



Citation: Noble v. Economical Insurance, 2024 ONLAT 22-009483/AABS

Licence Appeal Tribunal File Number: 22-009483/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Jennifer Noble

Applicant

and

Economical Insurance

Respondent

DECISION

ADJUDICATORS: Harry Adamidis and Robert Maich

APPEARANCES:

For the Applicant: Robert Seredynski, Counsel

For the Respondent:

Stephen Whibbs, Counsel
Martin Forget, Counsel

Court Reporter Kim Terryberry

HEARD: by Videoconference: January 22, 2024

OVERVIEW

- [1] Jennifer Noble, the applicant, was involved in an automobile accident on August 12, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by the respondent, Economical, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “*Tribunal*”) for resolution of the dispute.

PRELIMINARY ISSUES

- [2] The respondent brought a motion for an order barring the application from proceeding pursuant to s.55(1)2 of the *Schedule*, on the ground that the applicant failed to participate in an insurer's examination pursuant to s.44 of the *Schedule*.

ISSUES

- [3] The issues in dispute are:
- i. Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?
 - ii. Is the applicant entitled to \$687.82 for occupational therapy services, proposed by Neuro Rehab Services in a treatment plan/OCF-18 (“*plan*”) dated July 30, 2020?
 - iii. Is the applicant entitled to \$1,522.88 for occupational therapy services, proposed by Rehab First in a plan dated July 16, 2020?
 - iv. Is the applicant entitled to \$1,860.00 for chiropractic services, proposed by Dr. Catherine Wright in a plan dated July 23, 2020?
 - v. Is the applicant entitled to \$6,645.75 for optometric services, proposed by Dr. Patricia Fink Optometry in a plan dated August 17, 2020?
 - vi. Is the applicant entitled to \$9,011.84 for occupational therapy services, proposed by Rehab First in a plan dated September 4, 2020?
 - vii. Is the applicant entitled to \$3,950.00 for dental services, proposed by Dr. Victor Schacter in a plan dated September 2, 2020?
 - viii. Is the applicant entitled to \$4,214.19 for psychological services, proposed by Dr. Shannon Purseley in a plan dated October 19, 2020?

- ix. Is the applicant entitled to \$100.00 for assistive devices (brace), proposed by Leah Gater in a plan dated October 27, 2020?
- x. Is the applicant entitled to \$2,078.34 for physiotherapy services, proposed by Leah Gater in a plan dated November 25, 2020?
- xi. Is the applicant entitled to \$2,531.20 for transportation services, proposed by Dr. Moez Rajwani in a plan dated September 23, 2021?
- xii. Is the applicant entitled to \$5,227.58 for occupational therapy services, proposed by Deborah Prestwood in a plan dated November 24, 2021?
- xiii. Is the applicant entitled to \$4,978.20 for occupational therapy services proposed by Deborah Prestwood in a plan dated May 30, 2022?
- xiv. Is the applicant entitled to \$5,418.35 for CAT assessments, proposed by KRA Health Solutions in a plan dated August 9, 2021?
- xv. Is the applicant entitled to \$161.95 for assistive devices, submitted on a claim form (OCF-6) dated September 17, 2020?
- xvi. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
- xvii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] The applicant is barred from proceeding with this application pursuant to s. 55(1)2 of the *Schedule* for failing to attend an insurer's examination (IE).

PROCEDURAL HISTORY

- [5] On January 10, 2024, a motion for an adjournment was brought by the respondent. The respondent submitted, in part, that an adjournment was appropriate due to the applicant's failure to attend an IE pursuant to s. 44 of the *Schedule*. The motion was denied by Order of Adjudicator Evans dated January 10, 2024.
- [6] The Order of January 10, 2024 outlined the reasons the motion was denied, citing the availability of another remedy at para. 7(a):

It is open to the respondent to argue that the application is barred by s. 55(1)2 of the *Schedule*. That is the remedy available to a respondent

when an applicant fails to comply with a notice requiring an examination under s. 44. I make no finding as to whether that claim has merit as that would be a matter for the hearing adjudicator to decide.

