

2009 CarswellOnt 6064
Financial Services Commission of Ontario (Arbitration Decision)

Forbes v. Royal & SunAlliance Insurance Co. of Canada

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**Howard Forbes, Applicant and Royal & Sunalliance
Insurance Company of Canada, Insurer**

Denise Ashby Member

Heard: June 29, 2009
Judgment: September 11, 2009
Docket: FSCO A-08-001854

Counsel: Robert Franklin, David Carranza, for Mr. Forbes
Nestor E. Kostyniuk, for Royal & SunAlliance Insurance Company of Canada

Subject: Insurance

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Insurance

[XII Automobile insurance](#)

[XII.5 No-fault benefits](#)

[XII.5.i Practice and procedure on claim for benefits](#)

[XII.5.i.iv Attendance at medical examination](#)

Headnote

Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits

Table of Authorities

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

s. 282 — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

Generally — referred to

s. 38(15) — referred to

s. 42 — referred to

s. 42(1) — referred to

s. 42(9) ¶ 1 — referred to

s. 42(10)(b) — referred to

Denise Ashby Member:

Issues:

1 The Applicant, Howard Forbes, was injured in a motor vehicle accident on August 5, 2003. He applied for and received statutory accident benefits from Royal & SunAlliance Insurance Company of Canada ("Royal"), payable under the *Schedule*.¹ Royal denied a Treatment Plan submitted by Mr. Forbes. The parties were unable to resolve their disputes through mediation, and Mr. Forbes applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

2 The preliminary issue is:

1. Did Mr. Forbes reasonably decline to participate in the In-home Assessment scheduled for December 13, 2007, pursuant to section 42 of the *Schedule*?

Result:

3

1. Mr. Forbes did reasonably decline to participate in the In-home Assessment scheduled for December 13, 2007.

Evidence and Analysis:

4 On the morning of December 13, 2007, Ms. Betty Cowan, O.T., attended at Mr. Forbes' residence, on behalf of Royal, to conduct an In-home Assessment in respect of the denied Treatment Plan. Mr. Forbes, who lives with 5 other family members, did not participate in the assessment.

5 The Treatment Plan, dated November 23, 2007, recommended academic upgrading and related expenses in the amount of \$32,013.67. The Treatment Plan was issued by an Occupational Therapist who had assessed Mr. Forbes.²

6 The Applicant, Howard Forbes, and his father, Caleb Forbes, testified. Ms. Cowan and Grace Bach, Accident Benefit Representative, testified on behalf of Royal.

7 Subsection 42(1) of the *Schedule* provides:

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.

8 Subsection 42(9)1 requires "the insurer shall make reasonable efforts to schedule the examination for a day and time that are convenient for the insured person."

9 Subsection 42(10)(b) provides:

if the attendance of the insured person is required at the examination, the insured person shall attend the examination and submit to all reasonable physical, psychological, mental and functional examinations requested by the person or persons conducting the examination.

10 Subsection 38(15) provides:

If an insured person fails or refuses to comply with subsection 42(10), the insurer may make a determination that the insured person is not entitled to the goods and services contemplated by the treatment plan.

11 Mr. Forbes testified that upon receiving notice of the assessment, two days before the assessment, he called his representative's office to request it be cancelled. He testified that he explained there was insufficient space and the assessment would interfere with his sister's work. As a consequence, he believed the assessment had been cancelled.

12 Mr. Forbes stated that when he told Royal's assessor, Ms. Cowan, the assessment had been cancelled she denied it had been cancelled, expressed her frustration that he was refusing to participate and suggested his conduct would have serious consequences. As a consequence, he felt threatened. Both Mr. Caleb Forbes' and Ms. Cowan's evidence supported Mr. Forbes' evidence that Ms. Cowan was frustrated. As well, Ms. Cowan agreed that she had advised the Applicant of the consequences of his not submitting to the assessment.

13 Ms. Cowan testified that notwithstanding the frustration she experienced on December 13, 2007, she was able and willing to conduct a professional and objective assessment of Mr. Forbes.

14 On December 13, 2007 at 3:00 pm, Mr. Forbes' representative faxed a letter dated December 11, 2007, to Royal's Accident Benefit Representative, Ms. Bach. The letter acknowledges receipt of the Notice of Examination dated November 29, 2007 and requests that Mr. Forbes be assessed by a vocational counsellor because the Treatment Plan under consideration is related to vocational retraining.³ A further letter, dated January 22, 2008, requests a different assessor because: "Mr. Forbes felt some animosity."⁴

15 Mr. Forbes neither disputes that the assessment is reasonably necessary nor that Ms. Cowan is an appropriate professional to conduct the assessment. However, he submits that his non-participation was reasonable in the circumstances and Ms. Cowan's animosity towards him renders her an inappropriate assessor. Royal submits that Mr. Forbes was available for the assessment and unreasonably declined to participate. It maintains it has the right to choose its assessor so long as the assessor meets the requirements of the *Schedule*.

16 The Applicant testified in a straightforward manner and I accept his evidence. Therefore, I find that he sought cancellation of the assessment because it would interfere with his sister's work. Further, I find that Mr. Forbes felt threatened by Ms. Cowan's comments regarding the consequences of his non-participation.

17 Section 42(9)1 requires Royal to make reasonable efforts to arrange an assessment at the convenience of Mr. Forbes. This is of particular importance when an insurer seeks to have its assessor enter the private domain of its insured. Although there is no requirement that appointments be confirmed in the *Schedule*, a confirming telephone call might have avoided the inconvenience and frustration experienced by Ms. Cowan. It is not improbable that between the issuance of the Notice and the date of the assessment something might arise which might necessitate its rescheduling. A large household requires co-operation and it is reasonable to expect Mr. Forbes' sister's working at home would be accommodated. Therefore, I find that Mr. Forbes' sister's working at home was a reasonable basis for Mr. Forbes denying Ms. Cowan entry to his home and declining to participate in the assessment on December 13, 2007.

18 Pursuant to subsection 42(1), Royal is entitled to its choice of assessor. However, the choice must be exercised reasonably. Assessors are expected to maintain a degree of professional neutrality. Ms. Cowan exceeded her role and expertise and compromised her professional neutrality by providing an opinion as to the consequences of Mr. Forbes'

non-participation. Her comments caused him to feel threatened. Therefore, it would be inappropriate for Ms. Cowan to conduct a rescheduled assessment.

Denise Ashby Member:

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

1. Howard Forbes did reasonably decline to participate in the In-home Assessment scheduled for December 13, 2007.

Footnotes

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

2 Exhibit 4, Tab 2

3 Exhibit 4, Tab 5

4 Exhibit 4, Tab 6