



FSCO A09-000198

BETWEEN:

HO YEN (TERESA) CHUNG

Applicant

and

UNIFUND ASSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

*Minor errors on pages 3, 5 and 8 corrected on September 30, 2010 in accordance with the *Dispute Resolution Practice Code* and section 21.1 of the *Statutory Powers Procedure Act*.

Before: Lloyd Richards

Heard: April 19 and 20, 2010, at the offices of the Financial Services Commission of Ontario in Toronto. Written submissions were received on April 19, 2010.

Appearances: Darryl Singer for Ms. Chung
Kadey B. J. Schultz for Unifund Assurance Company

Issues:

The Applicant, Ho Yen (Teresa) Chung, was injured in a motor vehicle accident on February 28, 2007. She applied for and received statutory accident benefits from Unifund Assurance Company (“Unifund”), payable under the *Schedule*.¹ Unifund denied Ms. Chung’s claims for the following benefits:

1. Chiropractic, massage therapy and acupuncture treatments recommended by Optimum Health in the amounts of \$5846.51, \$1427.10 and \$1318.56 under treatment plans dated May 29, 2007, June 29, 2007, July 31, 2007, October 4, 2007, March 3, 2008 and September 26, 2008.

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

2. \$1764.82 for physiotherapy at Carlan Physio Centre in a treatment plan dated September 6, 2007.
3. \$59.30 for Celebrex medication and a heat pack, submitted to Unifund April 5, 2007.
4. \$45.00 for an ambulance charge incurred on February 28, 2007.
5. Housekeeping and home maintenance services at the rate of \$100.00 per week from March 1, 2007 to February 28, 2009, less \$4284.70 paid by Unifund.
6. The cost of examinations conducted by Optimum Health in the amounts of \$411.39 for a reassessment on May 1, 2007 and \$263.72 for a reassessment on August 10, 2007.
7. On September 22, 2009, at the pre-hearing in this case, Ms. Chung also claimed a special award.

The parties were unable to resolve their disputes through mediation, and Ms. Chung applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The arbitration hearing in this matter commenced on April 19, 2010. At the start of the hearing, Unifund brought a motion to have Ms. Chung's documents and witnesses excluded from the hearing. Ms. Chung sought an adjournment of the hearing but agreed that I should hear the submissions on the exclusion of documents and witnesses first as that would affect her decision to pursue an adjournment. I heard submissions from the parties on April 19, 2010. On April 20, 2010 I issued an oral order granting Unifund's request to exclude Ms. Chung's documents but I denied Unifund's request to exclude Ms. Chung's witnesses. In its motion, Unifund also requested a stay of the proceedings. I saw no reason to stay the proceedings on Unifund's behalf, but I offered Ms. Chung the opportunity to request a stay of the proceedings pending receipt of my written reasons and any appeal of my ruling. Ms. Chung requested a stay and I granted it.

The preliminary issues are:

1. Should Ms. Chung's documents be excluded due to non-compliance with Rule 39.3(c) of the *Dispute Resolution Practice Code*?
2. Should Ms. Chung's medical witnesses be excluded from the hearing pursuant to Rules 41 and 42 of the *Dispute Resolution Practice Code*?
3. Should Ms. Chung's arbitration be stayed pending the outcome of an appeal on the decisions in the above two issues?

Result:

1. Ms. Chung's documents will be excluded at this hearing due to non-compliance with Rule 39.3(c) of the *Dispute Resolution Practice Code*.
2. Ms. Chung's medical witnesses will not be excluded from the hearing pursuant to Rule 41 and 42 of the *Dispute Resolution Practice Code*.
3. Ms. Chung's arbitration is stayed pending the outcome of any appeal on the decisions in the above two issues. The parties must notify me in writing before July 20, 2010 whether an appeal has been acknowledged by the Commission. In the event that no appeal has been acknowledged the parties shall, before July 30, 2010, provide me with available dates to resume the hearing in this case.

EVIDENCE AND ANALYSIS:

Background

Ms. Chung filed an arbitration application dated January 22, 2009. Ms. Chung and Unifund attended a pre-hearing on September 22, 2009 where Ms. Sahereh Baghbani of Yeung and Associates represented Ms. Chung and Ms. Elizabeth Wilson of Hughes, Amys represented Unifund. Arbitrator Bujold presided at the pre-hearing and his letter, dated September 23, 2009, lists the issues in dispute and clarifies the production agreements between the parties. At the pre-hearing, Ms. Chung requested a special award and undertook to provide particulars of the special award claim within 60 days of receiving a copy of Unifund's adjuster's file. Arbitrator Bujold's September 23, 2009 letter also noted that one possible consequence of failing to comply with a time requirement established by the *Dispute Resolution Practice Code* (the "Code") or failure to comply with an order or agreement is the exclusion of documents at a hearing.

