

1995 CarswellOnt 5145
Ontario Insurance Commission

Gallo v. Royal Insurance Co. of Canada

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Dorian Gallo, Applicant and Royal Insurance Company of Canada, Insurer

Miller Arb.

Heard: November 20, 1995

Judgment: December 4, 1995

Docket: A-001378

Counsel: Ian Little, for Applicant

Nestor E. Kostyniuk, for Insurer

Subject: Insurance; Public; Civil Practice and Procedure; Corporate and Commercial

Headnote

Insurance

Alternative dispute resolution

Miller Arb.:

Issues:

1 The Applicant, Dorian Gallo, was injured in a motor vehicle accident on August 18, 1990. She applied for and received statutory accident benefits from the Insurer, payable under Ontario Regulation 672.¹ Weekly benefits were terminated by the Insurer on August 24, 1995. The parties were unable to resolve their disputes through mediation and the Applicant applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

2 By letter dated August 25, 1995, the Royal Insurance Company of Canada ("Royal") informed Ms. Gallo that an appointment for an independent medical examination (IME) with Dr. Allan

3 Rosenbluth was made for October 3, 1995. On September 25, 1995 Royal wrote to Ms. Gallo's counsel to remind Ms. Gallo of her appointment. Ms. Gallo did not attend the scheduled IME and Royal requested that a motion be held to stay the arbitration hearing.

The issue before me is:

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1. Is Ms. Gallo precluded from proceeding with this arbitration because she failed to attend a medical examination, as required by section 23(2) of the *Schedule*?

Result:

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1. Ms. Gallo is precluded from proceeding with this arbitration, unless she makes herself reasonably available for a medical examination to be scheduled by Royal.

Hearing:

6 The hearing of the preliminary issue was held by teleconference on November 20, 1995 before me, Joyce Miller, arbitrator.

Present at the Hearing:

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Applicant:	Dorian Gallo
Applicant's	Ian Little
Representative:	Barrister and Solicitor
Insurer's	Nestor E. Kostyniuk
Representative:	Barrister and Solicitor
Insurer's	Terry Boyle
Officer:	
Exhibits:	Two exhibits were filed

Evidence and Findings:

8 Royal takes the position that Ms. Gallo is precluded from proceeding with the arbitration because she failed to make herself reasonably available for an IME. Mr. Little, counsel for Ms. Gallo, stated that Ms. Gallo had not attended the IME because she had changed her phone number and his office had not been able to reach her to inform her of the appointment. Mr. Little agreed with Mr. Kostyniuk that the IME assessment was necessary. He did not contest Royal's motion to stay the arbitration hearing.

9 The relevant provisions are found in sections 23(2) and 25 of the *Schedule*:

23(2) In respect of claims under Part IV, the insurer may, on reasonable notice, require an examination of the insured person by a qualified medical practitioner, psychological advisor or chiropractor as often as it reasonably requires, and require an autopsy of a deceased insured person in accordance with the law relating to autopsies.

25 No person may commence a mediation proceeding under section 280 of the *Insurance Act* in respect of benefits under this Regulation unless the requirements of section 22 have been satisfied and the insured person has made himself or herself reasonably available for any examination required under section 23.

10 These two sections were considered in the case of *Hanna*². In that case Arbitrator Draper stated that the purpose of section 23(2) was meant to give an insurer a reasonable opportunity to evaluate an ongoing claim for weekly benefits. He held that section 25 should be interpreted in light of this purpose. Since section 25 states that an applicant cannot access the dispute resolution process *at all* until he or she has made himself or herself reasonably available for a medical examination, Arbitrator Draper concluded that an applicant cannot proceed with the dispute resolution process, unless the applicant makes himself or herself reasonably available for a medical examination. I agree with Arbitrator Draper's conclusions.

11 Accordingly, I find that Ms. Gallo is precluded from proceeding with this arbitration, unless she makes herself reasonably available for a medical examination to be scheduled by Royal.

Expenses:

12 I decline to make an award of expenses at this time. I believe that the issue of expenses should be reserved for the arbitration hearing. However, if this matter does not proceed to arbitration, then the parties may apply for an assessment of the expenses.

Order:

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1. Ms. Gallo is precluded from proceeding with this arbitration, unless she makes herself reasonably available for a medical examination to be scheduled by Royal.

Footnotes

1 Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule — Accidents Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.

2 *Kevin Hanna and Royal Insurance Company*, December 2, 1994, OIC File No. A-005409