1994 CarswellOnt 4954
Ontario Insurance Commission

Hanna v. Royal Insurance Co. of Canada

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# Kevin Hanna, Applicant and Royal Insurance Company of Canada, Insurer

Draper Arb.

Heard: November 1, 1994
Judgment: December 2, 1994
Docket: A-005409

Counsel: Michael W. Kelly, for Applicant
Nestor E. Kostyniuk, for Insurer

Subject: Insurance

***Draper Arb.*:**

**Preliminary Issue:**

1 The Royal Insurance Company of Canada ("Royal") raises the following preliminary issue:

Is Mr. Hanna precluded from proceeding with this arbitration because he failed to attend a medical examination, as required by section 23(2) of the Schedule?

**Result:**

2

Mr. Hanna is precluded from proceeding with this arbitration unless he makes himself reasonably available for a medical examination to be scheduled forthwith by Royal.

**Hearing:**

3 The hearing of the preliminary issue was held in Hamilton, Ontario, on November 1, 1994, before me, David R. Draper, arbitrator.

4 Present at the Hearing:

| | |
|---|---|
| Applicant's Representative: | Michael W. Kelly<br>Barrister and Solicitor |
| Insurer's Representative: | Nestor E. Kostyniuk<br>Barrister and Solicitor |

5 Exhibits:

The exhibits introduced in this hearing and the other documents before the arbitrator are listed in Appendix A to this decision.

 

6 Cases considered:

Edward J. Opatowski and Wawanesa Mutual Insurance Company, September 22, 1992, OIC File No. A-000381;

Francois Philippe and Royal Insurance Company of Canada, January 24, 1994, OIC File No. A-001736 (under appeal);

Rajendra Ramjeet and State Farm Mutual Automobile Insurance Company, December 23, 1993, OIC File No. A-004685 (under appeal);

Rysyk v. Booth Fisheries Canadian Co. Ltd. et al. (1970), 14 D.L.R. (3d) 539 (Ont. C.A.);

Patricia Scott and Toronto Transit Commission (Markel Insurance), September 4, 1992, OIC File No. A-001116.

**Reasons for Decision:**

***1. The Facts***

7 The Applicant, Kevin Hanna, was injured in a motor vehicle accident on June 23, 1990. He applied for accident benefits from Royal, payable under Ontario Regulation 672 [1] . Royal paid him weekly income benefits of $320.00 per week for approximately two months (June 30, 1990 - August 28, 1990).

8 Mr. Hanna then attempted to return to work, but was unable to continue. Instead of reapplying for accident benefits, he applied for workers' compensation benefits based on a hand injury that he sustained in 1988. His application was granted and he received workers' compensation benefits for the next two years - up to and including September 3, 1992.

9 When Mr. Hanna's workers' compensation benefits stopped, he reapplied to Royal for weekly income benefits. Royal refused his application. Approximately nine months later, in June 1993, Mr. Hanna applied for mediation of his claim for ongoing weekly income benefits from September 4, 1992.

10 Mr. Kelly represented Mr. Hanna at the mediation. The dispute was not resolved, but it appears that Royal agreed to reconsider its position after an examination by a doctor of its choice. I accept Mr. Kelly's submission that this examination was done with Mr. Hanna's consent. He did not concede that Royal could require him to attend a medical examination.

11 Royal arranged for Dr. John Darracott, a physical medicine and rehabilitation specialist, to assess Mr. Hanna on September 13, 1993. By this time, it was over three years since the accident, and just over one year from Royal's refusal to pay benefits. In his report, dated September 17, 1993, Dr. Darracott concluded:

> I can find no clinical evidence that he has suffered any injury which would be likely to have any longterm impact on his employment potential, nor which would be likely to cause the development of any premature degenerative change.

12 Dr. Darracott recommended that Mr. Hanna be referred to an appropriate reconditioning program. He expected that after no more than eight weeks, Mr. Hanna would be able to do all of his pre-accident duties at TJ Car Care. Based on Dr. Darracott's report, Royal confirmed its decision to refuse Mr. Hanna's application for additional weekly income benefits.

13 There was another delay before Mr. Hanna proceeded with his claim. On February 23, 1994, approximately five months after Dr. Darracott's examination, he applied for arbitration. His claim is that he "remains unable to perform the essential tasks of his occupation" and, therefore, is entitled to ongoing weekly income benefits from September 4, 1992.

 

14 A pre-hearing discussion was scheduled for August 15, 1994. In the interim, Royal sent Dr. Darracott the medical information then available and asked him for a further opinion. Dr. Darracott did not see Mr. Hanna again, but prepared a second report based on his review of the documents. In his report, dated June 13, 1994, he concluded:

> There is no information in the information forwarded to me, that would suggest any change in my report of 17/09/93. This young man has adopted a dysfunctional state, and excluding the unrelated injury to the right index PIP joint, has no evidence of any pathology which would prevent him working fully and normally in any occupation that he chose. His continued dysfunction is inappropriate and to reinforce to him that he is permanently and completely disabled, is counterproductive and indeed only reinforces an inappropriate dysfunctional state.

