Beltrame's central and peripheral nervous system and provide a diagnosis of the source of any neurological impairment, a neuropsychological examination would assess her cognitive, emotional and behavioural function; provide a diagnosis of whether she sustained a traumatic brain injury; address any impact of her brain tumor on function; provide an estimate of pre-accident function; and provide recommendations for rehabilitation planning in the context of dysfunction arising from a traumatic brain injury. In *Thach v. State Farm Mutual Automobile Insurance Co.* [2011 CarswellOnt 8488 (F.S.C.O. App.)], [9] counsel agreed that a neuropsychological examination is "the precise examination required to assess whether an individual suffers from a traumatic brain injury."

61 The claims examiner identified that Ms. Beltrame might be entitled to non-earner, housekeeping, medical and rehabilitation benefits and cost of examination benefits. The determination of entitlement to non-earner benefits involves a comparison of pre and post-accident levels of function. Since a neuropsychologist is able to provide an estimate of pre accident levels of cognitive function and assess function at the time of the assessment, that input would be helpful in determining entitlement to the benefit.

62 A claims examiner of sound and modest judgement would appreciate that there was particular time sensitivity involved in arranging a neuropsychological examination in relation to Ms. Beltrame's entitlement to non-earner benefits at the 26 week mark, since that is when Dominion would be required to pay those benefits, if Ms. Beltrame could establish that she met the qualifications for the benefit. Such an examination would be in Ms. Beltrame's interest. In my view, it would also be in Dominion's interest. If the neuropsychologist opined that Ms. Beltrame sustained a traumatic brain injury, he or she could provide Dominion with a basis to pay legitimate benefit claims and an appropriate focus of rehabilitation. If the examiner opined that she did not sustain a traumatic brain injury, it could also assist Dominion in limiting its exposure.

63 For these reasons I conclude that Dominion should have arranged a neuropsychological examination as part of a proper investigation.

Section 42 of the Schedule

64 Section 42 of the *Schedule* permits an insurer to require an insurer examination to determine entitlement to a benefit for which an application is made. Dominion submits it could not arrange a section 42 examination in relation to Ms. Beltrame's non-earner benefits, because she failed to apply for the non-earner benefit.

65 Section 42 of the *Schedule* states:

> **42.** (1). For the purposes of assisting an insurer 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, as often as is reasonably necessary, require an insured person to be examined under this section by one or more persons chosen by the insurer who are members of a health profession or are social workers or who have expertise in vocational rehabilitation. O. Reg. 546/05, s. 21.

66 Dominion's submission on the meaning of "application" in section 42 is that an insured person claiming a specified benefit must first provide medical evidence or *prima facie* entitlement to that benefit before the insurer is permitted or obliged to arrange an insurer examination. Interpreting "application" as a complete application would, in my view, be inconsistent with the insurer's duty to conduct a proper investigation in a first party relationship.

67 In my view, for the reasons given earlier in *McIntosh*, the question of whether an application has been made should also be interpreted in section 42 of the *Schedule* in light of all of the communications between the insurer and the claimant. I accept that a claims examiner has the discretion whether to seek an insurer examination. In my view, that discretion must be

exercised in a manner which is consistent with a first party insurer's common law obligations to conduct a proper investigation based on all the available information.

68 In *Campeau v. Liberty Mutual Insurance Co.* [2001 CarswellOnt 5132 (F.S.C.O. Arb.)], (FSCO A00-000522, March 12, 2001), Arbitrator Blackman, as he then was, stated: "IME and DAC examinations are not defence medical examinations. They do not arise because the physical or mental condition of an adverse party in an existing legal proceeding is in question. They are legislatively mandated as part of a statutory scheme of first-party contractual rights and obligations, to clarify, as part of the normal adjusting process, whether an applicant has met the applicable entitlement requirements."

69 Dominion's position at this hearing, that it lacked the authority to arrange a section 42 examination of Ms. Beltrame because she failed to apply for the non-earner benefit, conflicts with the position that it took on April 28, 2011, when it wrote Ms. Beltrame and purported to have the requisite authority to arrange an insurer examination in relation to her claims for non-earner and housekeeping benefits. In that letter, the claims examiner stated that "in order for me to determine your continuous entitlement to

- Non-earner benefit
- Payment for housekeeping or home maintenance..."

and enclosed a copy of section 37(1)of the *Schedule*. That section gives an insurer the discretion to seek an insurer examination under section 42 of the *Schedule* in respect of such entitlement. [10]

70 A traumatic brain injury may give rise to cognitive, emotional and behavioural impairments, which may impact on the need for many benefits available under the *Schedule*. Thus, even if Dominion is correct that Ms. Beltrame was obliged to first provide a disability certificate which stated that she met the test for non-earner benefits before it could arrange an assessment of her non-earner benefits, Dominion had the authority to arrange a neuropsychological examination in relation to Ms. Beltrame's claims for other benefits, for example, the housekeeping benefit, for which she provided a disability certificate. Dominion would also have the authority in relation to her claims for benefits which did not first require the provision of a disability certificate.

