



FSCO A11-001987

BETWEEN:

CARLEY-ANNE OUELLETTE (Minor)

Applicant

and

INTACT INSURANCE COMPANY

Insurer

DECISION ON A MOTION

Before: Robert Bujold

Heard: By telephone conference call on September 23, 2011.
Written submissions were received by September 16, 2011.

Appearances: David Payne for Ms. Ouellette
Brian Evoy-Smith for Intact Insurance Company

Overview:

The Applicant, Carley-Anne Ouellette, was injured in a motor vehicle accident on May 10, 2007. She applied for and received statutory accident benefits from Intact Insurance Company (“Intact”), payable under the *Regulations*.¹

¹ At the time of this accident, accident benefits were available pursuant to the *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996* (the “*Old Regulation*”). Effective September 1, 2010, the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “*New Regulation*”) came into force. The transition rules in the *New Regulation* provide that, subject to certain exceptions, benefits that would have been paid under the *Old Regulation* are to be paid under the *New Regulation*, but in amounts determined under the *Old Regulation*. The procedures for claiming benefits after August 31, 2010 are governed by Part VIII of the *New Regulation*.

Ms. Ouellette seeks a determination that she was catastrophically impaired as a result of the accident. Intact seeks to have Ms. Ouellette attend several in-person examinations, pursuant to section 44 of the *New Regulation*, to help it determine whether Ms. Ouellette sustained a catastrophic impairment.

Ms. Ouellette has refused to attend any in-person examinations by Intact on the issue of catastrophic impairment. Ms. Ouellette maintains that Intact has already determined, more than once on the basis of paper reviews, that she is not catastrophically impaired. Further, Ms. Ouellette maintains that, on the facts of this case, Intact's request that she attend any catastrophic impairment assessments pursuant to section 44 amounts to an abuse of process.²

As a result, and prior to a pre-hearing discussion being held in this matter, Ms. Ouellette brought this motion for a preliminary determination regarding Intact's request for in-person assessments. Specifically, Ms. Ouellette sought an order directing Intact to make a determination on her application for catastrophic impairment status on the basis of the information currently available and, in the event that Intact maintains its position that she is not catastrophically impaired, that Intact be required to proceed to arbitration without the benefit of the requested in-person section 44 examinations.

Intact brought its own motion for an order "Staying these arbitration proceedings until such time as the Applicant has attended assessments to be arranged by Intact in order to assist it in determining whether the Applicant has sustained a Catastrophic Impairment."

Intact denies that it ever took the position that a determination of catastrophic impairment could be made without in-person examinations; only that an Application for Determination of Catastrophic Impairment (OCF-19) could be completed without the need for in-person assessments. However, Intact has since admitted that its position on this point was in error and has paid \$2,000.00 for each of the three assessments conducted on Ms. Ouellette's behalf.

² As addressed later in these reasons, Ms. Ouellette maintains that Intact's abuse of process is systemic, extending beyond this case.

While admitting its error, Intact denies that its conduct amounts to an abuse of process. Intact further maintains that it would be unjust to require that it make a determination on the issue of catastrophic impairment and/or require it to proceed to arbitration without affording it the opportunity to have Ms. Ouellette assessed. Intact notes that Ms. Ouellette is young and the financial consequences to both parties are high. To the extent that its conduct is in issue, Intact states that the appropriate remedy is a special award determined on the basis of findings made on a full record at the main hearing; not a denial of its right to a fair hearing.

Issues:

The parties agreed on the following statement of issues:

1. Is it reasonably necessary for Ms. Ouellette to attend multidisciplinary examinations proposed by Intact to determine whether she sustained a catastrophic impairment as a result of the accident?
2. In the event the examinations are determined to be reasonably necessary, is Intact entitled to a stay of the arbitration proceedings pending Ms. Ouellette's attendance at the examinations?

Result:

1. Intact is entitled to conduct two or more in-person assessments to assist it in making a determination of catastrophic impairment. In the event that Notices of Examination are delivered and an issue arises as to whether one or more of the assessments are reasonably necessary, either party may bring a motion to have the issue determined. The request for a stay of the arbitration proceedings may be revisited at that time.

EVIDENCE AND ANALYSIS:

Background:

The facts are not in dispute, although the parties disagree on the implications of those facts. The following is a chronology of the more salient facts that inform the issues on this motion.

