Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A06-002513

BETWEEN:

SURJIT WALIA

Applicant

and

CERTAS DIRECT INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Denise Ashby

Heard: Written submissions concluded on August 17, 2007.

Appearances: Rameshwer Sangha for Mr. Walia
Heather Kawaguchi for Certas Direct Insurance Company

Issues:

The Applicant, Surjit Walia, was injured in a motor vehicle accident on May 26, 2003. He applied for and received statutory accident benefits from Certas Direct Insurance Company ("Certas"), payable under the *Schedule.*[1] Certas stopped payment of income replacement and housekeeping and home maintenance benefits and denied medical benefits on various dates in 2003. Certas asserts that Mr. Walia is statute barred from arbitrating a claim for these benefits. The parties were unable to resolve their disputes through mediation, and Mr. Walia 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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[1] *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

The preliminary issues are:

1. Is Mr. Walia precluded from proceeding to arbitration in respect of his claims for:

   (a) income replacement benefits;
   (b) medical and rehabilitation benefits in respect of treatment received from Om Sai, Natural Touch;
   (c) housekeeping and home maintenance benefits; and
   (d) transportation expenses;

   by operation of subsection 281.1(1) of the *Insurance Act* and subsection 51(1) of the *Schedule*?

2. Is Mr. Walia precluded from proceeding to arbitration in respect of a medical benefit for expenses incurred at Shiv Clinic because he failed to notify Certas of his claim in accordance with sections 32(1) and (1.1)(a) of the *Schedule*?

3. Is Mr. Walia precluded from proceeding to arbitration in respect of his claim for an examination expense in respect of an assessment conducted by Profile Evaluations because he failed to notify Certas of his claim in accordance with sections 32(1) and (1.1)(a) of the *Schedule*?

4. Is Certas liable to pay Mr. Walia's expenses in respect of the preliminary issue hearing pursuant to subsection 282(11) of the *Insurance Act*, R.S.O.1990, c.I.8?

5. Is Mr. Walia liable to pay Certas' expenses in respect of the preliminary issue hearing pursuant to subsection 282(11) of the *Insurance Act*, R.S.O.1990, c.I.8?

Result:

1. Mr. Walia is precluded from proceeding to arbitration in respect of his claims for:

   (a) Income replacement benefits;
   (b) A medical benefit for transportation expenses;
   (c) Chiropractic services provided by the Shiv Clinic; and
   (d) Housekeeping and home maintenance expenses.

2. Mr. Walia may proceed to arbitration in respect of his claims for:

   (a) Chiropractic services, physiotherapy and massage therapy provided by Om Sai Physiotherapy Clinic; and
   (b) An examination expense incurred for a Functional Abilities Evaluation conducted by Profile Evaluations

3. Neither party is entitled to recover expenses from the other.

BACKGROUND:

On May 26, 2003, Mr. Walia was injured in a motor vehicle accident when the car he was driving was "rear ended."[2] On the day following the accident he returned to work. However, he has not been employed since May 28, 2003.

Mr. Walia submitted an Application for Accident Benefits, dated October 26, 2003, to Certas. Certas paid Mr. Walia both weekly income replacement and housekeeping and home maintenance benefits for a period of time. It also paid some medical benefits for treatment but denied transportation expenses.

On or about September 8, 2003, Certas was advised that Mr. Walia had retained counsel.[3] In a letter dated March 5, 2004, Mr. Walia advised Certas that he was visiting in India and was continuing to receive treatment there. Mr. Walia appears to have provided a copy of the letter to the lawyer who was representing him at the time.[4] On or about April 14, 2005, Certas was advised that Mr. Sangha had been retained to act on Mr. Walia's behalf.[5]

On May 10, 2007, the date scheduled for the pre-hearing at the Commission's offices, neither Mr. Walia nor his counsel attended. Mr. Sangha was contacted and participated by telephone. He advised that notwithstanding his client was in India, he had authority to proceed. The

[2] Motion Record, Tab 2, Exhibit "B", Application for Accident Benefits
[3] Motion Record, Tab 2, Exhibit "H"
[4] Motion Record, Tab 2, Exhibit "Y"
[5] Motion Record, Tab 2, Exhibit "Z"

parties agreed to dates for this written preliminary issue hearing. These dates were extended to permit Mr. Sangha additional time to communicate with Mr. Walia in India.

