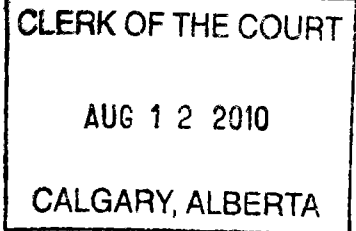


Court of Queen's Bench of Alberta

Citation: Abbas v. Menhem, 2010 ABQB 527



Date:
Docket: 0801 02660
Registry: Calgary

Between:

Youssef Abbas

Plaintiff

- and -

Chadi Menhem

Defendant

**Memorandum of Decision
of the
Honourable Mr. Justice C.S. Brooker**

INTRODUCTION

[1] This is an application by the Defendant for an order compelling the Plaintiff to attend at and submit to a "Certified Medical Examination"¹ (hereafter "CME") to be conducted by Dr. Glen Edwards, a duly qualified medical practitioner.

[2] In the alternative, the Defendant seeks an order deeming the Plaintiff's injury to be a "minor injury" due to his refusal to attend a CME without reasonable excuse.

¹ Both counsel use this term but I note that the Regulation speaks of an "assessment" by a "certified examiner". I am satisfied that that is what counsel mean by a CME and I will use it for convenience.

[3] The application is brought pursuant to the *Minor Injury Regulation*, Alta.Reg. 123/2004 (hereinafter "*Regulation*").

FACTS

[4] The Plaintiff claims that on April 20, 2006 the vehicle he was driving was struck from behind by the Defendant's motor vehicle and that as a result the Plaintiff claims damages for various injuries. He issued a Statement of Claim on March 7, 2008.

[5] On February 4, 2009 the Defendant filed a Statement of Defence in which: he denies he was negligent; denies that the Plaintiff suffered injuries; pleads contributory negligence; denies causation of any injuries; alleges the Plaintiff's failure to mitigate; and says that if the Plaintiff suffered injuries, they do not justify recovery in the amounts claimed.

[6] By letter of October 6, 2009 counsel for the Defendant served a "Request for Assessment by a Certified Examiner" on counsel for the Plaintiff. That "Request" was in the prescribed Notice Form MI-1. The "certified medical examiner" proposed by the Defendant was Dr. Glen Edwards.

[7] Dr. Edwards is a physician approved under the *Regulation* as a Certified Examiner.

[8] By e-mail dated October 7, 2009 counsel for the Plaintiff declined the request for a CME, advising counsel for the Defendant that: "It is our position that Mr. Abbas has a disc injury, which is a WAD III, or an injury with "objective neurological signs (etc. from the definition) and is therefore outside the protocols."

[9] The Defendant relies on various medicals attached to the affidavit of Jo Newall filed in support of the motion suggesting that the Plaintiff suffered a concussion and WAD II injury. The Plaintiff relies on an MRI as well as a report of Dr. Cundal, an orthopaedic specialist who diagnosed a WAD II injury to the cervical spine but a more severe injury to the lumbar spine. Dr. Cundal's report says in part:

MRI investigation of the lumbar spine shows a significant lesion at L4/5. A prominent disc bulge displaces the ventral aspect of the theca sac and has the appearance of a midline protrusion. This correlates with the patient's disco genic back pain features and right-sided sciatica that worsens with sitting. Clearly, he has sustained a neurologic injury as a result of this MVA.

...

...There appears to be a significant aggravation of his pre-existing back complaints as well as new, structural injury to the L4/5 disc, as seen on MRI. Neurologic injury as a result of this disc lesion is evident both subjectively and objectively.

POSITIONS OF THE PARTIES

[10] The Defendant argues that the *Regulation* applies. He says that while there is no specific provision in the *Regulation* authorizing the Court to order a party to attend for a CME, the Court has the inherent jurisdiction to do so pursuant to s.8 of the *Judicature Act*, R.S.A. 2000, Chapter J-2. He argues that because there appears to be some disagreement amongst the medical specialist as to the nature of the injuries which the Plaintiff received in the accident the Court should order a CME. He also cites s.8 of the *Regulation*.

[11] The Defendant also argues that since the Plaintiff has refused to submit to a CME, he has obstructed the certified medical examiner's assessment and as a result, pursuant to s.10 of the *Regulation* his injuries should be deemed to be "minor".

[12] Accordingly, the Defendant seeks an order directing the Plaintiff to attend upon Dr. Edwards for a CME or, in the alternative, an order deeming the Plaintiff's low back injury "minor" based upon his refusal to attend a CME.

