Citation: Yevdokymova v. Economical Insurance, 2022 ONLAT 21-000502/AABS

Licence Appeal Tribunal File Number: 21-000502/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:

Inna Yevdokymova

Applicant

and

Economical Insurance

Respondent

DECISION AND ORDER

VICE-CHAIR: **D. Gregory Flude**

APPEARANCES:

For the Applicant:	Inna Yevdokymova, Applicant Michael R Switzer, Counsel James Horan, Paralegal
For the Respondent:	Natasha Richards and Lisa Quesnel, AB Specialist Martin Forget, Counsel Suhasha Hewagama, Counsel
Court Reporter:	Guido Riccioni

Heard by Videoconference: **June 13, 14, 15 and 17, 2022**

REASONS FOR DECISION AND ORDER

BACKGROUND

[1] The applicant was injured in an automobile accident on **January 13, 2017** and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* ("SABS"). There is a dispute between the parties over the applicant's entitlement to benefits, so she submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") to resolve that dispute.

[2] At an April 28, 2021 case conference, the hearing was scheduled via videoconference for June 13, 2022 for 10 days. In the weeks leading up to the hearing there were motions brought both by the applicant to add issues in dispute and by the respondent to address preliminary issues. By order released on June 2, 2022, the Tribunal ordered the addition of issues in dispute and that the respondents preliminary issues motion should be heard by me at the hearing.

ISSUES

[3] The issues to be decided in the hearing are:

1. Has the applicant sustained a catastrophic impairment as defined by the SABS?

2. Is the applicant entitled to an attendant care benefit in the monthly amount of $10,539.24 submitted by Amanda Burns for the period June 17, 2021 and ongoing dated June 17, 2021, and denied September 24, 2021?

3. Is the applicant entitled to a medical benefit (OCF-18) in the amount of $132.40 submitted by Amanda Burns on March 16, 2021 and denied May 25, 2021 ($2,128.16 less $2,095.76 partially approved)?

4. Is the applicant entitled to a medical benefit (OCF-18) in the amount of $2,465.16 ($8,550.47 less $6,085.31partially approved) for occupational therapy submitted by Amanda Burns on April 25, 2021 and denied on June 11, 2021?

5. Is the applicant entitled to a medical benefit (OCF-18) in the amount of $1,332.00 for chiropractic services submitted by Michelee Girduckis on June 21, 2021 and denied June 30, 2021?

6. Is the applicant entitled to a medical benefit (OCF-18) in the amount of $3,044.59 for other assistive devices submitted by Amanda Burns on August 4, 2021 and denied September 9, 2021?

7. Is the applicant entitled to a medical benefit (OCF-18) in the amount of $8,999.35 for occupational therapy services submitted by Amanda Burns on January 6, 2022 and denied January 28, 2022?

8. Is the applicant entitled to expenses in the amount of $1,841 for a laptop computer, case, printer, external hard drive, laptop stand and set up services (OCF-6) submitted November 10, 2021 and denied December 8, 2021.

9. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

10. Is the applicant entitled to interest on any overdue payment of benefits?

[4] Issues 2 through 8 above were added by order of the Tribunal released on June 2, 2022.

PRELIMINARY ISSUES

[5] Pursuant to the Tribunal's order released on June 2, 2022, the following preliminary issues were referred to me to be heard at the hearing:

a. Is the applicant barred from proceeding with this Application because the Tribunal has previously made a determination on the reliability of her testimony in LAT file #19-013140/AABS?

b. Is the applicant barred from applying to the Tribunal for a determination on attendant care benefits pursuant to s. 55(1)2 of the SABS for failure to attend an insurer's examination scheduled under s. 44 of the SABS?

[6] The hearing focused on the preliminary issues. I granted the respondent's preliminary issues motion at the hearing with reasons to follow. These are the reasons. Following my preliminary issues ruling, the parties resolved issues 3 through 10 in the paragraph [3].

RESULT

[7] With respect to the respondent's motion, I find:

a. The applicant is barred from proceeding with her claim for a catastrophic

impairment determination on the basis of the findings of fact in an earlier Tribunal proceeding between the parties, LAT file #19-013140/AABS.

b. The applicant's claim for an attendant care benefit is stayed under s. 55(1) of the SABS until such time as she attends an insurance assessment without attempting to impose pre-conditions on her attendance.

PREVIOUS PROCEEDINGS

[8] On November 27, 2019, the applicant filed an appeal with the Tribunal seeking, *inter alia*, a non-earner benefit. The matter proceeded to a six-day hearing in late July 2020. In a decision released on November 30, 2020, the Tribunal held that the applicant did not suffer a complete inability to live a normal life because she had failed to meet her onus to show that she was continuously prevented from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

[9] In arriving at its decision, the Tribunal found the applicant to be an "unreliable witness." In a thorough review of the applicant's testimony and her medical records, the Tribunal found that many of the complaints the applicant attributed to the accident pre-dated it. One example dealing with the psychological evidence addressed the applicant's claim of depression resulting from the accident. She told the Tribunal that she had experienced depression as a result of the death of her husband but that "It lifted at the conclusion of participating for about a year in a grief counselling group. The applicant testified that she stopped the group counselling which she attended with other widows about one year before the accident." However, the medical records disclosed "that the applicant continued with the grief group in February 2017 up until April 6, 2018. This would mean that the applicant's depression from the death of her husband lifted about a year after the accident."