PROCEDURAL ISSUE:

In its materials in reply, Certas sought an order that Mr. Walia's submissions in response not be considered on the basis that they were filed late.

Mr. Walia was granted an extension to Friday, July 20, 2007. His materials were filed on Monday, July 23, 2007. Having considered Certas' submissions, I deny its motion on the basis it has provided no evidence that the nominal delay prejudiced Certas' right of reply.

EVIDENCE AND ANALYSIS:

Certas submits that Mr. Walia is statute barred from proceeding to mediation and then arbitration on the basis that he failed to dispute Certas' termination of income replacement and housekeeping and home maintenance benefits and its denial of certain medical benefits within the two year limitation provided for in both the *Insurance Act* and *Schedule*. Certas also submits that Mr. Walia cannot proceed to arbitration in respect of treatment he received in India at the Shiv Clinic and an examination expense he incurred at Profile Evaluations because Mr. Walia failed to notify Certas of his claim in accordance with sections 32(1) and (1.1)(a) of the *Schedule*.

Mr. Walia submits that consideration should be given to his continuing accident related disability and the "human factor." Therefore the matter should be determined with a judicial view rather than by applying a strict statutory interpretation.

The issue of whether or not Mr. Walia is statute barred from proceeding with his claim is a question of law. An arbitrator has no discretion to apply principles of equity to alter the result reached by application of the rules of statutory interpretation.[6]

[6] *Lopez and Commercial Union Assurance Company*, (FSCO A98-001223, April 13, 1999, page 8)

Two Year Limitation Period:

Section 49 of the *Schedule* requires an insurer, which refuses to pay or reduces the amount of a benefit, to give the insured written notice of the procedure for resolving disputes under the *Insurance Act*. What constitutes notice has been considered arbitrally and judicially.

In *Smith v. Co-operators General Insurance Company*, the Supreme Court held that the notice must be "in straight forward and clear language directed towards an unsophisticated person."[7]

The issue of sufficiency of notice was also considered in *Kuperman and Allstate* in which the arbitrator adopted the two step approach of *Zeppieri*.[8] It is first necessary to determine whether, and when, there was a reduction or refusal to pay benefits and then whether an insurer may rely on a limitation period that runs from the date of the refusal. She went on to describe the process as follows:

> There is a consistent body of arbitral jurisprudence that the limitation period found in subsection 281(5) and section 51 of the *Schedule* is not triggered until the insurer establishes that the applicant received proper notice; that is, that the refusal was clear and unequivocal and was communicated to the applicant in writing, with supporting reasons.[9]

Subsection 281.1(1) of the *Insurance Act* provides:

> A mediation proceeding or evaluation under section 280 or 280.1 or a court proceeding or arbitration under section 281 shall be commenced within two years after the insurer's refusal to pay the benefit claimed.

Subsection (2) provides the following exception:

> Despite subsection (1), a proceeding or arbitration under clause 281(a) or (b) may be commenced,

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[7] [2002], 2 S.C.R. page 7

[8] *Zeppieri and Royal Insurance Company of Canada*, (FSCO A-005237, February 17, 1994), upheld on appeal (FSCO P-005237, December 22, 1994)

[9] (FSCO A01-000647, February 15, 2002) page 5

(a) if there is an evaluation under section 280.1 within 30 days after the person performing the evaluation reports to the parties under clause 280.1(4)(b);
(b) if mediation fails but there is no evaluation under section 280.1, within 90 days after the mediator reports to the parties under subsection 280(8)

Subsections 51(1) and (2) of the *Schedule* provide:

(1) A mediation proceeding or evaluation under section 280 or 280.1 of the *Insurance Act* or a court proceeding or arbitration under clause 281(1)(a) or (b) of the Act in respect of a benefit under this Regulation shall be commenced within two years after the insurer's refusal to pay the amount claimed.

Despite subsection (1), a court proceeding or arbitration under clause 281(1)(a) or (b) of the Insurance Act may be commenced within 90 days after the mediator reports to the parties under subsection 280(8) of the Act or within 30 days after the person performing the evaluation provides a report to the parties under section 280.1 of the Act, whichever is later.