- [7] The respondent served the motion to bar the applicant from proceeding with his application pursuant to s. 55(1)2 of the *Schedule* on January 12, 2024 and filed this motion with the Tribunal on the same date.
- [8] The Tribunal issued a Notice of Motion to be heard at a scheduled event to the parties on January 15, 2024. While the applicant requested the motion be rescheduled to a date prior to the hearing date of January 22, 2024, the applicant's motion was denied by Order dated January 17, 2024.
- [9] The applicant served the respondent with its responding materials to this motion on January 18, 2024 and filed the responding material and with the Tribunal on even date.
- [10] The respondent served the applicant its reply to the applicant's submission for this motion on January 18, 2024, and filed the reply and certificate of service with the Tribunal on even date.
- [11] Both parties filed their materials for the scheduled hearing of January 22, 2024 on January 22, 2024

ANALYSIS

- [12] The respondent brought a motion seeking to dismiss this application pursuant to s.55(1)2 of the *Schedule*, which provides as follows:

Restriction on proceedings

55. (1) Subject to subsection (2), an insured person shall not apply to the Licence Appeal Tribunal under subsection 280 (2) of the Act if any of the following circumstances exist:

1. The insured person has not notified the insurer of the circumstances giving rise to a claim for a benefit or has not submitted an application for the benefit within the times prescribed by this Regulation.
2. The insurer has provided the insured person with notice in accordance with this Regulation that it requires an examination

under section 44, but the insured person has not complied with that section.

[...]

(2) The Licence Appeal Tribunal may permit an insured person to apply despite paragraph 2 or 3 of subsection (1). O. Reg. 44/16, s. 6.

(3) The Licence Appeal Tribunal may impose terms and conditions on a permission granted under subsection (2). O. Reg. 44/16, s. 6.

- [13] The applicant attended the office of Dr. Ali Liaquat for a psychiatric examination on March 3, 2023 pursuant s. 44 of the *Schedule*. There was no issue as to the sufficiency of the notice.
- [14] During the course of the examination of March 3, 2023, the applicant became uncomfortable and requested a break to contact her counsel. She spoke with her counsel and then left without completing the examination.
- [15] In his email dated April 25, 2023 to the respondent, counsel for the applicant indicated that the applicant's needs were not accommodated during the examination and that she was treated poorly by both Dr. Ali Liaquat and his office staff.
- [16] The respondent learned approximately 10 days after the examination of March 3, 2023 that Dr. Ali Liaquat was subject to professional disciplinary action.
- [17] The respondent attempted to reschedule another examination with a different psychiatric assessor. By notice of examination dated May 17, 2023, an IE with Dr. Yedish Naidoo was scheduled for June 21, 2023.
- [18] By correspondence dated June 7, 2023, the applicant's counsel advised the respondent that his client would not attend the examination scheduled for June 21, 2023 with Dr. Yedish Naidoo, on the basis that the applicant had already attended the examination of March 3, 2023 for 90 minutes and a further examination was not reasonable or necessary due to the intrusive nature of the examination. Further, applicant's counsel maintained that the March 3, 2023 assessment be completed with Dr. Ali Liaquat. It is significant that the applicant's counsel acknowledged in his correspondence that IE was not completed, characterizing it as "highly intrusive".

- [19] The respondent subsequently disclosed to applicant's counsel that Dr. Ali Liaquat was subject to professional discipline and it required the applicant to complete the psychiatric assessment with another assessor.
- [20] By correspondence of July 7, 2023 the applicant's counsel again recounted his concerns with Dr. Ali Liaquat's conduct and reiterated his refusal to advise his client to attend an examination with Dr. Yedish Naidoo due to the intrusive nature of the examination.
- [21] The respondent rescheduled another psychiatric examination of the applicant by letter dated December 13, 2023 with Dr. Janet Patterson on January 16, 2024. Applicant's counsel again refused to produce his client to attend this examination, as stated in his correspondence of January 11, 2023 to respondent's counsel.