Intact writes three letters in 2009-10 advising of limits on duration and amounts of benefits payable based on non-catastrophic impairment designation

On February 5, 2009 (approximately 3 months before the 104 week post-accident mark), Intact³ wrote to Ms. Ouellette⁴ in connection with attendant care benefits that Intact had been paying. The letter advised:

... Based on the medical information we have on file, Carley Ouellette did not sustain a catastrophic impairment as a result of the accident and, in accordance with Section 18 of the *Statutory Accident Benefits Schedule*, are [sic] not eligible to receive an attendant care benefit beyond May 9, 2009, which is 104 weeks from the date of the accident.

Should we receive medical information from a qualified health practitioner that changes that diagnosis we will reconsider your application for this benefit.

We enclose an *OCF-9 – Explanation of Benefits* detailing our position at this time and your rights to dispute. ...

Three months later, on May 6, 2009, Intact wrote another letter to Ms. Ouellette similar in content to its February 5, 2009 letter. It confirmed Intact's position that, "based on the medicals we have on file," Ms. Ouellette did not sustain a catastrophic impairment as a result of the accident and, as a result, Intact would not be paying attendant care benefits beyond 104 weeks post-accident. Again, Intact indicated that it would "reconsider this benefit" should it receive medical information that "changes that diagnosis." In addition to an OCF-9, this letter also included an OCF-19 (Application for Determination of Catastrophic Impairment) to be

³ ING at that time.

⁴ As Ms. Ouellette is a minor, the letter was directed to her guardian. The letter was also copied to her counsel.

completed “should you feel Carley has suffered a catastrophic injury as a result of the accident dated May 10, 2007.”

A further 14 months later, on July 16, 2010, Intact wrote to Ms. Ouellette to advise her that medical and rehabilitation benefits would be payable until she attained the age of 25 years, as she was only 12 years of age at the time of the accident.⁵ The letter also advised that, in respect of any one accident, medical and rehabilitation benefits shall not exceed \$100,000.00 or, if the insured person sustained a catastrophic impairment as a result of the accident, \$1,000,000.00. The letter continues that “Current medical document [sic] on file indicates that you did not sustain a catastrophic impairment as a result of the accident.” Intact then provided Ms. Ouellette with the balance of medical and rehabilitation benefits remaining available to her at that point (\$37,770.43) based on a limit of \$100,000.00.

Intact denies Ms. Ouellette’s section 25 request for funding of multidisciplinary catastrophic impairment assessments by Kaplan and Kaplan

By Treatment and Assessment Plan (OCF-18) dated October 27, 2010, Dr. Ronald Kaplan requested funding for multidisciplinary catastrophic impairment assessments at approximately 3½ years post-accident.^{6,7} The OCF-18 recommended assessments by seven assessors: three psychologists, a psychiatrist, a registered nurse, an occupational therapist and a pharmacologist. The “estimated duration of this treatment plan” is stated to be 20 weeks, and the total cost of the multidisciplinary assessments is projected at \$20,200.00. In the “Additional Comments” section, Dr. Kaplan provides the following rationale for the assessments:

⁵ Pursuant to subsection 18(1)(b) of the *Old Regulation*.

⁶ The *New Regulation* took effect on September 1, 2010. Subject to limited exceptions, an insurer remains not liable to pay for the cost of assessments or examinations unless prior approval has been sought. However, the amount that an insurer shall pay for conducting any one assessment or examination is now limited to \$2,000.00 pursuant to subsection 25(5)(a) of the *New Regulation*. There is no exception for catastrophic impairment assessments. The *New Regulation* also eliminated “rebuttal reports” that had been available pursuant to section 42.1 of the *Old Regulation*.

⁷ I note that the copy of the OCF-18 contained in the Applicant’s Motion Record, and marked as Exhibit “F” to the affidavit of Deanna S. Gilbert, is signed on behalf of Ms. Ouellette (Part 10), but is not signed by Dr. Kaplan (Part 4). In any event, Intact did not take issue with the sufficiency of the OCF-18.

We have considerable expertise in catastrophic impairment determination. However, we do not have sufficient information to rate Ms. Ouellette's physical, psychological, and mental impairments and as such we are applying according to the SABS for a number of specific assessments and examinations to determine rateable impairments from the MVA. We do not require prior approval to complete an OCF 19 and are not applying to complete this form but for the assessments necessary to precisely diagnose and completely rate all MVA caused impairments.