In order for Certas to rely on the limitation, it must establish on a balance of probability that it gave Mr. Walia unequivocal notice that it was terminating or denying the benefits he claimed together with its reasons. Further, that it described "in straight forward and clear language directed towards an unsophisticated person," the essential elements of the dispute resolution process.[10] Certas must then establish that Mr. Walia failed to commence mediation within two years of the termination or denial.

Section 49 Notice:

Certas provided information relating to Mr. Walia's right to dispute as part of its Notice of Stoppage of Weekly Benefits(Notice of Stoppage) (OCF-17) and certain Explanations of Benefits Payable (OCF-9). The information provided regarding the dispute resolution process was the same for both forms. Step 1 sets out the obligations of the applicant: to notify the insurer and submit an application for the benefit claimed and make himself available for any required examination and any required assessment.

[10] *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. pg. 7, *Nahsari and Belair Insurance Company Inc.*, (FSCO P02-00002, September 9, 2002, page 11, appeal), *Finlayson and Allstate Insurance Company of Canada*, (FSCO A04-002133, November 6, 2006)

Step 2 sets out the process for applying for mediation and provides the Commission's address and telephone and fax numbers. It also contains the following statement: "To dispute the refusal or reduction you must first mediate your claim through the Financial Services Commission of Ontario (FSCO) within two years of your insurer's refusal to pay, or reduction of, a benefit."

Step 3 provides:

> **Step 3: ARBITRATION, LAWSUIT, NEUTRAL EVALUATION**
>
> If mediation fails, you have the right to:
>
> (i) arbitrate at FSCO or
>
> (ii) commence a lawsuit in court or
>
> (iii) if you and your insurer both agree, you may request a neutral evaluation, the neutral evaluator will provide an oral opinion on the likely outcome of a proceeding in court or an arbitration and a written report identifying issues evaluated and still in dispute.
>
> However, you CANNOT arbitrate, commence a lawsuit or request a neutral evaluation UNLESS:
>
> (i) you proceeded with mediation, AND
>
> (ii) the mediation failed.
>
> **WARNING: TWO YEAR TIME LIMIT**
>
> You have TWO YEARS from the date of your insurer's refusal to pay, or reduction of a benefit, to arbitrate or commence a lawsuit in court. You may have longer than two years if the arbitration or lawsuit is commenced 90 days from the date the mediator provides his or her mediation report, or within 30 days from the date the neutral evaluator provides his or her report.

The information in Step 3, regarding a potential extension, is imprecise. However, the statement in Step 2 that mediation must be applied for "within two years of your insurer's refusal to pay, or reduction of, a benefit," is clear and unequivocal. I find that the three steps, read together, set out the essential steps of the dispute resolution process in simple and straightforward language.

Income Replacement Benefits:

Certas issued a Notice of Stoppage of Weekly Benefits dated November 18, 2003, effective December 2, 2003.[11]

On April 29, 2005, Mr. Walia's counsel, Mr. Sangha, wrote to Certas. The letter contains a heading "WITHOUT PREJUDICE."[12] As Mr. Walia has not objected to its inclusion as an exhibit to Certas' supporting affidavit, I find that it is properly before me.

The letter contains the following statement:

> We understand from Mr. Walia that Certas issued a Notice of Stoppage of Benefits notice for his weekly income replacement benefits with an "Effective Stoppage Date" of December 2, 2003.
>
> After his weekly benefits were terminated and without any money coming in to pay his rent and bills, Mr. Walia's post-accident depression became even more pronounced. With no family support in Toronto and his wife living in India he borrowed money and returned back to India around the end of December 2003…
>
> Based on the attached medical reports from Dr. Gupta of the SHIV Clinic in India and Dr. Mughal's April 18, 2005 updated Disability Certificate we will be filing for a Mediation Application in order to dispute Mr. Walia's terminated weekly income replacement benefits…

I accept that Mr. Walia did not request a disability DAC.[13]

On May 15, 2006, Mr. Walia filed for mediation seeking a weekly income replacement benefit at the rate of $394.13, from December 3, 2003 and ongoing. The Application is date stamped by the Commission as Received May 24, 2006.[14] The Report of Mediator was issued

