

**BETWEEN:**

**GILLIAN BAPTISTE**

**Applicant**

**and**

**PILOT INSURANCE COMPANY**

**Insurer**

**DECISION ON A MOTION**

**Before:** Jeffrey Rogers

**Heard:** By telephone conference call on December 9, 2004.  
Written submissions were completed on January 18, 2005.

**Appearances:** Steven Rastin, solicitor for Ms. Baptiste  
Heather Kawaguchi, solicitor for Pilot Insurance Company

**Issues:**

The Applicant, Gillian Baptiste, was injured in a motor vehicle accident on August 20, 1998. She applied for and received statutory accident benefits from Pilot Insurance Company (“Pilot”), payable under the *Schedule*.<sup>1</sup> Ms. Baptiste and Pilot disagree about her entitlement to statutory accident benefits. The parties were unable to resolve their dispute through mediation, and Ms. Baptiste applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The principal issue in the hearing is whether Ms. Baptiste sustained a catastrophic impairment within the meaning of section 2 of the *Schedule*. On October 14, 2004, counsel for Pilot was served with a new medical report that assesses an aspect of the Applicant's impairment that was not addressed by the Catastrophic Designated Assessment Centre ("CAT DAC"). The hearing was scheduled to begin on October 18, 2004.

Because the new report was not served at least 30 days before the first day of the hearing, as required by Rule 39.1 of the *Dispute Resolution Practice Code*, Pilot sought an adjournment to allow the DAC an opportunity to address the additional issue.

Ms. Baptiste did not oppose allowing the DAC to assess the new issue if I granted the adjournment. I granted the request for an adjournment. The hearing is now scheduled to begin on March 1, 2005. When the adjournment was granted, both parties anticipated that the DAC would be willing to comment on the opinion in the new report, as it had done with an earlier report. However, the DAC took the position that the proper procedure in the circumstances is that a new CAT DAC assessment must be conducted. Upon learning of this position, Pilot requested that Ms. Baptiste attend a new CAT DAC. She refused.

On October 29, 2004, Pilot requested a hearing to resolve the impasse. I heard submissions from the parties by teleconference on December 9, 2004. At that time, counsel indicated that Pilot was requesting an order that Ms. Baptiste attend a new CAT DAC. I raised the issue of whether an Arbitrator has jurisdiction to make that order. I agreed to deal with Pilot's request by way of written submissions.

The submissions that I have received go beyond the order Pilot sought on December 9, 2004. Pilot now seeks, in the alternative, a stay of the proceedings until Ms. Baptiste attends for a new CAT DAC, enforcement of Ms. Baptiste's consent to have the DAC review the new report, and a ruling on

whether a recently requested examination for the purpose of assessing the newly raised aspect of impairment is reasonable and necessary pursuant to section 42 of the *SABS*. Ms. Baptiste's written submissions address all issues. In the interest of expediting the process, I will deal with all issues.

The issues in this motion may be summarized as follows:

1. Is Ms. Baptiste required to attend a further CAT DAC?
2. Is Ms. Baptiste's consent to have the DAC review the new report enforceable?
3. Is Ms. Baptiste required to attend the section 42 examination that Pilot has requested?

**Result:**

1. Ms. Baptiste is not required to attend a further CAT DAC.
2. Ms. Baptiste's consent to have the DAC review the new report is not enforceable.
3. Ms. Baptiste is not required to attend the proposed section 42 examination.

**ANALYSIS:**

**The Further CAT DAC**

The procedure for engaging the dispute resolution process regarding the issue of catastrophic impairment is established by section 40 of the *SABS*. The section provides for an insured person to be assessed by a designated assessment centre, either at the request of the insurer or the insured. That process has been followed and the Applicant has been assessed.

There is no provision in the *SABS* for an insurer or an insured to require more than one CAT DAC. Subsection 40(4) provides that the determination by the designated assessment centre is binding on the parties, subject only to the determination of a dispute by mediation and adjudication in accordance with sections 279 to 283 of the *Insurance Act*. There is nothing in the *Insurance Act* that expands the obligation of an insured person to attend a CAT DAC. Counsel for Pilot has pointed to no jurisprudence to that effect.