The following assessments and examinations are reasonable and necessary to diagnose and rate Ms. Ouellette's impairments. At the end of this process we will provide precise ratings for the SABS criteria and complete the OCF 19 if Ms. Ouellette meets any of the catastrophic impairment criteria.

Intact conducted a paper review of Dr. Kaplan's request for funding of multidisciplinary catastrophic impairment assessments. Based on reports from Dr. Heitzner, psychiatrist, and Dr. Diana Garcia, psychologist, dated November 22 and 23, 2010 respectively, Intact concluded that the assessments recommended by Dr. Kaplan were not reasonable and necessary.

In his report, Dr. Heitzner commented

... She [Ms. Ouellette] was thoroughly assessed and treated by chronic pain specialist, orthopedic surgeon and occupational therapist and psychologist. There is enough information contained in the file to properly fill out the OCF-19. Therefore, the submitted OCF-18 requesting multiple assessments to determine a catastrophic rating is not necessary.

In her report, Dr. Garcia commented

Based upon review of the medical documentation, including various reports from multiple disciplines, I am of the opinion that there is sufficient information available to an evaluator with appropriate familiarity/expertise in the AMA Guides to establish, without the requirement of a direct assessment, whether Ms. Ouellette's impairments *potentially* fall within the criteria of catastrophic determination and in turn establishing the requirement for the completion and submission of an OCF-19. [emphasis added]

By letter to Intact dated November 26, 2010, Dr. Kaplan acknowledged that Ms. Ouellette had participated in numerous assessments and received treatment, but noted that these had not specifically addressed questions of catastrophic impairment. Dr. Kaplan further acknowledged that Ms. Ouellette's impairments "potentially fall" (to use Dr. Garcia's language) within the catastrophic impairment designation, but noted that the OCF-19 used to apply for a

determination of catastrophic impairment requires the physician completing the application to “confirm that the applicant suffered a catastrophic impairment” and to acknowledge that “it is an offence under the Insurance Act to knowingly make a false or misleading statement or representation to an insurer in connection with the person’s entitlement to a benefit” and that “it is an offence under the federal Criminal Code for anyone to knowingly make or use a false document with the intent it be acted on as genuine....”

Given the warning, Dr. Kaplan confirmed that he could not submit a completed OCF-19 on Ms. Ouellette’s behalf. He could not certify that she had sustained a catastrophic impairment without further expert assessments and examinations; thus, the reason for the OCF-18 requesting funding for multidisciplinary catastrophic impairment assessments. Dr. Kaplan concluded by requesting that Intact reverse its position and approve the assessments.

It is not clear whether Intact responded to Dr. Kaplan’s letter or issued a further Explanation of Benefits, but, two months later, correspondence from Ms. Ouellette’s counsel dated February 4, 2011 confirmed that Intact “maintains its refusal to pay for your insured to be assessed for catastrophic status through the offices of Kaplan and Kaplan....” Counsel’s strongly worded letter reiterated Dr. Kaplan’s point that the OCF-19 did not permit a physician to certify that an insured person was “potentially” catastrophic (as suggested by Dr. Garcia) and noted that, according to a plain reading of the form, to do so would be an offence under the *Insurance Act* and the *Criminal Code*. Counsel’s letter also put Intact on notice that “if and when an OCF-19 is submitted to your principal, Carley Ouellette will not allow the insurer to conduct Section 44 in-person insurer examinations for the very reason that its own experts have already declared, that is, they are not necessary.”

Kaplan and Kaplan conducts catastrophic impairment assessments, without funding from Intact, and submits an OCF-19 (Application for Determination of Catastrophic impairment)

Four days after counsel’s letter, an OCF-19 dated February 8, 2011 was completed by Dr. Garner, psychiatrist, of Kaplan and Kaplan. A Catastrophic Impairment Determination

Executive Summary⁸ of same date concludes that Ms. Ouellette sustained a catastrophic impairment in accordance with subsection 2(1.2)(f) of the *Old Regulation* (55 per cent or more impairment of the whole person). Specifically, Dr. Garner concluded that Ms. Ouellette's physical impairments resulted in a whole person impairment (WPI) rating of 52%. Drs. Pignol and Kaplan, psychologists, concluded that Ms. Ouellette's mental and behavioural impairments resulted in a WPI rating of 12%. Combining the ratings of 52% and 12%, the assessors arrived at an overall WPI of 58%. However, this was viewed as a minimum rating. Given that Ms. Ouellette was under the age of 16 years at the time of the accident, the developmental implications of the impairments were also considered.⁹ This resulted in WPI ratings ranging from 60-65%.