15 On July 21, 1994, prior to the pre-hearing, Mr. Kostyniuk wrote to Mr. Kelly advising him that Royal had scheduled a second examination by Dr. Darracott to take place on August 4, 1994. Mr. Kelly responded by letter, dated July 22, 1994, taking the position that because Royal had terminated benefits, it no longer had the right to require Mr. Hanna to attend a medical examination. He suggested that the issue be dealt with at the pre-hearing.

16 The pre-hearing discussion took place on August 15, 1994, with Mr. Hanna and both counsel participating. There is no indication in the letter confirming the pre-hearing discussion that the proposed examination by Dr. Darracott was discussed. The day after the pre-hearing, however, Mr. Kostyniuk wrote to Mr. Kelly reminding him that an appointment had been scheduled for August 25, 1994. Mr. Kelly responded on August 18, 1994, stating that Mr. Hanna would not be attending the examination.

***2. Analysis and Conclusions***

17 Royal takes the position that Mr. Hanna is precluded from proceeding with the arbitration because he failed to make himself reasonably available for a medical examination. Mr. Hanna maintains that once Royal terminated his weekly income benefits, it no longer had the right to require him to attend an examination.

18 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.
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> . . . . .
>
> **25.** No person may commence a mediation proceeding under section 280 of the Insurance Act in respect of benefits under this Schedule 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.

19 This issue was addressed in *Rajendra Ramjeet and State Farm Mutual Automobile Insurance Company*, December 23, 1993, OIC File No. A-004685. In that case, Arbitrator Palmer rejected the applicant's submission that the payment of weekly income benefits is a condition precedent to the insurer's ability to request a medical examination:

> Regarding the first submission, in my view, there is no provision in the No-Fault Benefits Schedule which would remotely suggest that the Insurer must continue to pay weekly income benefits if it wishes to exercise its right under section 23 of the Schedule to an examination of the claimant. The Applicant in this proceeding is asserting a claim to Part IV benefits. It therefore is entirely open to the Insurer to "require" an examination of the insured person.

20 Although I reach the same conclusion, Mr. Kelly presented substantial arguments on behalf of Mr. Hanna that should be addressed. I would summarize his submissions as follows:

21 The insured person and the insurer have contractual obligations under the insurance policy. The insured person is required to submit medical information in support of his or her claim for weekly income benefits. If that information

  

indicates that the applicant is eligible, the insurer must pay the benefits. Section 23(2) provides a mechanism for the insurer to evaluate whether it should *continue* paying weekly income benefits.

22 The only consequence for failing to attend an examination is set out in section 25 of the *Schedule*. It states that an insured person who fails to make himself or herself reasonably available for a medical examination is precluded from applying for mediation. This implies that the right to require a medical examination ends with the termination of benefits. Further, there is no authority in the legislation or the Dispute Resolution Practice Code to prevent someone who has properly applied for mediation from proceeding with the mediation, and on to arbitration.

23 If a medical examination is required after weekly income benefits have been terminated and the insured person has applied for arbitration, the arbitrator can ask the Director to refer a medical question to the Medical and Rehabilitation Advisory Panel (MRAP) under section 282(5) of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

24 In support of his submissions, Mr. Kelly relied on the arbitration decision in *Francois Philippe and Royal Insurance Company of Canada*, January 24, 1994, OIC File No. A-001736 (under appeal). In that case, the applicant received weekly income benefits until he returned to work. He subsequently applied to have his weekly income benefits reinstated on the basis that he was unable to continue working. Despite a supportive report from the applicant's family doctor, the insurer refused to consider paying him any additional weekly income benefits until he was examined by a doctor of its choosing. Senior Arbitrator Naylor found this unreasonable and ordered the insurer to pay a special award under section 282(10) of the *Insurance Act*.

25 In my opinion, the *Philippe* case is distinguishable. The unreasonable behaviour in *Philippe* was the insurer's *refusal to consider* the applicant's eligibility until an examination took place. There is no evidence in this case that Royal refused to consider Mr. Hanna's application for weekly income benefits from September 4, 1992. Rather, it decided that he was ineligible.

26 An insurer is allowed to refuse an application for weekly income benefits. It takes some risk that if the person is ultimately determined to be entitled to benefits, it will be required to pay a high rate of interest under section 24 of the *Schedule*, and could be ordered to pay a special award. Unlike the benefits specified in section 6(7) of the *Schedule*, however, weekly income benefits do not have to be paid pending the resolution of the dispute.

27 The issue in this case is whether, after refusing Mr. Hanna's application for weekly income benefits, Royal has any right to require a medical examination in order to evaluate Mr. Hanna's ongoing claim.

28 In my opinion, the applicant's interpretation of the legislation is unduly narrow. I agree with Senior Arbitrator Naylor that section 23(2) is meant "to ensure that an insurance company has an effective opportunity to evaluate the applicant's medical condition" (*Patricia Scott and Toronto Transit Commission (Markel Insurance)*, September 4, 1992, OIC File No. A-001116).