Section 24 of the Schedule

71 Counsel for the Insurer submits that Dominion met its obligations to assist the Applicant in applying for benefits by paying for a number of section 24 assessments. While an insurer is obliged to consider such assessments in evaluating a claim, I am not persuaded that an applicant can discharge an insurer's obligations to conduct a proper investigation of a claim.

Conclusion

72 Dominion did not respond to the December 2009 OCF-3, and effectively delayed the crystallization of the dispute in relation to her non-earner benefits until June 2011. In my view, this delay, coupled with Dominion's failure to arrange a neuropsychological evaluation, provide Ms. Beltrame with a reasonable explanation for the delay in providing evidence which she submits establishes her entitlement to the non-earner benefit. For these reasons I conclude that Ms. Beltrame may proceed to arbitration with her claim for non-earner benefits.

Expenses:

73 If the parties are unable to agree on expenses of this preliminary issue hearing, that issue may now be addressed.

Suesan Alves Member:

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

1. Ms. Beltrame may proceed to arbitrate her claim for non-earner benefits.

2. Dominion should have arranged a neuropsychological examination of Ms. Beltrame.

3. If the parties are unable to agree on expenses, that issue may now be addressed.

Footnotes

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

2 (FSCO P04-00019, March 15, 2005)

3 At p. 9 of the *H'ng v. Allstate Insurance Co. of Canada* [1997 CarswellOnt 1413 (Ont. Insurance Comm.)] arbitration decision, quoted at para. 42 of *Liberty Mutual Insurance Co. v. Commerce Insurance Co.* [2001 CarswellOnt 4710 (Ont. S.C.J.)].

4 Section 32(2)(a) requires the insurer to promptly provide "the appropriate application forms." Section 32(3) requires the claimant to submit "an application for the benefit" within 30 days of "receiving the application forms." The "application package" used at the initial stage of a claim was approved by the Superintendent under s. 69 of the *SABS-1996*, which states that the application forms referred to in s. 32(2)(a) shall be in a form approved by the Superintendent. The *SABS-1996* accident benefit application package was published in Bulletin A-10/96, dated October 23, 1996. The cover page indicates that the package includes: the Application for Accident Benefits (OCF-1/59), Activities of Normal Life form (OCF-12/59), Employer's Confirmation of Income (OCF-2/59), Permission to Disclose Health Information (OCF-5), Disability Certificate (OCF-3/59), and Treatment Plan (OCF-18/59). At the foot of the cover page is stated: "After the insurance company reviews your complete application package, you will be contacted about the benefits you are entitled to receive. If your insurance company needs any additional information in order to process your application, they will contact you."

5 See, for example, *F. (L.) v. State Farm Mutual Automobile Insurance Co.* [2004 CarswellOnt 5176 (F.S.C.O. App.)], (FSCO P02-00026, June 3, 2004), which concerned the attendant care benefits application process, at p. 22, and *Antony v. RBC General Insurance Co.* [2004 CarswellOnt 5177 (F.S.C.O. App.)], (FSCO P03-00023, July 22, 2004), which concerned the weekly benefits election, at pp. 7-9. *Carruthers v. Royal & SunAlliance Insurance Co. of Canada* [2003 CarswellOnt 5919 (F.S.C.O. App.)], (FSCO P02-00015, April 10, 2003), discussed the remedial purposes underlying the application process in a priority dispute situation.

6 *Carruthers v. Royal & SunAlliance Insurance Co. of Canada*, (FSCO P02-00015, April 10, 2003), at p. 8: "Accident benefits are intended to meet the current needs of those injured in automobile accidents. They are payable on a first-party basis, regardless of fault. It follows, in my view, that the application process should not present undue obstacles."

7 *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129 (S.C.C.)

8 *Cowans v. Motors Insurance Corp.* [2010 CarswellOnt 8176 (F.S.C.O. Arb.)] (FSCO A09-003237, October 15, 2010)

9 (FSCO P10-00019, August 16, 2011)

10 *DETERMINATION OF CONTINUING ENTITLEMENT TO SPECIFIED BENEFITS*

37.(1) If an insurer wishes to determine if an insured person is still entitled to a specified benefit, the insurer,

(a) shall request that the insured person submit within 15 business days a new disability certificate completed as of a date on or after the date of the request; and

(b) may notify the insured person that the insurer requires the insured person to be examined under section 42. O. Reg. 546/05, s. 11.

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