[10] There are many other examples addressing her physical and pain complaints which the applicant had testified were exacerbated by the accident. Her evidence was that these complaints stopped her enjoyment of life, particularly piano playing. The Tribunal notes that in a visit to her family doctor, Dr. Ferreira, she attributed her limited inability to play the piano to a second accident which occurred on April 28, 2017.

[11] In the end the applicant had no explanation for the fact that her medical records showed her largely enjoying life as before, in contrast to her evidence that she was continuously unable to engage in all of the activities she engaged in before

the accident. At paragraph [55] of the decision, the Tribunal covers the evidence that showed:

> after the accident the applicant was gardening, doing crafts with her granddaughter, playing piano, pursuing her business of teaching piano, and going on social outings...She had no cogent explanation for why sentiments such as joy, enjoyment, excitement, or happiness were used to describe her post-accident activities in her medical records.

[12] The Tribunal then rejected the applicant's evidence about the extent to which the accident had rendered her completely unable to live a normal life, and dismissed her claim for a non-earner benefit. Despite the applicant's submissions that the Tribunal should have discounted the respondent's expert assessors' evidence on the basis that their reports contained information on statements she had not made, and results of tests she had not been asked to do, the Tribunal analyzed the reports and accepted them. The Tribunal ultimately concluded that, regardless of the respondent's reports, it could not accept the applicant's evidence as reliable.

The Current Application

[13] The applicant currently seeks a determination that she meets the definition of catastrophic impairment as set out in s. 3.1(1)8 of the SABS, that is that she has:

> an impairment that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993 results in a class 4 impairment (marked impairment) in three or more areas of function that precludes useful functioning or a class 5 impairment (extreme impairment) in one or more areas of function that precludes useful functioning, due to mental or behavioural disorder.

[14] The American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993 ("Guides") set out a rating system for measuring psychological impairments that has four measurement domains rated on a scale of 1–5 as set out in the following table.

Area or aspect of functioning	Class 1: No Impairment	Class 2: Mild Impairment	Class 3: Moderate Impairment	Class 4: Marked Impairment	Class 5: Extreme Impairment
Activities of Dailly Living Social Functioning Concentration Adaptation	No impairment is noted	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some but not all useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning

[15] To be considered catastrophically impaired, the applicant must show that she has marked impairments in three out of the four domains, that is, she is significantly impeded from useful function in most areas of her life. She submits, and I agree, that this test differs from the test for entitlement to a non-earner benefit, the latter test being that she is continuously prevented from engaging in substantially all of the activities in which she ordinarily engaged before the accident. Notwithstanding the different tests, there is significant overlap. This overlap is even more pronounced in this case where the applicant intends to rely on the same evidence that was rejected by the Tribunal in the earlier hearing.

[16] The respondent submits that for the applicant to succeed I must make findings of fact that are at odds with the factual matrix upon which the Tribunal based its earlier decision. It submits that the applicant's attempt to have me reweigh the earlier evidence and come to a different result triggers the doctrines of res *judicata* and abuse of process.

[17] Throughout submissions, both parties argued *res judicata* freely and addressed the applicable test. The respondent also submitted that to permit the applicant to relitigate findings of fact that have been previously determined against her is an abuse of process, a wider concept than *res judicata*. The authority to prevent abuse of its processes is specifically granted to the Tribunal by s. 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

[18] The leading case on the common law doctrines of *res judicata*, collateral attack, and abuse of process is *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 SCR 77 ("*CUPE*"). In *CUPE*, the union grieved the dismissal of an employee, Oliver, who had been fired for sexual assault of a boy under his

supervision. Oliver was convicted and the conviction was upheld on appeal. After the City of Toronto fired Oliver a few days after his appeal failed, C.U.P.E. grieved his termination, and the matter went to arbitration. Oliver testified at the arbitration, claiming that he had never sexually assaulted the boy. The City of Toronto relied on a transcript of the complainant's trial testimony and the fact of the conviction. The arbitrator ruled that the criminal conviction was admissible as *prima facie* proof of the assault, but that it was not conclusive as to whether Oliver had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause. The Divisional Court quashed the arbitrator's ruling, and the Court of Appeal upheld that decision, although applying different legal theories.