Unifund forwarded to Ms. Chung a complete copy of its file on or around November 23, 2009. Ms. Chung does not dispute this fact. By letter dated March 18, 2010, roughly 30 days before the hearing, Unifund advised Ms. Chung that she had satisfied none of the production requests agreed to at the pre-hearing, nor any of the production agreements made subsequent to the pre-hearing. Ms. Chung also does not dispute the fact that Unifund, at Ms. Chung's request, pre-paid for the productions. In its March 18, 2010 correspondence, Unifund also advised Ms. Chung that it intended to resist her reliance on any documents at the hearing that were not produced according to the Rules in the *Code*.

In complying with the *Code*, on March 19, 2010 Unifund delivered to Ms. Chung all documents it intended to rely on at the hearing. In correspondence to Ms. Chung of the same date, Unifund noted that it did not intend to call witnesses and requested Ms. Chung's witness list.

On March 26, 2010 Ms. Chung delivered to Unifund the documents she intended to rely on at the hearing. Ms. Chung's correspondence did not include all the documents that she had agreed to produce. In particular, the complete clinical notes and records of Drs. Skolnik, Counti and Au, who are all practitioners at Optimum Health Clinic, were not produced. In addition, the collateral benefits file from Great West Life was not produced. The documents from Carlan Physiotherapy Centre that were produced appear to have been in Ms. Chung's possession since May 28, 2009. The documents from Dr. Hugo Law appear to have been in Ms. Chung's possession since May 28, 2009. The decoded OHIP summary, covering the period January 1, 2006 to May 21, 2009 also appears to have been in Ms. Chung's possession for some time before being produced to Unifund.

Findings

I find that Ms. Chung's documents should be excluded due to non-compliance with Rule 39.3(c) of the *Code*. I also find that Ms. Chung's medical witnesses should not be excluded from the hearing pursuant to Rule 41 and 42 of the *Code*.

Document Exclusion

Rule 39.1 of the *Code* states that, subject to Rule 39.2, all documents to be introduced at a hearing must be served on the other party at least 30 days before the first day of the hearing. Rule 39.2 goes on to state that, in extraordinary circumstances, an arbitrator may grant a party permission to serve a document on the other party for use at a hearing less than 30 days before the first day of the hearing.

Rule 39.3 states the following:

The hearing arbitrator will determine the relevance, materiality and admissibility of evidence submitted at the hearing, but will not admit evidence at a hearing that:

- (c) was not served on the opposing party in accordance with Rules 39.1 and 39.2, unless the hearing arbitrator is satisfied that extraordinary circumstances exist to justify an exception.

Rule 34.1 of the *Code* states that where a party fails to produce documents in compliance with an order or agreement, an arbitrator may award or deny a party its expenses, exclude a document filed, impose a new timetable for compliance, draw an adverse inference against a party or make any other order the arbitrator considers just. Pursuant to Rules 1 and 81.1(b), the *Code* is to be interpreted broadly to produce the most just, quickest and least expensive resolution of the dispute, and an arbitrator can, on appropriate terms, decide that a Rule does not apply in respect of a proceeding.

The pre-hearing in this case took place on November 22, 2009 and the pre-hearing arbitrator's letter stated that Ms. Chung and Unifund would exchange documents within 60 days of November 22, 2009. Unifund forwarded a complete copy of its producible file on or around November 23, 2009. Ms. Chung forwarded no documents. Unifund did not receive any of Ms. Chung's documents until March 26, 2010, which was 21 days before the first day of the hearing. I note that Ms. Chung did not at that time produce all of the documents that Unifund requested, although she had never objected to producing them. Ms. Chung also did not provide particulars about the special award that she claimed at the pre-hearing even though she had agreed to provide particulars within 60 days of receiving Unifund's adjuster's file. Ms. Chung advised me on the first day of the hearing that she would withdraw the special award claim.

According to its plain meaning, Rule 39 prohibits me from admitting, at a hearing, documents that have not been served on an opposing party at least 30 days before the first day of a hearing, unless extraordinary circumstances warrant an exception. Commission decisions have been clear in establishing that, although arbitrators have a range of remedies to address late service, the late service of documents must first be justified by exceptional circumstances.² The question then is whether extraordinary circumstances exist in this case. I do not have to consider the relevance,

²*Rovella and State Farm Mutual Automobile Insurance Company* (FSCO A01-001012, March 26, 2003), *V.J. and Security National Insurance Co./Monnex Insurance Mgmt. Inc.* (FSCO A01-001635, May 8, 2003), *Strzalka and Coachman Insurance Co.* (FSCO A03-000366, January 13, 2006)

materiality or admissibility of evidence before first considering whether extraordinary circumstances warrant admitting the evidence.