Intact requests its own multidisciplinary catastrophic impairment assessments, pursuant to sections 44 and 45, and Ms. Ouellette refuses to attend

Intact received the OCF-19 from Kaplan and Kaplan on February 11, 2011. On February 22, 2011, Intact wrote to Ms. Ouellette¹⁰ acknowledging receipt of the OCF-19 and advising that "Based on the documentation currently on file we are unable to determine whether you have suffered a catastrophic impairment as a result of the accident. I am therefore requesting your participation in an examination(s) under Section 44 of the Statutory Accident Benefits Schedule. Details of the examination(s) will follow."

In an exchange of letters between February 23, 2011 and March 11, 2011, Ms. Ouellette's counsel and Intact set out and debated their respective positions regarding Intact's requests for section 44 examinations. In this exchange, Ms. Ouellette's counsel questioned Intact's conduct in contacting Ms. Ouellette directly; questioned who, if anyone, Intact had consulted in arriving at its conclusion that it was "unable to determine" if Ms. Ouellette was catastrophically impaired; and confirmed Ms. Ouellette's position that she would not attend any Section 44 in-person

⁸ The Executive Summary appears as Exhibit "A" to the Supplementary Affidavit of James Allingham filed on behalf of Intact. Neither the OCF-19 of February 8, 2011 nor the catastrophic impairment assessment reports themselves were filed on the motion.

⁹ See subsections 2(1.3) and (1.4) of the *Old Regulation*.

¹⁰ This letter was sent to the attention of Ms. Ouellette directly, rather than to the attention of her guardian who resides at the same address. The letter was, however, copied to Ms. Ouellette's counsel.

catastrophic impairment examinations “for the very reason that the insurer’s own experts have already declared that they are not necessary.” For its part, Intact confirmed that it reviewed the OCF-19 and attached reports from Kaplan and Kaplan; concluded that it was unable to determine whether the impairment was a catastrophic impairment, pursuant to subsection 45(3); and consequently made its request for in-person examinations to assist it in making that determination, pursuant to section 44. Intact confirmed that it had not consulted with any regulated health professionals in connection with its receipt of the OCF-19.¹¹

Intact delivered five Notices of Examination, each dated March 10, 2011. Particulars of the examinations are as follows:

- Zinnia Lee, physical therapist, scheduled for March 17, 2011 in Mississauga;
- Dr. Paitich, orthopaedic surgeon, scheduled for April 5, 2011 in Brampton;
- Dr. Mayer, neurosurgeon, scheduled for April 13, 2011 in Mississauga;
- Cameron St. Germain, occupational therapist, scheduled for April 20, 2011 in Toronto; and
- Dr. Garcia, psychologist, scheduled for April 28, 2011 in Toronto.

Ms. Ouellette did not attend these assessments and, in fact, refuses to attend any in-person section 44 assessments or examinations pertaining to the issue of catastrophic impairment.

Intact reconsiders its initial denial and decides to fund the catastrophic impairment assessments conducted by Kaplan and Kaplan

Intact wrote to Ms. Ouellette’s counsel on August 4, 2011, just over two months after the mediation in this matter. After referencing Intact’s initial decision to deny funding for the catastrophic impairment assessments recommended by Kaplan and Kaplan, the letter continues

Intact Insurance has reconsidered our position in this regard. It is apparent that Dr. Heitzner and Dr. Garcia concluded that in-person assessments were not required as there was enough information in the medical brief to determine whether you “potentially fall” within the definition of a catastrophically impaired individual. We are in agreement with you that the OCF-19 requires the

¹¹ I note that Intact also initially took the position that “Ms. Ouellette would be unable to proceed to mediation until such time as she complies with section 44.” Ms. Ouellette’s counsel noted that this position, if correct, would prevent an insured person from ever being able to challenge the reasonableness and necessity of a section 44 examination. The matter did, in fact, proceed to mediation on an expedited basis on May 31, 2011. The Report of Mediator notes “ING [Intact] raised the preliminary issue of Section 55(b) of the SABS.”

completing physician to conclude that Miss Ouellette has actually, as opposed to potentially, sustained a Catastrophic Impairment. Further, the revisions to the *Statutory Accident Benefits Schedule* effective September 1, 2010 specifically contemplate that assessments may be completed prior to the submission of an Application for Determination of Catastrophic Impairment.