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11 Motion Record, Tab 2, Exhibit "Q"
12 Motion Record, Tab 2, Exhibit "BB"
13 Motion Record, Tab 2, page 4, paragraph 22
14 Ibid, Tab 2, Exhibit "DD," page 1

October 10, 2006.[15] The Application for Arbitration is date stamped by the Commission as received November 30, 2006.[16]

The Notice of Stoppage advised Mr. Walia that Certas was terminating his Income Replacement Benefits on the basis of Dr. Grossman's report which was sent separately. Certas' letter enclosing Dr. Grossman's report is dated November 18, 2003.[17] Part 4 of the Notice of Stoppage describes an "Applicant's Rights" which contains the information regarding the dispute resolution process considered above. I found this notice complied with section 49 as interpreted by the Court in *Smith v. Co-operators*.

Certas' reason for terminating Mr. Walia's Income Replacement Benefit was its reliance on Dr. Grossman's report which was provided to Mr. Walia.

As the effective date of termination set out in the Notice of Stoppage was December 2, 2003, the two year limitation period lapsed December 2, 2005. Mr. Walia did not apply for mediation until May 15, 2006, more than five months after the lapse of the two year limitation. Therefore, I find that he is statute barred from proceeding to arbitration in respect of his claim for an income replacement benefit.

Medical Benefits:

Subsection 38(7) of the *Schedule* provides:

> On receiving the application, the insurer shall promptly determine whether the insurer is required to pay for the goods and services contemplated by the treatment plan.

Subsection 38(8) provides that if there is no conflict of interest disclosed then within 14 days of receiving the application the insurer will give the insured a notice,

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[15] Ibid, Tab 2, Exhibit "FF"
[16] Ibid Tab 2, Exhibit "II"
[17] Ibid, Tab 2, Exhibit "O"

(a) stating that,

(i) the insurer will pay for all goods and services contemplated by the treatment plan,
(ii) the insurer will pay for such goods and services, contemplated by the treatment plan as are specified in the notice, or
(iii) the insurer will not pay for any goods and services contemplated by the treatment plan; and

(b) disclosing any conflict of interest that the insurer has relating to the treatment plan.

Subsection 38(12) requires an insurer, issuing a subsection 38(8)(a)(ii) or (iii) notice, to require the insured person to be assessed by a DAC pursuant to subsection 38(12)(a). Subsection 38(12)(b) provides:

(b) insurer shall include in the notice under subsection (8),
(i) statement of the insurer's reasons for not agreeing to pay for all goods and services contemplated by the treatment plan, and
(ii) notice that the insurer requires the insured person to be assessed by a designated assessment centre in accordance with section 43.

Om Sai Physiotherapy Clinic:

On September 5, 2003, Om Sai Physiotherapy submitted a treatment plan recommending chiropractic treatment and physiotherapy in the amount of $3,840.00. As well, a further Treatment Plan, of the same date, was submitted recommending massage therapy in the amount of $640.00.[18]

On September 17, 2003, Certas denied the treatment on the basis that: "the proposed treatment does not appear to be reasonable and necessary." Certas offered to refer Mr. Walia to the nearest DAC for assessment in accordance with section 43 of the *Schedule* and enclosed a copy of the section. It also enclosed an Explanation of Benefits Payable (OCF-9) which

[18] Motion Record, Tab 2, Exhibit "G"

stated that the Treatment Plan, dated September 5, 2005, in the amount of $3,840.00 "did not appear to be reasonable and necessary" and "the proposed treatment appears to be excessive." It noted that Certas would "require a medical assessment to provide current medical diagnosis, prognosis and recommendations regarding appropriate, reasonable and necessary treatments and determine abilities and limitations."[19]

On or about October 22, 2003, Mr. Walia responded by providing permission to disclose health information to the DAC.[20]

On November 3 and November 5, 2003, a medical and rehabilitation DAC assessment was conducted by Mississauga Physical Rehabilitation Centre. The DAC report found that the Treatment Plans for chiropractic, physiotherapy and massage therapy submitted by Om Sai were not reasonable and necessary as Mr. Walia "had likely attained maximum therapeutic benefit from treatments already undergone." The DAC made no recommendations for further physical treatment.[21]