The burden of proof is on Ms. Chung to demonstrate that extraordinary circumstances led to her late service. She has been represented throughout this arbitration process by Yeung and Associates and has not had a change of solicitors. She presented no evidence of experiencing hardship in procuring the documents to be used at the hearing. Furthermore, it appears that some of the documents that were produced late to Unifund had been in her possession for quite some time, yet inexplicably they were not delivered to Unifund according to the requirements of Rule 39.

Ms. Chung argues that any decision to exclude her documents would amount to a dismissal of her case on a purely procedural basis. Her reasoning is that without documentary evidence she would not be able to properly present her position to me. She posits that the late delivery of the documents was not in her control, but rather was in her counsel's control, and that preventing her from presenting her position because of the late service would amount to an extraordinary circumstance.

In my view, this line of reasoning misses the point. The extraordinary circumstances that Ms. Chung is obligated by Rule 39 to demonstrate must have led to the late service. The late service itself cannot be considered the extraordinary circumstance.

Ms. Chung has been represented throughout this process and Unifund has communicated with her repeatedly in an attempt to have her deliver the documents she intends to rely on. She has presented no evidence explaining why she produced the documents late other than that she relied on her counsel and her counsel failed to abide by the *Code*. While excluding her documents might seem harsh under the circumstances, the *Code* clearly states that short served documents will only be admitted if extraordinary circumstances exist, of which there are none in this case.

Ms. Chung argues that I have other remedies available to me and that in the circumstances it would be just for me to address the late service through an award of costs or other remedies. She relies on the decision in *Huynh and Allstate Insurance Company of Canada*³ in which the arbitrator refused to dismiss an arbitration where the Applicant had failed to abide by undertakings. The arbitrator in that case awarded costs and expressed concern that Allstate raised technical arguments more for a tactical advantage than to address the merits of the case or procedural fairness. In this case, Unifund's arguments, while technical in nature, are valid and speak to Ms. Chung's failure to keep the arbitration on track and communicate with Unifund in an effort to speedily and effectively deal with the issues in dispute. Ms. Chung never communicated with Unifund before the first day of the hearing to address the late served documents, nor did she produce all of the documents that she had earlier agreed to produce.

I have the jurisdiction to apply either Rules 1 or 81.1(b) of the *Code* to make an exception in this case. However, I see no reason to apply either. Nor do I see any reason to apply Rule 34.1. Ms. Chung's counsel's failure to abide by the Rules, without explanation, does not mean that the Rules do not apply in this case. Ms. Chung has other remedies available to her if the exclusion of her documents renders her unable to proceed with her case.

Witness Exclusion

The Rules dealing with witnesses do not include the same language as the Rules dealing with documents. Rule 41 states that each party must provide the other parties with the names of witness as which the party intends to call and the names of persons the party requires to attend for cross-examination. Rule 42 concerns expert witnesses and is similar in tone to Rule 41. Rules 41 and 42 do not state that I will exclude the witnesses if the parties do not comply with the Rules. However, Rule 39 states that I will not admit late served documents, unless extraordinary circumstances justify the late service. Rules 41 and 42 contain no such language and merely state that I may exclude witnesses if a party does not comply with the *Code*.

³(FSCO A98-001309, February 14, 2001)

Unifund presented little argument about why I should exclude Ms. Chung's witnesses. Considering the way in which Rules 41 and 42 are framed, I see no reason to exclude the witnesses from the hearing.

Given my decision to exclude her documents, Ms. Chung advised me that she does not wish to make an adjournment request and so I do not have to deal with the issue. Ms. Chung requested a stay of proceedings to give her time to consider appealing my decision. I will grant the stay pending the outcome of any appeal of this decision.

EXPENSES:

I am not prepared to consider awarding expenses at this point. If required, either party can request an expense hearing after an appeal decision on the above issues or after the hearing in this case concludes.

Lloyd (J.R.) Richards
Arbitrator

May 31, 2010

Date



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BETWEEN:

HO YEN (TERESA) CHUNG

Applicant

and

UNIFUND ASSURANCE 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. Chung's documents will be excluded at this hearing due to non-compliance with Rule 39.3(c) of the *Dispute Resolution Practice Code*.
2. Ms. Chung's medical witnesses will not be excluded from the hearing pursuant to Rules 41 and 42 of the *Dispute Resolution Practice Code*.
3. Ms. Chung's arbitration is stayed pending the outcome of any appeal on the decisions in the above two issues. Ms. Chung's arbitration is stayed pending the outcome of any appeal on the decisions in the above two issues. The parties must notify me in writing before July 20, 2010 whether an appeal has been acknowledged by the Commission. In the event that no appeal has been acknowledged the parties shall, before July 30, 2010, provide me with available dates to resume the hearing in this case.

Lloyd (J.R.) Richards
Arbitrator

May 31, 2010

Date