29 I accept the proposition, as set out by the Ontario Court of Appeal in *Rysyk v. Booth Fisheries Canadian Co. Ltd. et al.* (1970), 14 D.L.R. (3d) 539, that the authority to require someone to submit to a medical examination must be found in the legislation. In *Rysyk*, however, the Court of Appeal rejected a narrow interpretation of section 75 of the *Judicature Act*. Instead, it interpreted the section quite broadly in order to achieve the legislative purpose of providing a discovery process that would facilitate a fair trial and a just result.

30 The situation in this case is similar. The applicant is urging an interpretation that would severely restrict the insurer's ability to evaluate the applicant's ongoing claim. In this case, it would mean that Royal had no right to require a medical examination to evaluate Mr. Hanna's claim, even though it covers a period of over two years (September 4, 1992 to present), and now appears to involve the stricter post-156 week test in section 12(5)(b) of the *Schedule*.

31 Section 23(2) applies to *claims* for weekly benefits. Where, as in this case, the applicant is asserting an ongoing claim, I believe that the insurer is meant to have a reasonable opportunity to evaluate the claim. This is particularly true where the applicant's claim for ongoing weekly income benefits extends for a lengthy period, or beyond 156 weeks.

32 Section 25 should be interpreted in light of this purpose. 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. In light of the purpose of section 23(2), I believe that it follows that an applicant cannot proceed through the dispute resolution process unless he or she makes himself or herself reasonably available for a medical examination.

33 Mr. Kelly submitted that the applicant's interpretation would not result in unfairness because the arbitrator could make a referral to the Medical Rehabilitation Advisory panel (MRAP) under section 282(5) of the *Insurance Act*. This suggests a system of "in-house" assessments through MRAP. I am not persuaded that this is the purpose of section 282(5). In my view, the obligation rests with each party to evaluate its position and to present the evidence that is necessary to support it. A referral to MRAP becomes appropriate if the arbitrator requires some assistance in evaluating the medical evidence that is provided.

34 For these reasons, I conclude that section 23(2) remains available to an insurer after weekly benefits have been terminated and the applicant has applied for mediation. However, the medical examination must be for the purpose of evaluating the applicant's ongoing claim and must be reasonable.

35 I have no hesitation, in this case, in concluding that Royal's request for a follow-up examination by Dr. Darracott is reasonable. Over a year has passed since the last examination, Mr. Hanna has seen other specialists who have provided more recent opinions about his medical condition, and the post-156 week test now appears to be relevant.

*Expenses*

36 An award for expenses may be made under section 282(11) of the *Insurance Act*, which provides as follows:

> 282 (11) The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

37 Arbitrators have consistently granted expenses unless the claim was fraudulent, manifestly frivolous or vexatious, or the applicant's conduct unduly prolonged the proceedings. Mr. Kostyniuk, on behalf of Royal, submitted that Mr. Hanna should be denied his expenses on the basis that this issue has already been decided in previous arbitration decisions.

38 I am not persuaded that the issues raised by Mr. Hanna were so clearly decided that it was unreasonable for him to proceed. Therefore, I am inclined to award expenses. Rather than make a separate order for expenses at this time, however, I believe that the issue of expenses should be reserved to the arbitration hearing.

**Order:**

39

> Mr. Hanna is precluded from proceeding with this arbitration unless he makes himself reasonably available for a medical examination to be scheduled forthwith by Royal.

**Appendix A**

Exhibit 1 - "Summary of Facts", prepared by Mr. Kostyniuk on behalf of Royal.

Exhibit 2 - Photocopy of a letter, dated July 21, 1994, from Mr. Kostyniuk to Mr. Kelly.

Exhibit 3 - Photocopy of a letter, dated July 22, 1994, from Mr. Kelly to Mr. Kostyniuk.

 

Exhibit 4 - Photocopy of a letter, dated August 16, 1994, from Mr. Kostyniuk to Mr. Kelly.

Exhibit 5 - Photocopy of a letter, dated August 18, 1994, from Mr. Kelly to Mr. Kostyniuk.

Exhibit 6 - Photocopy of the report of Dr. John Darracott, dated September 17, 1993.

Exhibit 7 - Photocopy of the report of Dr. John Darracott, dated June 13, 1994.

Exhibit 8 - Photocopy of a report, dated August 23, 1993, from Dr. Walter F. Kean.

In addition to the exhibits, the following documents were before the arbitrator from the Ontario Insurance Commission file:

- Insured's Brief of Authorities.
- Insurer's Brief of Authorities.
- Report of Mediator, dated August 18, 1993.
- Application for Appointment of an Arbitrator, dated February 23, 1994.
- Response by Insurer, dated April 22, 1994.
- Reply by Insured Person, dated May 17, 1994.
- Letter, dated August 16, 1994, confirming the pre-hearing discussion held on that date.

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.

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