[13] The Plaintiff does not contest that Dr. Edwards is a Certified Medical Examiner. He also concedes that some of the injuries the Plaintiff received in this accident fall within the definition of "minor injury" as defined in the *Regulation*. However, with respect to the injury to his lower back, the Plaintiff maintains that by virtue of the definitions in the *Regulation*, the *Regulation* does not apply to his back injury. Therefore, there is no jurisdiction for the Defendant to demand nor the Court to order, under the *Regulation*, the Plaintiff to attend for a CME.

[14] The Plaintiff also concedes that he can be ordered to attend an independent medical examination pursuant to the *Alberta Rules of Court*. However, he notes that such an independent examination does not evoke the "prima facie evidence" provision of s.12 of the Regulations.

[15] In short, the Plaintiff's position is that injuries which do not fall within the definition of the *Regulation* are not subject to a CME. He submits that the Plaintiff's lower back injury is, by definition, specifically excluded from the *Regulation*. Therefore there is no jurisdiction for the Defendant to demand, nor for the Plaintiff to be compelled to attend for a CME.

ISSUES

[16] The arguments of each counsel framed the issues to be decided in this case somewhat differently from each other. It appears from the evidence, arguments and the relief sought that the central issue is whether or not the Defendant is entitled to compel the Plaintiff to undergo a CME. The answer to that question depends on whether or not the *Regulation* can be said to apply to this situation.

ANALYSIS

[17] Any analysis of the situation must start with the *Insurance Act*, R.S.A. 2000, Chapter I-3 pursuant to which the *Regulation* is promulgated. Section 650.1 states:

650.1(1) In this section, “minor injury” means an injury as defined or otherwise described by regulation as a minor injury.

(2) In an accident claim, the amount recoverable as damages for non-pecuniary loss of the plaintiff for a minor injury must be calculated or otherwise determined in accordance with the regulations.

(3) The Lieutenant Governor in Council may make regulations

- (a) defining minor injury or otherwise describing what constitutes a minor injury;
- (b) providing for the classification of or categories of minor injuries;
- (c) providing for the assessment of injuries, including, without limitation, regulations establishing or adopting guidelines, best practices or other methods for assessing whether an injury is or is not a minor injury;
- (d) governing damages, including the amounts of or limits on damages, for non-pecuniary loss for minor injuries;
- (e) governing deductible amounts or limits and the application of those amounts or limits in respect of damages for non-pecuniary loss for minor injuries;
- (f) providing for or otherwise setting out circumstances under which a minor injury to which this section would otherwise apply is exempt from the operation of this section;
- (g) governing the application of this section in respect of injuries arising out of an accident where
 - (i) it is unclear as to whether or not this section applies to those injuries, or
 - (ii) the injuries consist of a combination of minor injuries to which this section applies and injuries to which this section does not apply;

- (h) establishing and governing a system or process under which a person or a committee, panel or other body may review any injury to a person and give an opinion as to whether or not the injury is a minor injury;
- (i) providing for the appointment or designation of persons or of members of committees, panels or other bodies for the purposes of a system or process established under clause (h);
- (j) governing the payment of any fees, levies and other assessments in respect of a system or process established under clause (h), including, without limitation, regulations respecting
 - (i) the amount of the fees, levies or other assessments or the manner in which and by whom any of those amounts are to be determined, and
 - (ii) by whom and to whom the fees, levies or other assessments are to be paid;
- (k) governing any transitional matter concerning the application of this section in respect of matters dealt with under this section;
- (l) providing for any matter that the Lieutenant Governor in Council considers advisable for carrying out the purpose and intent of this section.

(4) This section does not apply to any accident claim that arose in respect of an accident that occurred before the coming into force of this section.

[18] Section 1 of the *Regulation* sets out definitions of various terms. By virtue of the opening words of section 1² the definitions apply both to section 650.1 of the *Insurance Act* as well as the *Regulation*. The definitions set out under section 1 of the *Regulation* are as follows:

- (a) “accident” means an accident arising from the use or operation of an automobile;
- (b) “Act” means the *Insurance Act*;

² “For the purposes of section 650.1 of the *Act* and this *Regulation*...”