On or about November 11, 2003, Certas sent a further OCF-9 to Mr. Walia in which treatment recommended by Om Sai in the amount of $1,742.10 was denied. The OCF-9 contained the following statement: "Please be advised that OCF 21's submitted by Om Sai for treatment will not be considered as the treatment plans were denied." Part 6 at page 3 of the OCF-9 contained the same explanation of the dispute resolution process as was considered above and which I found to meet the requirements of section 49 as interpreted in *Smith v. Co-operators*.[22]

Chiropractic Treatment and Physiotherapy:

Om Sai's Treatment Plan, dated September 5, 2003, recommending chiropractic treatment and physiotherapy in the amount of $3,840.00 was denied on the basis that "it did not appear to be reasonable and necessary" and "appeared to be excessive." These are equivocal statements,

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19 Motion Record, Tab 2, Exhibit "I"
20 Motion Record, Tab 2, Exhibit "L"
21 Motion Record, Tab 2, Exhibit "U"
22 Motion Record, Tab 2, Exhibit "N"

not reasons. Reasons require a justification for the denial or reduction of a benefit which can be understood by an unsophisticated insured. The adjuster provides no medical basis for concluding that the treatment recommended by a chiropractor might be unreasonable, unnecessary and excessive. Further the OCF-9, dated September 17, 2003, has no explanation of the dispute resolution process. Therefore, I find that Certas has not met its burden and cannot rely on the limitation set out in subsection 281.1(1) of the *Insurance Act* and section 51 of the *Schedule*.

The OCF-9 dated November 11, 2003 refers to OCF 21's submitted by Om Sai. It advises that payment of $1,742.10 would not be considered because the Treatment Plans were denied. This OCF-9 contains a description of the dispute process considered above and which I found to meet the requirements of section 49. However, the reasons provided are deficient and cannot be expected to be understood by an unsophisticated person because it fails to identify which Treatment Plans are being denied. Therefore, I find that Certas did not properly deny the chiropractic and physiotherapy treatment recommended by Om Sai in its Treatment Plan dated September 5, 2005 and cannot rely on the limitation period set out in subsection 281.1(1) of the *Insurance Act* and section 51 of the *Schedule*.

Mr. Walia may therefore proceed to arbitration in respect of the chiropractic treatment and physiotherapy in the amount of $3,840.00, as recommended by Om Sai in its September 5, 2003 Treatment Plan.

Massage Therapy:

Certas' letter dated September 17, 2003 and the OCF-9 of the same date do not refer to Om Sai's Treatment Plan dated September 5, 2003 recommending massage therapy. Although this Treatment Plan was the subject of the DAC assessment in November 2003, it was not properly denied. Therefore, Certas cannot rely on the limitation period set out in subsection 281.1(1) of the *Insurance Act* and section 51 of the *Schedule*. Therefore, Mr. Walia is entitled to proceed to arbitration in respect of his claim for massage therapy.

Transportation Expenses:

Mr. Walia claims a medical benefit for transportation expenses incurred in attending treatment at Om Sai in the amount of $864.00.

On October 6, 2003, Mr. Walia submitted his claim for transportation expenses.[23] On November 11, 2003, Certas issued an OCF-9 denying the benefit.[24] On November 28, 2003, Certas sent a further OCF-9 denying $70.00 in taxi expenses.[25]

In the OCF-9 dated November 11 2003, the adjuster provides the following justification for denying the transportation expenses: "Transportation fees will not be covered as the completed OCF-12 does not indicate that Mr. Walia is unable to drive." There is no evidence that the OCF-12 was enclosed with the OCF-9. An unsophisticated insured cannot be expected to be familiar with the meaning of OCF-12. However, I do not find that the mention of an obscure form invalidates the clear and unequivocal statement that the transportation expenses will not be paid because there is no indication that Mr. Walia is unable to drive.

The OCF-9 dated November 28, 2003 states: "This taxi expense is not reasonable and necessary as your injuries do not prevent you from driving." The form stipulates that the amount payable for a taxi expense of $70.00 is: "0.00". I find that this is an unequivocal denial of the benefit with reasons which would be understood by an unsophisticated person.

