When is a request for an insurance exam 'reasonably necessary?'

By Julius Melnitzer | Publication Date: Monday, 19 October 2009

Getting insurance claimants to submit to a medical exam has become harder due to a recent decision by the Financial Services Commission of Ontario.

Deanna Gilbert represents H.T. in a dispute with Security National Insurance Co.

When Ontario abolished designated assessment centres, it gave insurers the right to request medical examinations for each benefit for which a claimant applied. The only limit on the number of examinations was that a request be "reasonably necessary."

Typically, insurers have maintained that all their requests for examination are reasonably necessary and tend to exercise their right to deny benefits if the claimant fails to attend.

"Before the decision in *H.T. v. Security National,* there was no proper legal interpretation of what was 'reasonably necessary,'" says David Payne of Toronto's Thomson Rogers.

The case came about after H.T.'s injury in a vehicle accident in September 2003. Five years later, she applied for statutory benefits and provided an application for determination of catastrophic impairment signed by a psychologist and based solely on a mental or behavioural disorder.

Security National Insurance Co. responded with a request that H.T. attend four in-person examinations with a psychiatrist, a neurologist, an occupational therapist, and an orthopaedic surgeon.

Then, in September and October, H.T. attended previously scheduled insurer examinations with a psychiatrist, a dentist, and a physiatrist to determine her non-catastrophic entitlement.

The psychiatrist, Dr. L. Jerome, opined that the severity of H.T.'s functional impairment warranted consideration of an in-patient assessment and treatment program for post-traumatic stress disorder. He concluded that she suffered from a complete inability to carry on her normal life.

He also reported that H.T. suffered significant setbacks due to the stress of the assessments, which led her to becoming actively suicidal. He could not "stress strongly enough the risk that four assessments in the span of a little over two weeks" posed to H.T.

Payne's colleague, Deanna Gilbert, advised the insurer that her client wouldn't attend the catastrophic impairment examinations. The insurer responded that H.T.'s refusal to attend meant she didn't meet the requirements for catastrophic impairment.

Payne and Gilbert applied for arbitration, seeking a determination that H.T. suffered from catastrophic impairment and urgent directions on attendance at the examinations. Security National replied that it was entitled to conduct the examination and had the "sole and unqualified right to chose the assessors(s) for the said examination."

In February 2009, arbitrator John Wilson ruled that the insurer had to proceed with a determination of catastrophic impairment on the basis of the available assessments and a review of the documentary evidence.

"At this time, given [H.T.'s] current condition it is not reasonable to schedule further in-person examinations, although the [insurer] may refer supplementary questions to the previous examiners with regard to the claim for catastrophic impairment," Wilson wrote.

"It would therefore be reasonable to refer the issue back to Dr. Jerome who has expertise in catastrophic impairment and who has recently examined [H.T.] for a further paper review of the issue of catastrophic impairment from a psychiatric perspective."

As Wilson saw it, the insurer's right to conduct assessments gave rise to a fiduciary duty to the insured. The insurer, therefore, didn't have an unfettered right to change assessors.

"It is clear also that in the choice of [an] independent expert, one party's strategic interest does not trump issues of fairness," he wrote. "Given the first-party relationships in accident-benefit matters, the responsibility of experts chosen to assist in the determination of benefit entitlement should be no less than for unrelated parties in an adversarial situation.

"In this matter, it is not enough for Security [National] to have an unexplained preference for a new and different psychiatrist when such an abrupt change of assessors can lead to an inference of expert shopping for a more favourable report."

Security National, represented by Christopher Caston, sought to appeal Wilson's preliminary determination to FSCO's office of the director of arbitrations.

But delegate Lawrence Blackman ruled the insurer didn't have a "sole and unqualified right to determine the assessment of the assessors."

The fact that the examinations pertained to the issue of catastrophic impairment or that the potential increase in benefits might be significant didn’t eliminate the need to determine whether the insurers’ requests were reasonable.

Consequently, Blackman refused to accept the appeal of what was a preliminary issue.
According to Payne and Gilbert, the case articulates several fundamental principles relating to s. 42 of the statutory accident benefits schedule:

- Upon receipt of a benefit request, insurers can’t immediately initiate a full-blown assessment and multiple examinations without first considering a less invasive or demanding process;

- Insurers can’t conduct unlimited examinations without first considering available medical records and expert reports.

Caston, meanwhile, wouldn’t comment on the substantive aspects of the case as the matter is still pending.

He notes, however, that a private mediation is set to take place at the end of the month. But if the case doesn’t settle there, the parties will then proceed to arbitration in November, he adds.