(c) “certified examiner” means a physician who is entered in the certified examiners register in accordance with Division 2 of Part 3;

(d) “certified examiners register” means the register of certified examiners established under section 15;

(e) “claimant” means a person injured as a result of an accident;

(f) “council” means the council of the College of Physicians and Surgeons of the Province of Alberta;

(g) “defendant” means a person against whom an accident claim is made or may be made and includes, without limitation,

(i) that person’s insurer,

(ii) any insurer made a third party to the claim by the Court under section 635(14) of the *Act*, and

(iii) the Administrator of the *Motor Vehicle Accident Claims Act* when the Administrator is added as a party to an action in respect of the claim by order under section 4(5) of that *Act*;

(h) “minor injury”, in respect of an accident, means

(i) a sprain,

(ii) a strain, or

(iii) a WAD injury

caused by that accident that does not result in a serious impairment;

(h.1) “minor injury amount” means the total amount recoverable under section 6 as damages for non-pecuniary loss for all minor injuries sustained by a claimant as a result of an accident;

(i) “prescribed” means established by the Minister under section 803 of the *Act*;

(j) “serious impairment”, in respect of a claimant, means an impairment of a physical or cognitive function

(i) that results in a substantial inability to perform the

(A) essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

(B) essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or

(C) normal activities of the claimant's daily living,

(ii) that has been ongoing since the accident, and

(iii) that is expected not to improve substantially;

(k) "sprain" means an injury to one or more tendons or ligaments, or to both;

(l) "strain" means an injury to one or more muscles;

(m) "Superintendent" means the Superintendent of Insurance appointed under the *Act*;

(n) "WAD injury" means a whiplash-associated disorder other than one that exhibits one or both of the following:

(i) objective, demonstrable, definable and clinically relevant neurological signs;

(ii) a fracture to or a dislocation of the spine.

[19] Section 2 provides:

If a claimant sustains more than one injury as a result of an accident, each injury must be assessed separately to determine whether the injury is or is not a minor injury.

[20] Section 4 provides for the determination of a “minor injury” stating:

4(1) The determination as to whether an injury sustained by a claimant as a result of an accident is or is not a minor injury must be based on

(a) a determination as to whether the injury is a sprain, strain or WAD injury, and

(b) if the injury is determined to be a sprain, strain or WAD injury, a determination as to whether the sprain, strain or WAD injury results in a serious impairment.

(2) For the purpose of subsection (1)(a), the determination as to whether an injury is a sprain, strain or WAD injury must be based on an individual assessment of the claimant in accordance with the diagnostic protocols established under the *Diagnostic and Treatment Protocols Regulation*.

(3) For the purpose of subsection (1)(b), the determination as to whether a sprain, strain or WAD injury results in a serious impairment must take into account

(a) the claimant’s pre-existing medical history, and

(b) the matters referred to in section 1(j)(i) that relate to the claimant.

[21] Section 8(1) sets out a procedure to be followed if a claimant and a defendant disagree as to whether or not an injury claimed is or is not a minor injury. That procedure involves an assessment of the claimant by a “certified examiner”.

[22] Section 10(1) provides:

10(1) For the purpose of giving an opinion as to whether the claimant’s injury is or is not a minor injury, the certified examiner must assess the claimant to determine in accordance with section 4

(a) whether the claimant’s injury is a sprain, strain or WAD injury, and

(b) if the claimant’s injury is determined to be a sprain, strain or WAD injury, whether the sprain, strain or WAD injury results in a serious impairment.

[23] According to the provisions of section 10(3) if the claimant fails to attend an assessment without reasonable excuse, “the claimant’s injury shall be considered to be a minor injury”.

[24] Pursuant to the provisions of section 12 the opinion of the certified examiner is *prima facie* evidence that the injury is or is not a minor injury.

[25] In this case, there is clearly a disagreement as to whether or not the claimant's back injury is or is not a minor injury. The Defendant says that disagreement must be resolved pursuant to the provisions of s.8 of the *Regulation*. The Plaintiff says the *Regulation* does not apply because, by definition, the injury in issue is not a "minor injury"³ since it is excluded from the definition of a "WAD injury" because it exhibits "objective, demonstrable, definable and clinically relevant neurological signs"⁴.

[26] Counsel cited no cases to support their respective positions, advising that this case is one of first impression on this legislation.

[27] In Sullivan and Dredger *On The Construction of Statutes*, Butterworth, 4th edition at page 1 the authors quote what Elmer Dredger called the modern approach to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

And at page 282 the learned authors state:

Where the provision to be interpreted appears in a regulation, it is read in the context of both the regulation and the enabling Act as a whole.

[28] In considering this matter and in particular the *Regulation*, I intend to be guided by those principles.

[29] In my opinion, the legislators, through s.650.1 of the *Act* intended and in fact did, give the Lieutenant Governor in Council broad authority to set up a comprehensive scheme and procedure for administering minor injury claims arising out of motor vehicle accidents. Included in the delegated power was the ability to make regulations defining what constituted a minor injury as well as a procedure for determining whether or not an injury was a minor injury. The *Regulation* which was promulgated is a comprehensive code which not only provides a specific definition of what constitutes a minor injury, but also provides a detailed procedure to be applied if the parties disagree as to whether or not an injury is minor or not⁵. That procedure is not restricted to a defendant; it is available to both the claimant and the defendant.

