Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-006435

BETWEEN:

CARLY FRANIC-TEMPLE

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Jessica Kowalski

Heard: June 15, 2016 in St. Catharines, with written submissions on expenses received to June 26, 2016

Appearances: Siona Sullivan and Ryan Bonin for Ms. Franic-Temple
Eric Grigg for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Carly Franic-Temple, was injured in a motor vehicle accident on March 18, 2012. She applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule.*[1] State Farm refused to pay certain benefits. Ms. Franic-Temple applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

[1] *The Statutory Accident Benefits Schedule — Effective September 1, 2010, Ontario Regulation 34/10*, as amended.

Preliminary Issue:

After it received a treatment and assessment plan (OCF-18) from an occupational therapist (OT) recommending an in-home assessment, State Farm requested that Ms. Franic-Temple attend an insurer examination (IE) with an orthopaedic surgeon. Ms. Franic-Temple did not attend the IE. Funding for that OCF-18 is the main issue in dispute in this arbitration proceeding.

During the pre-hearing, State Farm raised as a preliminary issue that Ms. Franic-Temple was precluded from commencing a mediation pursuant to section 55(2) of the *Schedule* because she failed to attend the orthopaedic IE that State Farm required under section 44 of the *Schedule.*

State Farm submits that Ms. Franic-Temple has not complied with that section by not attending the IE. Ms. Franic-Temple challenges the validity of State Farm's Notice.

For the reasons that follow, I find that State Farm's Notice was valid and that Ms. Franic-Temple was precluded from commencing mediation by operation of section 55(2) of the *Schedule.*

Section 55(2) of the *Schedule* states that an insured person shall not commence a mediation proceeding under section 280 of the *Insurance Act* if the insurer has provided the insured person with a notice that it requires an IE under section 44 of the *Schedule*, but the insured person has not complied with that section.

Section 44 gives the insurer the right to its own assessments. Section 44(1) states that, for the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit, the insurer may require the insured person to be examined by one or more regulated health professionals chosen by the insurer, but not more often than is reasonably necessary.

If an insurer requires an IE, Section 44(5) requires the insurer to give the insured person a notice that sets out certain information. The items that the notice is required to set out are itemized in subsections 44(5) (a) through (d).

They are:

(a) the medical and any other reasons for the examination;

(b) whether the insured person's attendance is required at the examination;

(c) the name, professional affiliations, titles, designation and/or areas of specialization of the examiner; and,

(d) particulars of the examination, including length, time and place.

There is no dispute that State Farm's Notice for the orthopaedic IE complied with subsections 44(5)(b) through (d). Ms. Franic-Temple challenges the Notice on the basis that it did not provide the medical and any other reasons required by s. 44(5)(a), and was therefore invalid. I disagree.

EVIDENCE AND ANALYSIS:

Ms. Franic-Temple was involved in a motor vehicle accident in the early hours of March 18, 2012. She was sitting on a curb when a minivan taxi cab backed over her feet and ankles.

Ms. Franic-Temple did not sustain any fractures in the accident. This is not disputed. She continues to have pain and swelling, but all medical imaging in evidence had ruled out the existence of fractures.

Three years later, on May 15, 2015, OT Alicia Kralt submitted an OCF-18 requesting an in-home occupational therapy assessment to determine whether Ms. Franic-Temple needed attendant care, occupational therapy and assistive devices.

Ms. Kralt justified the OCF-18 on the basis that, among other things, Ms. Franic-Temple had fractured her foot in the accident. At Part 6 of the OCF-18, under the heading "Injury Sequelae Information", Ms. Kralt wrote: "Fracture of foot, except ankle." She provided additional comments at the end of the OCF-18, including that Ms. Franic-Temple reportedly "fractured the top of her left foot and experienced severe ligament and tissue damage in her right foot."

These were first references to fracture. Before that, in a Disability Certificate dated September 14, 2012, Ms. Franic-Temple's orthopaedic surgeon certified that she had a crush injury on both her feet but no fractures. MRIs on August 28 and September 23, 2013 were negative for fractures, as were previous x-rays.

State Farm denied funding for the assessment and advised that it would require Ms. Franic-Temple to attend an IE, with notice to follow. In its explanation of benefits form (OCF-9), the adjuster noted the following:

> Based on review of your medical file, the diagnosis reported in this OCF-18 was reported to be fracture of foot, except ankle. However, the documentation provided to our office which includes but [is] not limited to an MRI completed on September 3, 2013 and August 28, 2013 had reported there was no fracture or dislocation.