Counsel relies on a FSCO *Designated Assessment Centre Information Sheet* published in September 2003<sup>2</sup>, as authority. This information sheet contains the following statement: “*If new information emerges and the parties agree that the review of the new material may change the DAC’s opinion, then a new DAC assessment should be arranged. Neither party should request an ‘updated’ report from the DAC.*”

The information sheet cannot confer jurisdiction on an Arbitrator. The information sheet recognises that, where the parties consent, they have some latitude to tailor the dispute resolution process in a way that they believe will most efficiently resolve their dispute. It does not have the effect of giving an Arbitrator jurisdiction that is not found in the *SABS* or the *Insurance Act*.

In any event, there is no evidence that there is new information. The new report attributes a percentage of impairment to an aspect of Ms. Baptiste’s injury of which the DAC was aware, but which was not included in its assessment of her level of impairment. The new report does not assess a previously undisclosed injury or a changing condition. It offers a new opinion, not new information. Pilot’s assertion that the author of the report must have received new information that caused him to revise his earlier opinion is pure speculation. There is nothing in the report itself to support that position.<sup>3</sup>

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<sup>2</sup> Tab 4, Written Submissions on behalf of Pilot

<sup>3</sup> Tab 1, Written Submissions on behalf of Ms. Baptiste

I find that Ms. Baptiste is not required to attend a further CAT DAC. Since she is not required to attend a further CAT DAC, there can therefore be no sanction for her refusal to do so.

Had Ms. Baptiste refused to honour the consent she gave to have the DAC review the new report, there may be a remedy available to Pilot in order to prevent an abuse of process. But that is not the case. It is the DAC that refuses to act on her consent. Therefore, what Pilot really seeks in its request to enforce the consent is an order directing the DAC to act. Counsel pointed to no authority for jurisdiction to make such an order and I find none.

### **Section 42 Examination**

In Reply Submissions, Pilot concedes that notice of the examination has not been properly served and I find that notice has not been properly served. Pilot proposes to serve a proper notice upon a finding that the proposed examination is reasonably necessary.

Pilot's right to require Ms. Baptiste to be examined is derived from section 42 of the *SABS*. Section 42 also contains specific notice requirements. An insured cannot be found to have failed to attend unless proper notice has been given.

There is no evidence that Pilot has given Ms. Baptiste any notice under section 42. There is only correspondence from Pilot's counsel to counsel for Ms. Baptiste. The name of the proposed examiner and the date of the examination are only mentioned in Pilot's written submissions. There is no indication of which benefit is at issue. Even if the correspondence and the written submissions could be considered "notice", the notice would lack sufficient particulars of the reason the Insurer requires the examination and it would be void.

The fact that the “notice” was first given in correspondence and submissions offers insight into the reason for seeking the examination. That fact makes it unlikely that the proposed examination is for the purpose of determining entitlement to a benefit, as subsection 42(1) requires. Rather, it appears that the intent is purely to bolster Pilot’s case at the hearing. Indeed, counsel for Pilot concedes in her letter of December 17, 2004<sup>4</sup> that the proposed examination will not change Pilot’s position on the only issue currently in dispute. Counsel proposes that it would be in Ms. Baptiste’s best interests to have an assessment now so that the opinion is available in considering benefits that she may claim, if successful in the hearing.

Pilot does not have a right to require Ms. Baptiste to be examined for that purpose. Therefore, even if proper notice had been given, Ms. Baptiste would not be required to attend.

**EXPENSES:**

Of the criteria I am required to consider by the Expense Regulation, the only one relevant to this motion is degree of success. Given Ms. Baptiste’s success, she is entitled to her expenses of the motion, which I fix at \$500, in any event of the cause.

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Jeffrey Rogers  
Arbitrator

January 25, 2005

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Date

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<sup>4</sup> Tab 5, Written Submissions of Ms. Baptiste

**FSCO A04-000446**

**BETWEEN:**

**GILLIAN BAPTISTE**

**Applicant**

**and**

**PILOT INSURANCE COMPANY**

**Insurer**

**ARBITRATION ORDER**

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

1. Ms. Baptiste is not required to attend a further CAT DAC.
2. Ms. Baptiste's consent to have the DAC review the new report is not enforceable by order directing the DAC to act.
3. Ms. Baptiste is not required to attend the proposed section 42 examination.
4. Pilot shall pay Ms. Baptiste her expenses of the motion in the amount of \$500, GST included, in any event of the cause.

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Jeffrey Rogers  
Arbitrator

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January 25, 2005

Date