Intact Insurance, therefore accepts, in these circumstances, that in-person examinations were reasonably required for the purposes of completing the Application for Determination of Catastrophic Impairment....

Intact's letter also referenced the new funding limits in subsection 25(5)(a) of the *New Regulation*. Intact noted that the multidisciplinary assessments actually conducted by Kaplan and Kaplan consisted of a psychological assessment, a psychiatric assessment and a pharmacological review. Intact agreed to fund \$2,000.00 for each of the three assessments for a total of \$6,000.00.

A similar letter outlining Intact's reconsideration was sent to Kaplan and Kaplan on August 9, 2011. This letter enclosed a cheque in the amount of \$6,000.00 for the three assessments.

Analysis:

Should Intact be precluded from conducting in-person catastrophic impairment assessments?

Subsection 44(1) of the *New Regulation* provides that, as often as is reasonably necessary, an insurer may require an insured person to be examined by one or more regulated health professionals to assist the insurer to determine if the insured person is or continues to be entitled to a benefit. Subsection 45(3)(b) of the *New Regulation* makes specific reference to an examination under section 44 where an insurer has received an OCF-19 (Application for Determination of Catastrophic Impairment) and the insurer requires the examination to determine whether the impairment is a catastrophic impairment.

In *State Farm Mutual Automobile Insurance Company and Ramalingam*,¹² the Director's Delegate arrived at the following conclusions regarding the factors that should inform an arbitrator's decision on the reasonableness and necessity of insurers' examinations:

Rather than focusing on the insurer's motivations or other subjective factors, the prevailing arbitral authority is that the enquiry should focus mainly on the objective factors identified in numerous decisions, including:

- the timing of the request, especially whether it will require the hearing to be adjourned;
- whether the claimant disclosed relevant materials as soon as reasonably possible in accordance with the *Dispute Resolution Practice Code* and whether the insurer made its IE request as soon as it reasonably determined the need for the examination;
- what other information is available to the insurer, including information provided by the claimant and the number, nature and date of previous insurer examinations;
- whether information provided by the claimant since the insurer's last insurer examination suggests a new diagnosis, a change in the claimant's condition or a new direction in medical investigation of it;
- whether there is a reasonable nexus between the requested examination and the insured person's injuries;
- whether the insurer accepts the claim and continues to pay benefits; and
- generally whether the request is reasonable considering the balance between the insured person's right to privacy and the insurer's ongoing right and obligation to assess the claim.

I find these factors generally favour Intact. This is Intact's first request to conduct its own in-person catastrophic impairment assessments. Further, this is not a case where the request came late and threatened pending hearing dates. On the contrary, Intact sought to assess Ms. Ouellette even before this matter proceeded to mediation. As well, Intact's request related to a new diagnosis from Kaplan and Kaplan, and it notified Ms. Ouellette that it required the examinations within 10 business days of its receipt of the OCF-19, as required by subsection 45(3)(b).

¹² (FSCO P05-00026, August 13, 2007) Appeal; upheld on appeal to the Divisional Court [2009] O.J. No. 3491.

In oral submissions, Ms. Ouellette conceded that, provided the assessments are not for the dominant purpose of arbitration,¹³ an insurer in the ordinary case may very well be entitled to conduct in-person examinations to assist in determining whether the insured person sustained a catastrophic impairment as a result the accident. However, Ms. Ouellette maintained that this is not the ordinary case. Ms. Ouellette submitted that the exercise of my discretion in this case requires more than a rote application of the criteria in *Ramalingam*.¹⁴ Ms. Ouellette contends that Intact's conduct should lead me to exercise my discretion to bar it from conducting any in-person catastrophic impairment assessments. Any concerns over maintaining a "level playing field" in favour of Intact is superseded by concerns that Ms. Ouellette, and others like her, not be "abused" by insurers, especially first-party insurers acting in the context of consumer protection legislation where there is the obligation to act with utmost good faith.¹⁵

Ms. Ouellette pointed to Intact's initial refusal to fund the Kaplan and Kaplan assessments as an example of its abusive conduct. She submitted that Intact's refusal ran contrary to the industry standard where insurers have *always* approved assessments necessary to complete an OCF-19 application. However, I was not provided with any evidence on this point.