³ Section 1(h) of the *Regulation*.

⁴ Section 1(n)(i) of the *Regulation*.

⁵ Section 8 of the *Regulation*.

[30] Section 10 of the *Regulation* obliges the certified examiner, whether he is nominated by a defendant or a claimant, to determine whether or not the injury is a sprain, strain or WAD injury.

[31] If I were to accept the Plaintiff's argument, he could avoid all such determinations by simply obtaining a medical opinion that his WAD injury manifests the characteristics in the exemption to the definition of a WAD injury⁶. This, despite there being perhaps contrary opinions or interpretations of tests from other physicians.

[32] In short, the logical extension of the Plaintiff's position is that if a claimant has a medical opinion that, on its face, appears to take the injury out of the definition of a minor injury in the *Regulation*, none of the *Regulation* applies to the claim. I do not accept that. To do so would have the effect of permitting a claimant, by simply obtaining one opinion (which might even be inconsistent with the majority of opinions available), to circumvent the comprehensive code set up in the *Regulation* to determine if a claimed injury was minor or not. There would be no efficient procedure to resolve initial disputed or contrary opinions, or weight the relative merits of contrary opinions or even the qualifications of those giving opinions⁷. In short, to accept the Plaintiff's position has the potential to eviscerate the comprehensive procedures which have been established. The interpretation argued by the Plaintiff is, in my view, contrary to the legislative intent manifested in s.650.1 of the *Act* and the *Regulation*.

[33] In the result, I conclude that the *Regulation* applies to the Plaintiff's claims and that the Defendant was and is entitled to proceed with his request that the Plaintiff undergo an assessment by the certified medical examiner. As to the Defendant's request under s.10(3) for a declaration that the injury be considered a minor injury for his failure to attend such an assessment, I decline to make any such declaration. Any prior failure to attend had a reasonable excuse in that the interpretation of the *Regulation* and its application to the Plaintiff in respect of this claim was contested, and thus the legal obligation to attend under the *Regulation* was uncertain. This judgment clarifies that obligation. As to any future failure to attend, that is hypothetical and therefore I decline to consider it.

[34] As part of the relief sought in this application, the Defendant sought an order of the court "compelling the Plaintiff ... to attend and submit to a Certified Medical Examination ... by Dr.

⁶ Section 1(n) of the *Regulation*.

⁷ It must be noted that the certified medical examiner is someone the claimant and defendant agree upon (s.8(1),(2), and (3)) or, failing agreement, is appointed by the Superintendent (s.8). The certified medical examiner not only conducts an examination of the claimant, he is entitled to look at other relevant diagnostic, treatment or care information relevant to the claimant (s.10(2)(a)) as well as any other information that either the claimant or the defendant considers to be relevant (s.10(2)(b)). He is thus entitled to consider contrary opinions, tests and information placed before him, before giving his opinion.

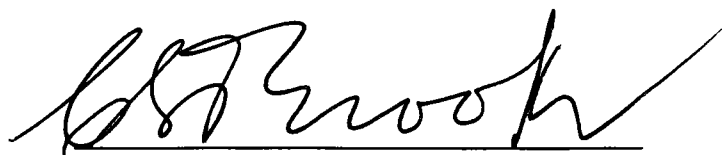
Glen Edwards...". As I have already noted, the *Regulation* is a complete code of procedure dealing with minor motor vehicle injury claims. Sections 8 through 13 deal with obtaining and conducting such assessment as well as the consequence of failing to attend or co-operate in such an assessment. Nowhere in the *Regulation* is there any provision for the court to order such an attendance. Nor would one be expected, given the consequence provided for in s.10(3).

[35] While the court undoubtedly has the power to order a medical examination under the *Judicature Act*, R.S.A.2007, Chapter J-2, given my comments in the preceding paragraph, this is not an appropriate circumstance in which to make such an order.

DECISION

[36] For the reasons set out above, the Defendant's request for an order compelling the Plaintiff to attend for an assessment by a certified examiner and for an order deeming the Plaintiff's injury to be a minor injury as a result of his refusal to attend for an assessment by Dr. Edwards previously, are dismissed.

Dated at the City of Calgary, Alberta this 12th day of August, 2010.

A handwritten signature in black ink, appearing to read 'C.S. Brooker', written over a horizontal line.

C.S. Brooker
J.C.Q.B.A.

Appearances:

James Cuming, Esq.
For the Plaintiff

Patrick Kenny, Esq.
For the Defendant