The respondent is entitled to a complete psychiatric assessment by an assessor of its choice

- [22] The *Schedule* clearly provides under s. 44 that an insurer is entitled to medical examinations of an applicant provided it is not more often than reasonably necessary. In this application, the applicant is seeking a catastrophic impairment designation under criterions 7 and 8. The onus of proving that an IE is reasonably necessary is on the insurer: see, *Al-Shimasawi v. Wawanesa Insurance Company* (FSCO A05-002737, May 11, 2007) at pg. 7.
- [23] It is reasonable for an insurer to obtain its own psychiatric assessment of the applicant to assess and determine the designation independently of the applicant's reports. We find the applicant acknowledged that the IE was reasonably necessary because she attended at the examination on March 3, 2023.
- [24] However, the IE of March 3, 2023 was not completed. The circumstances preventing the completion of the examination do not negate the insurer's entitlement to an IE if it is reasonably necessary, despite the inherently intrusive nature of insurer examinations.
- [25] An insurer is entitled to select its own examiner without interference from an insured person, subject to reasonable efforts in respect of time, date and location, as per *J.C. v Aviva General Insurance Company*, 2020 CanLII 80298, at para. 23:

In scheduling an IE under s. 44, there is no requirement for any input or

consent from the applicant. The right to an IE is exclusively at the discretion of the respondent as long as: (a) the IE is reasonably necessary, (b) the requirements of the notice are in accordance with s. 44 as discussed above, and (c) that the IE is in accordance with s. 44(9) to make reasonable efforts to schedule the examination for a day, time and location that is convenient for the applicant.

- [26] We find the respondent has demonstrated that the IE is reasonably necessary because an examination of this nature had not been completed to date, and it is entitled to a complete examination for an issue in dispute.

Did the applicant fail to attend an insurer examination without reasonable explanation?

- [27] The IE of March 3, 2022 was not completed. It is not necessary to make a finding of fault for the failure of the examination to be completed. If an insurer is found to have a reasonably necessary basis for an examination, the burden of proof lies upon the insured person to provide a reasonable explanation for not attending the examination: see, *D.C. v Aviva Insurance Canada*, 2018 CanLII 76416, at para. 13.

- [28] The applicant submitted that attending a second IE was too intrusive. However, this alone is not a reasonable explanation for non-attendance at an IE. As noted in *J.C. v. Aviva General Insurance Company*, 2020 CanLII 80298, at para 27:

Furthermore, there is no doubt there is some form of invasiveness in attending a medical examination, however s. 44(9) 2. iii. of the Schedule has a specific provision that the applicant shall attend the examination and submit to all reasonable physical, psychological, mental and functional examinations.

- [29] It is noted that the applicant attended but left the first IE before completion because she was uncomfortable with the process and the assessor; it is also noted that the assessor was latter disciplined. However, these circumstances does not negate the applicant's obligation to attend an IE under s.44.

- [30] Accordingly, we find that the applicant has failed to provide a reasonable explanation for non-attendance at an IE as prescribed by s. 44 of the *Schedule*. This Tribunal has well established caselaw that IEs are intrusive by nature, but are a necessary step in the process to determine accident benefit entitlement. A

mere statement by an insured that an examination is intrusive is not a reasonable explanation for non-attendance at an IE under s .44 of the *Schedule*.

[31] Under s. 55(2) of the *Schedule*, the Tribunal has discretion to permit the applicant to proceed with her application despite not attending an IE. We considered the fact that the applicant did not provide a reasonable explanation for non-attendance. We also note that the applicant made no submissions on why the Tribunal should apply its discretion under s.55(2). In light of these circumstances, we find there is an insufficient basis to permit the application to proceed under the provision of s.55(2) of the *Schedule*.

ORDER

[32] The applicant is barred from proceeding with this application pursuant to s. 55(1)2 of the *Schedule*.

Released: April 30, 2024

Harry Adamidis
Adjudicator

Robert Maich
Adjudicator