As a further exacerbating factor, Ms. Ouellette noted that, pre-September 1, 2010, an insured person also had the opportunity to secure "rebuttal reports" in response to an insurer's assessments. In short, under that regime, an insured person was able to secure both an initial assessment on the issue of catastrophic impairment as well as a rebuttal of the insurer's position. However, Kaplan and Kaplan's request for funding was made post-September 1, 2010 when rebuttal reports were no longer available. In the new regulatory environment, initial assessments for the purpose of completing an OCF-19 application represent an insured person's only

¹³ See, for example, *Worthman v. Assessed Inc. et al*, 80 O.R. (3d) 249 (ON SCDC), March 9, 2006.

¹⁴ I acknowledge and agree with Ms. Ouellette's submission that an insurer does not have an "an absolute right to an independent examination" under section 44 (see the Divisional Court decision in *State Farm Mutual Automobile Insurance Co. v. Ramalingam*, [2009] O.J. No. 3491, August 25, 2009, upholding the Director's Delegate). However, this statement simply recognizes that I have discretion to exercise. I further acknowledge and agree that my discretion should be "exercised cautiously," particularly since it can result in a stay of proceedings (see *Gonsalves and Certas Direct Insurance Company*, (FSCO A08-001248, December 30, 2008)). However, even in *Gonsalves*, the arbitrator referenced the criteria in *Ramalingam* to inform her analysis.

¹⁵ See *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129 (S.C.C.). See also, *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641(Ont. C.A.).

opportunity to conduct his or her own catastrophic impairment assessments paid for by the insurer. By refusing to fund the Kaplan and Kaplan assessments, Intact denied Ms. Ouellette this sole opportunity and left her with no recourse other than to fund the assessments herself.

Ms. Ouellette also asked that, in the exercise of my discretion, I consider that the opinions of Drs. Garcia and Heitzner¹⁶ relied on by Intact were clearly wrong. Specifically, Intact relied on opinions that misunderstood the obligation of a physician completing an OCF-19. These opinions set a low standard for completion of an OCF-19 and Dr. Garcia expressly misstated the obligation as merely requiring the physician to confirm a *potential* catastrophic impairment rather than an *actual* catastrophic impairment. Although Intact eventually came around to agreeing with Ms. Ouellette on this point, it took several months after both Kaplan and Kaplan and Ms. Ouellette's counsel wrote detailed letters explaining the misinterpretation and requesting that Intact reconsider its position.

I agree that Ms. Ouellette raises serious concerns about the way Intact handled Kaplan and Kaplan's request for funding of catastrophic impairment assessments to assist in the completion of an OCF-19. Further, I find Intact's explanations less than convincing. Intact explained that it finally decided to fund the Kaplan and Kaplan assessments because "We are in agreement... that the OCF-19 requires the completing physician to conclude that Miss Ouellette has actually, as opposed to potentially, sustained a Catastrophic Impairment. Further, the revisions to the *Statutory Accident Benefits Schedule* effective September 1, 2010 specifically contemplate that assessments may be completed prior to the submission of an Application for Determination of Catastrophic impairment."¹⁷ However, Intact did not specify how the wording of section 25 of

¹⁶ Ms. Ouellette also provided evidence of two other paper reviews conducted by Dr. Heitzner (in unrelated cases, with identifiers redacted) where he arrived at similar conclusions using similar language. Ms. Ouellette tendered this evidence in support of the allegation that Intact had engaged in "systemic abuse" and submitted that I should draw an adverse inference of such abuse because Intact did not tender evidence to counter this allegation. I am not prepared to draw that inference. Given Dr. Heitzner's (mistaken) view of what was required to complete an OCF-19, I am not surprised that he used similar language whenever concluding that an assessment was not reasonably necessary for that (mistaken) reason. Also, while the evidence may show that Intact turned to Dr. Heitzner for his opinion on more than one occasion, I am not persuaded that this establishes that Intact engaged in "systemic abuse" or, as Ms. Ouellette also put it, a "scheme" to deny. It may be small comfort to Ms. Ouellette, but Intact submitted that it has not only re-visited its position as it relates to her case, but will now approve all applications for assessments necessary to complete an OCF-19.

¹⁷ See Intact's letter to Kaplan and Kaplan dated August 9, 2011.

the *New Regulation* “contemplates” a right to an assessment that was not contemplated under section 24 of the *Old Regulation*.¹⁸ Nor was it made clear how a physician’s obligations in completing an OCF-19 had changed, if at all, from one regime to the next.¹⁹ Further, and in any event, no explanation was given as to why it took so long for Intact to arrive at its reconsidered position, particularly given the letters it received from Kaplan and Kaplan and Ms. Ouellette’s counsel several months earlier.

