Citation: Strub v. Economical Insurance Company, 2024 ONLAT 23-013961/AABS-PI

Licence Appeal Tribunal File Number: 23-013961/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:

Mike Strub

Applicant

and

Economical Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR:	**Kate Grieves**
APPEARANCES:	
For the Applicant:	Kate Mazzucco, Counsel
For the Respondent:	Earl Murtha, Counsel
Heard:	**By way of written submissions**

OVERVIEW

[1] Mike Strub (the "applicant") was involved in an accident on March 16, 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 Economical Insurance Company (the "respondent") and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] The applicant is disputing entitlement to a treatment plan for physical therapy, an award, and interest. The respondent raised a preliminary issue to be addressed in advance of the substantive issues.

PRELIMINARY ISSUE IN DISPUTE

[3] Is the applicant barred from proceeding to the hearing for all the benefits claimed in this application because the applicant failed to attend an insurer's examination ("IE") under s. 44 of the *Schedule*?

RESULT

[4] The applicant is barred from proceeding with his application under s. 55 of the *Schedule*, as he failed to attend a properly scheduled s. 44 IE.

ANALYSIS

The parties' positions and the law

[5] The respondent submits that the applicant failed to attend an IE with Dr. Jaroszynski (orthopaedic surgeon) on January 12, 2022, in relation to the treatment plan in dispute. The applicant had previously attended an assessment with Dr. Jaroszynski on March 9, 2020 regarding his entitlement to income replacement benefits. The respondent submits that the IE is reasonably required, as 674 days had elapsed between the assessments, further medical evidence had been provided in the interim, changes to the applicant's circumstances had occurred, including a failed return to work, qualification for CPP disability benefits, and termination of his long-term disability benefits.

[6] The applicant acknowledges he did not attend the IE scheduled for January 12, 2022 but submits that the IE was not reasonably necessary, because the respondent had already determined that the treatment plan was not reasonable or necessary. The applicant further submits that the respondent failed to provide

the medical or other reasons why the assessment was required. The applicant submits that he should not be barred from proceeding and relies on *M.B. v. Aviva Insurance Canada*, 2017 CanLII 87160 (ON LAT) ("*M.B.*"); *N.A. v. Aviva General Insurance,* 2020 CanLII 94814 (ON LAT); *B.H. v. Aviva Canada Inc.,* 2018 CanLII 84051 (ON LAT); *Applicant v. Aviva General Insurance*, 2020 CanLII 14483 (ON LAT); and *Wangden v. Economical*, 2021 CanLII 111184 (ON LAT) ("*Wangden*").

[7] Section 44 of the *Schedule* permits an insurer to examine an insured person by one or more regulated health professionals (or a vocational rehabilitation expert) to determine whether the insured person is, or continues to be, entitled to a benefit. Section 44 provides certain requirements for an insurer to comply with in order to evoke its rights to an IE.

[8] The requirements for a Notice of Examination ("NOE") are set out in section 44(5) of the *Schedule*:

> If the insurer requires an examination under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,
>
> (a) the medical and any other reasons for the examination;
>
> (b) whether the attendance of the insured person is required at the examination;
>
> (c) the name of the person or persons who will conduct the examination, any regulated health profession to which they belong and their titles and designations indicating their specialization, if any, in their professions; and
>
> (d) if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days.

[9] Section 55(1)2 of the *Schedule* provides that an insured person shall not apply to the Tribunal if the insurer has provided the insured person with notice that it requires an examination under section 44, but the insured person has not complied.

[10] These provisions of the *Schedule* make it clear that the applicant has a duty to participate in each in-person IE that is reasonably necessary and for which there is a *Schedule*-compliant notice.

[11] The oft-cited reconsideration decision of Executive Chair Lamoureux in *M.B.* provides guidance on the sufficiency of medical and other reasons:

> In my view, an insurer satisfies its obligation to provide its "[medical] and any other reasons," whether under s. 44(5)(a) or elsewhere, by explaining its decision with reference to the insured's medical condition and any other applicable rationale. That explanation will turn on the unique facts at hand. Therefore, it would be unwise to attempt to outline a comprehensive approach to doing so. Nevertheless, an insurer's "medical and any other reasons" should, at the very least, include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires. Additionally, an insurer should also refer to the specific benefit or determination at issue, along with any section of the *Schedule* upon which it relies. Ultimately, an insurer's "medical and any other reasons" should be clear and sufficient enough to allow an unsophisticated person to make an informed decision to either accept or dispute the decision at issue. Only then will the explanation serve the *Schedule*'s consumer protection goal.

Sufficient reasons were provided

[12] The applicant submits that the notice made references to Dr. Jaroszynski's report and the clinical notes and records but failed to explain the nexus between the references and the treatment plan, nor explain why those references justified its request for an assessment. Further, the respondent indicated that updated records had not been produced when they had been.