Both the OCF-9 of November 11 and November 28, 2003 contain the description of the dispute resolution process considered above and which I found comply with the requirements of section 49 as interpreted by *Smith v. Co-operators*.

As Certas provided Mr. Walia with reasoned, unequivocal and clear denials of the transportation benefit and has provided sufficient notice of the dispute resolution process, Certas may rely on the limitation set out in subsection 281.1(1) of the *Insurance Act* and

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[23] Motion Record, Tab 2, Exhibit "J"
[24] Motion Record, Tab 2, Exhibit "N"
[25] Motion Record, Tab 2, Exhibit "S"

section 51 of the *Schedule*. I find the effective denial dates were November 11 and 28, 2003. Thus the limitation period would lapse on November 11 and November 28, 2003 respectively.

Certas submits that Mr. Walia failed to dispute its denial of transportation benefits until May 24, 2006 some 51/2 months following the lapse of the limitation periods on November 11 and November 28, 2003. Mr. Walia has provided no contrary evidence. Therefore, I conclude that Mr. Walia is statute barred from proceeding to arbitration in respect of his claim for transportation expenses by operation of subsection 281.1(1) of the *Insurance Act* and section 51 of the *Schedule*.

Housekeeping:

On November 28, 2003, Certas issued a OCF-9 advising Mr. Walia that his housekeeping benefits for the period August 25 to November 10, 2003, in the amount of $1,200.00, would not be paid because: "the Disability Certificate (OCF-3) completed by Dr. Shelly Bhullar on August 24, 2003, indicates that you had discontinued your housekeeping services."

Section 41 of the *Schedule* sets out the procedure for claiming housekeeping benefits where an application for the benefit is received by the insurer. Subsection 41(2) requires the insurer to give notice of the reasons for the refusal within 30 days following the receipt of the application.

The OCF-9 contained the same information about the dispute resolution process as I considered above and found sufficient to meet the requirements of section 49.[26]

I find that, as the claim for housekeeping benefits extended to November 10, 2003 and the OCF-9 is dated November 28, 2003, Certas has complied with the provisions of subsection 41(2). Further, I find the reasons given for the denial of housekeeping benefits and the notice of the dispute resolution process were sufficient to satisfy the statutory requirements and therefore the effective date of termination of housekeeping benefits is November 28, 2003.

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[26] Motion Record, Tab 2, Exhibit "R"

Therefore, Certas is entitled to rely on the two year limitation period which lapsed on November 28, 2005.

There is no evidence that Mr. Walia disputed the denial of his housekeeping benefits until he filed for mediation on May 15, 2006. Therefore, I find that he is precluded from proceeding to arbitration by operation of subsection 281.1(1) of the *Insurance Act* and section 51 of the *Schedule*.

No Issue in Dispute:

Natural Touch Clinic:

Certas submits that all incurred expenses for accident related treatment provided by Natural Touch to Mr. Walia were either paid or resolved as part of a settlement agreement reached between Certas and Natural Touch. Therefore, there is nothing in dispute in respect of goods and services provided by Natural Touch.

Certas provided a copy of an OCF-21 dated June 16, 2003 submitted by Dr. O. Okem, a chiropractor who worked at Natural Touch, claiming $500.00 for services provided to Mr. Walia. As well, Certas provided a copy of the face of the cheque it issued to Dr. Okem in the amount of $500.00 dated July 2, 2003.[27] It also provided a fax cover sheet dated August 25, 2003, which confirmed settlement of Mr. Walia's account at Natural Touch. A copy of the face of the cheque dated August 25, 2003 in the amount of the agreed settlement was also submitted.[28]

Mr. Walia has made no submissions in respect of this issue. He has not provided any evidence that there are expenses which have not been paid or are in dispute.

[27] Motion Record, Tab 2, Exhibit "HH"
[28] Motion Record, Tab 2, Exhibit "F"

Subsection 279(1) of the *Insurance Act* provides:

> Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled shall be resolved in accordance with sections 280 to 283 and the *Statutory Accident Benefits Schedule*.

The condition precedent to entering the dispute resolution process is a dispute of either entitlement or amount of the benefit claimed.