Notwithstanding the concerns raised about Intact’s handling of this matter, I am not persuaded that I should exercise my discretion to bar Intact from conducting its own in-person catastrophic impairment assessments. While an insurer’s conduct is not irrelevant, I agree with Director’s Delegate Makepeace in *Ramalingam* that the focus should not be on “the insurer’s motivations or other subjective factors.” Instead, the focus should be on objective factors aimed at ensuring a full and fair hearing. Provided the insurer is not seeking to conduct assessments for the dominant purpose of litigation or arbitration (which I do not find to be the case here), and provided further that the criteria in *Ramalingam* generally favour conducting the assessments (which I find to be the case here), I am not persuaded that my discretion should be exercised to “punish” an insurer’s conduct, especially when to do so would compromise a full and fair hearing on the substantive issues.

In any event, I am not in the best position on this motion to make any final pronouncement regarding Intact’s conduct. Ms. Ouellette may pursue a claim for a special award on the basis that Intact unreasonably withheld or delayed funding of Kaplan and Kaplan’s catastrophic impairment assessments. The production of the adjuster’s log notes, as part of the pre-hearing process that has yet to take place, may shed more light on why Intact handled Ms. Ouellette’s file the way it did. Ultimately, the question of whether Intact unreasonably withheld or delayed payment is best left to the hearing arbitrator to decide on the complete evidentiary record which

¹⁸ Ms. Ouellette denied that the *New Regulation* changed an insurer’s obligation to fund a catastrophic impairment assessment necessary for the purpose of preparing an OCF-19, but neither party provided more than cursory submissions on these points.

¹⁹ I note that Part 5 of the new OCF-19 (which took effect on September 1, 2010) and Part 6 of the old OCF-19 (pre-September 1, 2010) both use identical wording to require a physician/health practitioner to confirm that the insured person sustained a catastrophic impairment and to warn of the offences in making a false or misleading statement.

may include further and better evidence not presented to me, like the log notes and/or the adjuster's oral evidence. I acknowledge Ms. Ouellette's concern that a special award may prove an inadequate remedy, but I am not persuaded that the adequacy of that remedy is sufficient to trump the need for a full and fair hearing.

Apart from the submissions that focussed on the way Intact handled Kaplan and Kaplan's request for funding, there are two other submissions I wish to address.

The first is Ms. Ouellette's submission that Intact's three letters in 2009-10 advising of non-catastrophic impairment benefit limits is evidence that Intact had already determined on multiple occasions that Ms. Ouellette had not sustained a catastrophic impairment and therefore did not require in-person assessments to help it re-visit the issue. I am not persuaded by this argument. While the letters do communicate Intact's position that Ms. Ouellette had not sustained a catastrophic impairment, it is clear that Intact's position at those various times was based on the information then contained in the file. The first two letters are also clear that Intact was prepared to reconsider its position on the basis of new medical information, and the letter of May 6, 2009 provided Ms. Ouellette with an OCF-19 so she could apply for a determination of catastrophic impairment. At no time did Intact suggest that in-person insurer examinations would not be required in the event that new information was provided. As stated above, the assessments by Kaplan and Kaplan constituted new medical information.

As well, I do not accept Ms. Ouellette's submission that Intact needed to establish that a paper review would be insufficient to make a determination of catastrophic impairment before requesting in-person assessments. I find the case law settled on this point.²⁰

Therefore, for all of the above reasons, I find that Intact is entitled to request in-person catastrophic impairment assessments to assist it in making a determination of catastrophic impairment.

²⁰ See *Wilson and Aviva Canada Inc.*, (FSCO P08-00007, July 20, 2009) Appeal. More recently, see *Albanese and State Farm Mutual Automobile Insurance Company*, (FSCO A10-000464, October 25, 2011).

Are the five assessments proposed by Intact reasonably necessary?