The OCF-9 summarized the medical information provided to State Farm and also referred to alleged "gaps in seeking treatment and rehabilitation without documented clinical explanation."

The OCF-9 concluded that, "[d]ue to the gaps in treatments and rehabilitation as well as inconsistency of the ongoing diagnosis of your medical status, we do not believe the submitted OCF-19 is reasonable and necessary."

In response to the OCF-9, Ms. Franic-Temple's counsel wrote to State Farm by letter dated June 1, 2015, that Ms. Franic-Temple would not attend any IEs. In her letter, counsel challenged the "alleged gaps in treatment without a clinical explanation" as not being a medical reason for the denial of funding, but did not address the fracture diagnosis.

On June 5, 2015, State Farm served Ms. Franic-Temple with Notice of the orthopaedic IE. The reasons were those set out in the OCF-9, namely the inconsistency in the (fracture) diagnosis and gaps in treatment and rehabilitation.[2]

[2]State Farm provided a further request for the same IE, for the same reasons.

Ms. Franic-Temple did not attend the IE. She argues that she did not have to because State Farm's Notice did not contain the "medical or any other reasons" required by section 44(5)(a). She relies on the decision in *Augustin and Unifund Assurance Company*,[3] a case involving the Minor Injury Guideline (MIG) in which Arbitrator Sapin held that if insurers' notices do not comply with *Schedule* requirements, an insured person will not be barred from mediation by s.55(2) if they fail to attend an IE.

Ms. Franic-Temple submits that State Farm's adjuster was simply captivated by the comment "fracture of foot, except ankle" and failed to appreciate the reasonable necessity of occupational therapy, which is why he requested an IE with an orthopaedic surgeon and not an OT. She argues that, by focusing on the (erroneous) diagnosis of an orthopaedic injury, he neglected to consider the real purpose of Ms. Kralt's OCF-18, that he failed to consider the source of the information (an OT and not an orthopaedic surgeon), and that an inconsistency of diagnosis by an OT is not an adequate reason for an examination by an orthopaedic surgeon.

I find that the OCF-9 contained a detailed description of the reasons that gave rise to the concern about the fracture diagnosis, and compared it to past medical records and examinations that had found no fracture, including Ms. Franic-Temple's own assessments.

With respect to the issue of medical reasons, I find that, when presented with an OCF-18 based on a different and new diagnosis from what was contained in the prior medical records, State Farm provided sufficient medical reasons to justify an orthopaedic IE. In *Augustin*, Arbitrator Sapin noted that neither the *Schedule* nor the MIG contains a definition of the term "medical reasons". I am satisfied that investigation of a condition, i.e., a diagnosis, is a medical reason and that the OCF-9 described in detail why the new diagnosis of fracture was a concern. Given that a fracture is an orthopaedic injury, referring Ms. Franic-Temple to an orthopaedic surgeon was not inappropriate.

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[3](FSCO A12-000452, November 13, 2013)

Ms. Franic-Temple's only response to the OCF-9 was counsel's June 1, 2015 letter pre-emptively refusing any IEs. The letter was silent on the question of new diagnosis and whether or not that was even accurate, instead focusing only on the less compelling claim of alleged gaps in treatment as the reason to deny funding. I agree with Ms. Franic-Temple that the fracture was but one part of a relatively detailed OCF-18 recommending an OT assessment to examine how her injuries affect Ms. Franic-Temple's activities of daily living, but the reasonableness or necessity of the assessment is not the issue before me, and I make no findings in this regard.

For these reasons, I find that the OCF-9 described in detail why the references to a fracture were of concern and that a new diagnosis of a fracture is a sufficient medical reason to justify an orthopaedic IE. I therefore find that the Notice complied with section 44.

Having failed to attend the IE after a valid Notice was issued, Ms. Franic-Temple was precluded from proceeding to mediation, and therefore arbitration, by operation of section 55(2) of the *Schedule*. This finding is without prejudice to Ms. Franic-Temple's right to submit a fresh or amended OCF-18.

EXPENSES

By the time of this hearing, the parties agreed that the reference to fracture in the OCF-18 was a mistake. In my view, both parties share responsibility for this proceeding that could have been avoided by simple communication.

Accordingly, I find that each party should bear its own expenses and I therefore make no order for expenses.

Jessica Kowalski
Arbitrator

March 15, 2017
Date

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ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and *Ontario Regulation 664*, as amended, it is ordered that:

1. Ms. Franic-Temple is precluded from proceeding to mediation of the May 15, 2015 Treatment and Assessment Plan (OCF-18) by operation of section 55(2) of the *Schedule*.

Jessica Kowalski
Arbitrator

March 15, 2017
Date