Mr. Walia has provided no evidence that there are medical goods or services provided by Natural Touch for which either entitlement or amount is in dispute. In contrast, Certas has provided cogent evidence that any past disputes were resolved long before Mr. Walia applied for mediation. I find that Mr. Walia has failed to meet the threshold of establishing a dispute between himself and Certas in respect of medical goods or services he received from Natural Touch. Therefore, Mr. Walia cannot proceed to arbitration in respect of his claim for payment of an outstanding amount of $500.00 with Natural Touch.

Shiv Clinic

Mr. Walia claims $1,000.00 for chiropractic services provided by Shiv Clinic in India. Certas submits that, as Mr. Walia failed to comply with the procedures for claiming entitlement to a medical benefit or examination expense he is precluded from proceeding to arbitration in respect of the treatment provided or assessments conducted by the Shiv Clinic.

On March 5, 2004, Mr. Walia wrote to Certas advising that he had gone to India and that he would be receiving treatment from a specialist. The letter indicates he enclosed a copy of a doctor's medical report. Mr. Walia goes on to ask that no action be taken in his absence. The letter provides a return address, in India. It is marked received on March 18, 2004.[29] Certas did not include the report referred to in the letter in its materials.

[29] Motion record, Tab 2, Exhibit "Y"

Mr. Walia submitted 9 reports from two doctors associated with the Shiv Clinic in his responding materials. The first report is dated February 28. It indicates that Mr. Walia was referred to the clinic by his family physician, Dr. Mughal of Mississauga, Ontario, Canada. The next is dated March 27, 2004. It refers to the previous report dated February 28. There is sufficient detail in the March 27 report to draw the inference that the initial report was prepared on February 28, 2004.[30] I find that Mr. Walia enclosed the first report with his March 5 letter to Certas.

The procedures for claiming benefits are set out in Part X of the *Schedule*. Section 31 provides that failure to comply with a time limit in Part X does not disentitle an insured to the benefit if he or she has a reasonable explanation. However, it also states that this provision does not apply to the limitation set out in section 51.

Subsection 32(1)(1.1) requires that the insured person notify the insurer within 30 days or "as soon as practicable" of the circumstances that gave rise to the entitlement to the benefit. Subsection 32(2) requires the insurer to "promptly" provide the insured with the proper forms. Subsection 32(4) provides:

> If a person is required by an insurer to submit an additional application in respect of a benefit that the person is receiving or may be eligible to receive, the person shall submit the additional application to the insurer within 30 days after receiving the additional application forms from the insurer.

Section 33 requires an insured who applies for a benefit provide certain information within 14 days of an insurer requesting the information.

Where an insured person is claiming a medical benefit, subsection 38(1.1) requires an insured person to submit an application for treatment before expenses are incurred and subsection 38(2) of the *Schedule* requires that the application include a treatment plan. Subsection 38(3) sets out information that the treatment plan must contain.

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[30] Response to Motion, Tab B

The Shiv Clinic reports, submitted by Mr. Walia, indicate that he was under medical care while in India. It is apparent that the Clinic's doctors were of the opinion that Mr. Walia suffered from "traumatic depression" and required rest. However, Mr. Walia has not provided anything that might be construed as a recommendation for chiropractic treatment. He has not provided any evidence that the Shiv Clinic provided chiropractic treatment from February 2004 to March 2005.

In March 2004, Mr. Walia notified Certas that he was receiving treatment in India. He provided an address at which he could be contacted. There is no evidence that Certas communicated with Mr. Walia regarding the procedures for claiming a benefit or requested information about the treatment to be provided in India or forwarded the relevant forms for making a claim. In *Smith v. Co-operators General Insurance Company* the Court described the *Schedule* as consumer protection legislation. In this context, I find that Mr. Walia's request that his claim be held in abeyance while he was in India did not relieve Certas of its obligation to provide information and forms relating to Mr. Walia's potential claim for treatment or assessments while in India.

I find Mr. Walia is precluded from proceeding to arbitration in respect of chiropractic services provided by the Shiv Clinic because he has failed to establish that such services were provided and therefore cannot establish this is an issue in dispute.

As Certas failed to provide Mr. Walia with the appropriate forms upon which to make a claim for treatment at the Shiv Clinic it cannot rely on any limitation period set out in either the *Insurance Act* or the *Schedule* in respect of treatment or assessments of Mr. Walia while he was in India.