It is not disputed that, as a result of the accident, Ms. Ouellette suffers from causalgia and reflex sympathetic dystrophy, also known as Complex Regional Pain Syndrome (“CRPS”), largely affecting her left arm. This is a condition that is characterized by severe pain, swelling and changes in the skin.²¹

The Kaplan and Kaplan assessments assigned impairment ratings for the physical and psychological impairments associated with Ms. Ouellette’s condition, as well as an impairment rating for the side effects of medications she takes for the condition. As previously noted, the OCF-18 submitted by Kaplan and Kaplan recommended several assessments by seven assessors to take place over an estimated duration of 20 weeks. It appears that only three assessments were actually conducted by four assessors: a physiatrist, a pharmacologist²² and two psychologists. However, it is not clear from Kaplan and Kaplan’s Executive Summary where the assessments took place or over how many days. I note that Kaplan and Kaplan’s assessment centre is located in Hamilton.

For its part, Intact sought five assessments over five weeks by five assessors: a physiotherapist, orthopaedic surgeon, neurosurgeon, occupational therapist and psychologist. The physiotherapy and neurological assessments were both scheduled to take place in Mississauga, but on different dates. The occupational therapy and psychological assessments were both scheduled to take place in Toronto, but on different dates. The orthopaedic assessment was scheduled to take place in Brampton on a date separate from the other assessments.

On its face, it seems reasonable to expect Ms. Ouellette to attend at least as many assessments over as many days, and travel at least as far, as she did for the assessments conducted by Kaplan and Kaplan. It also appears reasonable that those assessments would include, at minimum, a psychological assessment to respond to the assessments by Drs. Pignol and Kaplan, and a

²¹ See Kaplan and Kaplan’s Executive Summary, as well as paragraph 3 of Ms. Gilbert’s affidavit.

²² Although the physiatrist, Dr. Garner, refers to a report by Dr. Rosenbloom, pharmacologist, which leads Dr. Garner to assign an impairment rating of 3% on account of the impact of medications, it appears that the assessment by Dr. Rosenbloom may have been a paper review.

physical assessment (psychiatric, neurological or orthopaedic) that could respond to the assessment by Dr. Garner.

In short, I find that at least two or more in-person assessments, likely requiring some travel, would be reasonable and necessary, but I do not have sufficient evidence before me at this stage to decide on the specific assessments that were proposed by Intact in March and April of this year.²³

As a result, I leave it to Intact to review its position that all five assessments are reasonably required in light of the assessments conducted by Kaplan and Kaplan. Intact should also review whether any two assessments could be conducted on the same or concurrent days to reduce travel time and inconvenience to Ms. Ouellette and her guardian. Although an insurer is entitled to maintain some control over the assessment process and choose its assessors,²⁴ it may also be appropriate for Intact to re-examine whether any of the assessments could be conducted by specialists in the Windsor area.

In the event that Intact delivers new Notices of Examination for catastrophic impairment assessments and an issue arises as to whether one or more of the assessments are reasonably necessary, either party bring a motion to have the issue determined. The request for a stay of the arbitration proceedings may be revisited at that time.

This matter will now proceed to a pre-hearing discussion to be arranged with the case administrator, and I will remain seized.

²³ The parties did not make oral submissions on the reasonableness or necessity of the five assessments for which Intact delivered Notices in March and April; probably due to the fact that the parties were so heavily focussed on whether Intact's file handling should preclude it from conducting any in-person catastrophic impairment assessments.

The documentary record also contains little that is directly on point, other than paragraph 32 of Ms. Gilbert's affidavit that sets out the various assessments and implies inconvenience to Ms. Ouellette, and a letter from Intact dated August 16, 2011 (appearing as Exhibit "C" to the affidavit of James Allingham) that provides "Please be advised it may be necessary for Miss Ouellette and her guardian to travel to these examinations as it will not be possible to find qualified specialists who will travel to the Tecumseh [Windsor] area and remain within the \$2000.00 assessment fee cap... Intact Insurance will consider reasonable travel expenses and necessary accommodations fees needed to have the examinations completed."

²⁴ See, for example, *Scott and Toronto Transit Commission (Markel Insurance)*, (OIC A-001116, September 4, 1992).

EXPENSES:

I exercise my discretion to award neither party their expenses of this motion.

Robert Bujold
Arbitrator

December 15, 2011

Date



FSCO A11-001987

BETWEEN:

CARLEY-ANNE OUELLETTE (Minor)

Applicant

and

INTACT 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. Intact is entitled to conduct two or more in-person assessments to assist it in making a determination of catastrophic impairment. In the event that Notices of Examination are delivered and an issue arises as to whether one or more of the assessments are reasonably necessary, either party may bring a motion to have the issue determined. The request for a stay of the arbitration proceedings may be revisited at that time.

Robert Bujold
Arbitrator

December 15, 2011

Date