[13] I find that the notice provides adequate reasons and is therefore compliant with the *Schedule.* The notice identifies the treatment plan in dispute and sets out the statutory provision. It includes a reference to the previous report of Dr. Jaroszynski wherein he concluded that there was no objectively identifiable musculoskeletal impairment attributable to the accident. The notice refers to information in the records from the physiotherapist where he reported feeling not too bad with the use of medication and steroid injections. The notice also indicates that the respondent required updated records from the family doctor, and that it had no confirmation that comments made by Dr. Jaroszynski about prescription medication had been addressed. Further, there was no support from the family physician for ongoing physical therapy as a result of injuries sustained in the accident.

[14] I agree that there appears to be a misstatement in the notice because the applicant had previously provided updated clinical notes from the family doctor. However, reasons are not to be measured by the inch or held to a standard of perfection. The notice provides a principled rationale based fairly on the applicant's file. It identified enough detail about his condition and was adequate enough for an unsophisticated person to make an informed decision, consistent with *M.B.* and *BH*.

[15] Accordingly, I find that the notice of examination provides sufficient reasons in compliance with section 44(5) of the *Schedule.*

The assessment was reasonably required

[16] On January 3, 2022, the applicant's representative wrote to the respondent and advised that the applicant would not be attending the IE with Dr. Jaroszynski on the basis that it was unreasonable, because Dr. Jaroszynski had already opined that the applicant's injuries had resolved by March 2020 and the respondent had already denied the treatment plan.

[17] The respondent's indication in the letter that it did not believe the treatment plan was reasonable and necessary does not deprive it of the right to seek further information in the form of an IE. The letter and notice specifically highlighted that it required more medical information.

[18] The respondent's right to require the applicant is set out in section 44 of the *Schedule.* As noted in *Spiegel v. Intact Insurance Company,* 2022 CanLII 78804 (ONLAT) ("*Spiegel*") there is no requirement for any input or consent from the applicant as to who performs the IE. The right to an IE is exclusively at the discretion as long as: (i) the IE is reasonably necessary; (ii) the requirements of the notice are in accordance with section 44 discussed above, and (ii) that in accordance with section 44(9) reasonable efforts are made to schedule the examination for a day, time and location that is convenient for the applicant.

[19] In determining of a requested IE is reasonably necessary, the Tribunal has considered the following criteria (see *17-005291/AABS v. Travelers*, 2018 CanLII 13171 (ON LAT):

i. The timing of the insurer's request;

ii. The possible prejudice to the other side;

iii. The number and nature of the previous insurer's examinations;

iv. The nature of the examination being requested;

v. Whether there are any new issues being raised in the applicant's claim that require evaluation; and,

vi. Whether there is a reasonable nexus between the examination requested and the applicant's injuries.

[20] I find that the examination was reasonably necessary to address the applicant's entitlement to the benefit. The applicant attended multiple assessments in March 2020 to evaluate his entitlement to income replacement benefits. Dr. Jaroszynski opined that the applicant did not suffer an impairment in his ability to work. He was diagnosed with bilateral knee contusion, injury to the axial skeleton with compression fractures, that had reportedly healed. The applicant had ongoing complaints of back pain for which he was attending treatment. Dr. Jaroszynski opined that the applicant should gradually return to work over four weeks.

[21] In July 2020 the applicant underwent a section 25 occupational therapy assessment, where she opined that he should not return to work, and noted that he had not been cleared to return to work by the family doctor.

[22] The respondent continued to fund ongoing treatment (approximately 100 sessions) throughout 2020 and 2021. In October 2021 the insurer was advised that the applicant's long term disability payments had been stopped, as it was determined that the employer could accommodate his limitations, as he was capable of performing light physical demands. On December 3, 2021 the treatment plan was submitted.

[23] The second assessment was requested to assess whether further physiotherapy was reasonable and necessary. There were 674 days between the assessments, and it was for a different benefit, so I find that the timing was reasonable. There is a reasonable nexus between the type of benefit and the assessment: the plan was for further physical therapy physiotherapy, Dr. Jaroszynski is an orthopaedic surgeon. Only one assessment was requested to assess the plan and nature of the examination appears to be reasonable. Considering the time elapsed since the previous assessment, conflicting subsequent medical opinions, and the significant information submitted in the interim, I find that it was reasonable, in the circumstances, to have Dr. Jaroszynski assess the applicant and consider whether further physiotherapy was required. Nothing in section 44 requires the respondent to justify its choice of an in-person assessment over a paper review.

[24] Accordingly, I find that the insurer's examination was reasonably necessary.

ORDER

[25] The notice of examination is compliant with section 44(5) of the *Schedule.* The insurer's examination was reasonably necessary.

[26] The applicant is barred from proceeding with his application under s. 55 of the *Schedule*, as he failed to attend a properly scheduled s. 44 IE.

Released: August 20, 2024

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Kate Grieves
Adjudicator