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INSURANCE LAW BULLETIN

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ARE INSURER'S EXAMINATIONS PERMISSIBLE AFTER THE RECEIPT OF AN APPLICATION FOR ARBITRATION?

The right of an insurer to conduct independent medical assessments to determine an insured's accident-related impairments has essentially always existed throughout the various statutory accident benefits regimes. However, the ability to obtain an insurer's examination after an insured elected to proceed by way of arbitration through FSCO was, until recently, uncertain.

Two Divisional Court decisions and a recent arbitration decision now make it clear that "an insurer has a *prima facie* right to require an insured person to be assessed, upon a change in the test for entitlement."

State Farm v. Ramalingam, 2009 CanLII 44115 (Ont. Div. Ct.)("Ramalingam")

In this case, the insurer had obtained three s. 42, pre-104 week insurer examinations. They were conducted prior to arbitration. Upon applying for arbitration, the insured underwent a number of multi-disciplinary assessments arranged by insured's counsel. The reports were served on State Farm "on the eve of arbitration". The insurer brought a motion for an adjournment of the arbitration (and then a stay) until it was permitted to conduct its own assessments. Both Arbitrator Kominar and Arbitrator Rogers (the arbitrators of the first and second decisions dealing with the motions to order the assessments/stay the proceeding) rejected the insurer's request for its own updated insurer examinations. This was in spite of the fact that the insured was receiving post-104 income replacement benefits.

The Arbitrators held that State Farm had to demonstrate "changed circumstances" to justify the insurer examinations sought. It was not enough to have received new reports from the insured. In Arbitrator Rogers' view, the "crystallization of a claim for post-104 week income replacement benefits" as set out in the insured's reports did not "change" the circumstances known to State Farm.

The case was appealed to the Director's Delegate. In her decision to uphold the denial of the requested insurer examinations, she recognized that Arbitrator Rogers took an "unduly narrow approach" to the insurer's motion for examinations. However, she indicated that the insurer's delay in bringing its motion was critical (State Farm waited until six weeks prior to the commencement of the arbitration to bring a motion for additional s. 42 assessments). She also

indicated that a number of other factors could be addressed to determine whether requested s. 42 assessment(s) were reasonable and whether an arbitration should be stayed. These factors included the following:

- the timing of the request, and whether it would require the hearing to be adjourned;
- whether the insured disclosed relevant materials as soon as reasonably possible and in accordance with the Dispute Resolution Practice Code;
- whether the insurer made its s. 42 request as soon as it reasonably determined the need for the examination;
- what other information was available to the insurer; whether new information provided by the insured since the last s. 42 assessment suggested a new diagnosis, a change in the insured's condition or a new direction in medical investigation;
- whether the insurer continues to pay benefits; and,
- generally, whether the request is reasonable in balancing the insured's right to privacy and the insurer's ongoing right and obligation to assess the claim.

The Ontario Divisional Court dealt with the case on a number of issues and upheld the Director's Delegate's decision. The Court held that procedural fairness entailed the right of a party to make full response. However, with respect to State Farm's entitlement to insurer examinations in the circumstances, the Court commented that the insurer could have made its requests earlier than it did (i.e. rather than "very close" to the start of the scheduled arbitration).

Certas Direct v. Gonsalves, 2011 CanLII 3986 (Ont. Div. Ct.)("Gonsalves")

In this case, one month prior to the commencement of a scheduled arbitration, the insured delivered two new orthopaedic opinions to the insurer. The insurer sought an adjournment to obtain its own further report. The adjournment was granted and the arbitration was rescheduled. The insured appealed to the Director's Delegate and refused to attend the s. 42 assessment. The Director's Delegate overturned the arbitrator's decision and the case was appealed by Certas Direct to the Divisional Court.

In upholding the original arbitration decision (ordering that the arbitration be adjourned and that the insured attend the s. 42 assessment), the Divisional Court stated:

> *In our view, the insurer would be denied the right to make a full response and would not be heard as the dictates of procedural fairness require. It is not enough to say that the delivery of these reports was made within the permitted time frame [one day before the Code said was acceptable i.e. day 31] when, as the arbitrator found, they provide new evidence supporting a new position. <u>This is trial by ambush</u>* (emphasis added).

Yogesvaran v. State Farm, [2012] O.F.S.C.D. No. 37

In this case, the insured's entitlement to income replacement benefits was terminated. The insured applied for arbitration after a failed mediation. There were a number of decisions released by FSCO with respect to the issues between the parties. However, for the purpose of this Bulletin, the relevant decision dealt with whether State Farm was entitled to an insurer's examination once the arbitration was scheduled to resume. The arbitration was scheduled for December 2011. State Farm wrote to the insured in April 2011 stating that three s. 44

assessments had been scheduled. Shortly after, the insured's counsel advised their client would not attend the assessments. In October 2011, counsel for State Farm applied to have the preliminary issue order varied by the Director's Delegate stating that the insured was not entitled to on-going IRBs as she refused to attend the scheduled s. 44 assessments. State Farm's application for variation was rejected.

In its arbitration materials filed December 2011, State Farm requested an order that it had a right to assess the insured by way of a s. 44 assessment and that the arbitration should be stayed until she attended. State Farm had conducted s. 44 assessments prior to the post-104 week period. The insured had provided three reports, post-104. State Farm submitted that it would be forced to rely on outdated data and "denied the right to make a full response and … not be heard as the dictates of procedural fairness require[d]".

The insured submitted that State Farm had "ample notice" of the post-104 issue when the application for arbitration was received and it took no steps to arrange any additional assessments. Furthermore, the insured submitted that State Farm failed to bring its motion in a timely manner once her counsel advised she would not attend the s. 44 assessments in April 2011.

Although Arbitrator Miller determined that State Farm had not met its onus to prove that a s. 44 assessment was reasonable and necessary, she confirmed that *Ramalingam* and *Gonsalves* established that "an insurer has a *prima facia* right to require an insured person to be assessed, upon a change in the test for entitlement." [Emphasis added].

Arbitrator Miller went on to state that "the timing of an insured's request for an insurer's examination is a factor in its reasonableness" so as not to delay a proceeding. As a result, she determined that State Farm had "more than ample notice" early on that the insured was claiming post-104 benefits (from receipt of the application for arbitration). It also had a pre-104 assessment that addressed the insured's entitlement to post-104 benefits. It was not until nearly two years after the initial commencement of the arbitration that State Farm raised the issue and then it waited "until the eve" of the re-commencement of the arbitration to make its request again.

Commentary

The above decisions confirm that an insurer **DOES** have the right to require an insured to attend a s. 44 assessment "upon a change in the test for entitlement". The decisions also confirm that an evaluation of factors considering "fairness" (rather than the former narrow approach) is necessary. However, the decisions also make it clear that it is imperative that any decision to request s. 44 examinations must be made without delay after the receipt of an application for arbitration when it is clear that the insured is claiming post-104 benefits. If the request is not made in a timely manner and there is any risk that the failure would delay a scheduled arbitration, it is highly likely that the insurer would be precluded from conducting further s. 44 assessments.