Examination Expense:

Mr. Walia claims an examination expense of $1,171.00 for a Functional Abilities Evaluation conducted by Profile Evaluations. The invoice is referred to in the list of documents appended

to the Application for Mediation received by the Commission on May 24, 2006.[31] However, Certas denies receiving the invoice until November 8, 2006. In its "Response to Mediation Application," dated September 21, 2006, Certas stated:

> **Cost of Examination:** Amount in dispute $1171.00. FCE by Profileevaluations. Date submitted: 2003/09/29. Claiming partial approval. We do not have a FCE evaluation report from Profile evaluations. We have a In home report. We have issued payment of $1038.00 based on Invoice received by us in Oct 2003. This issue is being mediated two years after denial.[32]

The Report of Mediator was issued October 10, 2006. It notes that Certas raised a preliminary issue in respect of the examination expense for a Functional Abilities Evaluation conducted by Profile Examinations on September 29, 2003 in the amount of $1,171.00.[33]

It appears the invoice was faxed to Mr. Sangha on November 8, 2006 by Profile Evaluations. The fax cover sheet has two dates: a printed date of, November 2, 2005, which is crossed out and replaced by a hand-written date of "Nov.8/2006." The invoice is dated June 10, 2003 and is addressed to Certas with a copy to Mr. Walia's former counsel.[34]

On the basis of the foregoing, I find that the parties accepted that Certas had not received the invoice in June 2003. As a consequence, Mr. Sangha obtained a copy of the invoice by fax, from Profile Evaluations on November 8, 2006. A copy of the faxed invoice was then provided by Mr. Sangha to Certas on or about November 8, 2006. There is no indication on the face of the invoice that it was provided to Mr. Walia. There is a suggestion it may have been provided to counsel who preceded Mr. Sangha. However, the inference must be drawn that if Certas did not receive the invoice then counsel for Mr. Walia did not receive it as well. As with the housekeeping claim, subsection 41 sets out the procedure for claiming a benefit pursuant to Part VI, Other Expenses. The invoice or application for the examination expense was not received until November 8, 2006. There is no evidence that Certas either gave notice

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[31] Motion Record, Tab 2, Exhibit ""DD"
[32] Motion Record, Tab 2, Exhibit "EE"
[33] Motion Record, Tab 2, Exhibit "FF"
[34] Motion Record, Tab 2, Exhibit "GG"

of its denial with reasons or provided notice of the dispute process within 30 days of its receipt of the invoice pursuant to subsection 41(2) of the *Schedule*.

There is no evidence which might explain why Profile Evaluation's invoice failed to reach Mr. Walia, his counsel or Certas. One can speculate that it was human error. However, I am satisfied that Mr. Walia should not be prejudiced by administrative error over which he had no control. Therefore, I find that Mr. Walia provided Certas with his application for payment of the expense as soon as practicable pursuant to subsection 32(1.1) and may proceed to have his claim arbitrated.

EXPENSES:

Neither Mr. Walia nor Certas was totally successful. Further, Mr. Walia's submissions were of limited value. Having considered the *Expense Regulation*, I exercise my discretion and order that each party shall bear its own expenses in respect of this preliminary issue hearing.

Denise Ashby Arbitrator	October 5, 2007 Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A06-002513

BETWEEN:

SURJIT WALIA

Applicant

and

CERTAS DIRECT 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. Mr. Walia shall not proceed to arbitration in respect of his claims for:
   a. Income replacement benefits;
   b. A medical benefit for transportation expenses incurred attending treatment at Om Sai clinic;
   c. A medical benefit for treatment received from Natural Touch;
   d. Chiropractic services provided by the Shiv Clinic; and
   e. Housekeeping and home maintenance expenses.

2. Mr. Walia is not precluded from proceeding to arbitration in respect of his claims for:
   a. A medical benefit in respect of treatment provided by Om Sai Physiotherapy Clinic;
   b. An examination expense incurred for a Functional Abilities Evaluation conducted by Profile Evaluations.

3. Neither party is entitled to recover expenses from the other.

October 5, 2007

Denise Ashby
Arbitrator

Date