[19] C.U.P.E. appealed to the Supreme Court of Canada. Justice Arbour, writing for the majority of the Court, reviewed the three common law doctrines used to prevent relitigation: *res judicata*, collateral attack, and abuse of process. She noted that *res judicata* and collateral attack did not apply to the facts of the case. *Res judicata* required three elements: the same issue, the prior decision was final, and the parties were the same or their privies. The test was not met because the City of Toronto was not the same as the Crown or a privy of the Crown. The doctrine of collateral attack involves an attempt to overturn a decision in the wrong forum. Citing *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at p. 599, where the superior court had authorized a wiretap, Justice Arbour noted that it was not open to a lower court to overturn the superior court's authorization. The only avenue to overturn the authorization was through the superior court's appeal routes. Justice Arbour held at paragraph 34 of *CUPE* that collateral attack did not apply because C.U.P.E. was not looking to overturn the conviction.

[20] After reviewing recent developments in the *res judicata* doctrine in the United States where the elimination of the mutuality requirement has led to concerns about how the doctrine is used, Justice Arbour determined that the better approach was to leave the doctrine of *res judicata* unaltered. To avoid any overcomplication created by these recent US developments, Justice Arbour determined they were best addressed in Canada through the doctrine of abuse of process. At paragraph 37, Justice Arbour stated:

> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles (2000)*, 2000 CanLII 8514 (ON

CA), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis in the Original]

[21] In examining the current facts to determine if the pure common law doctrine of *res judicata* applies. I note that the parties are identical, the previous decision is a final decision, all appeal rights have been exhausted and the issue in dispute is entitlement to benefits under the SABS. The applicant submits that the issue in dispute is different, a catastrophic impairment designation as opposed to entitlement to a non-earner benefit in the earlier proceeding. The respondent argues that *res judicata* applies because I must consider that same evidence that was before to previous tribunal.

[22] In my view, *CUPE* minimizes the fine distinctions between the various common law doctrines designed to bring finality to legal proceedings. This analysis is apparent in Justice Arbour's review of the recent US case law on *res judicata* where the US courts have relaxed the doctrine of mutuality. Her analysis suggests that this relaxation is leading to increasingly complex distinctions to determine when the doctrine is being used as a defence and when it is being used offensively and whether use as an offensive tool should be permitted in all instances. Her application of the abuse of process doctrine cuts through these distinctions to finally point out at paragraph 51: "Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process."

[23] Applying Justice Arbour's analysis to the present facts and applying the Tribunal's statutory power to prevent abuse of its own process, I find that the integrity of the Tribunal's adjudicative process would be significantly undermined if I were to arrive at different findings of fact on largely identical evidence.

The Evidence

[24] The applicant appealed the denial of a non-earner benefit to the Tribunal on November 27, 2019. On January 31, 2020 she submitted a claim form (OCF-19) for a determination that she was catastrophically impaired, based on assessments that were conducted by Omega Medical Associates ("Omega") in October 2019, in particular, the mental/behavioural assessment by Dr. Giselle Braganza, a clinical psychologist and neuropsychologist, on October 21 and an occupational therapy assessment by Beth Crystal, Occupational Therapist, on October 22 and 23. Dr. Braganza determined that the applicant had a Class 4 Marked impairment in three of the four domains, and a Class 3 Moderate impairment in the social functioning domain.

[25] The respondent exercised its right under s. 44 of the SABS to have the applicant assessed by its own assessors. Due to delays resulting from the COVID pandemic, the respondent's assessments were not completed by the date the hearing commenced on July 13, 2020. The applicant sought to rely on her CAT assessments at the hearing into her entitlement to a non-earner benefit. The respondent submitted that it would be unfair to permit her to do so as it had not yet completed its s. 44 assessments. The Tribunal noted: "The applicant submits that the Omega report is relevant with respect to the **facts of the observations and diagnosis** that were made by the Omega assessors. I agree." [Emphasis added] The Tribunal admitted the Omega assessments.

[26] I have discussed the Tribunal's findings of fact above. Put succinctly, the Tribunal rejected almost all of the applicant's evidence of the degree to which she was impaired by the accident. It is this rejected evidence that is at the heart of Dr. Braganza's conclusions about the degree of the applicant's psychological impairments before me now. It also is extensively covered by Ms. Crystal in her OT assessment.

[27] In *Alazab v. Aviva General Insurance*, 2022 CanLII 14944 (ON LAT), the Tribunal addressed a similar fact situation. In an earlier decision the Tribunal had found that Ms. Alazab's impairments were not caused by the accident in question. When she later applied for further benefits, the respondent insurer raised the causation finding as a bar. The Tribunal found that "She cannot be successful in the current appeal without a determination that is contrary to the previous determination." Similarly, in this matter, the applicant cannot be successful unless I make factual findings that are contrary to the previous findings of the Tribunal.

Failure to Attend s. 44 Assessment – Attendant Care Benefit

[28] The applicant applied to the respondent for an attendant care benefit by submitting an Assessment of Attendant Care Needs (Form 1) in September 2021. The Form 1 was completed by her treating OT, Amanda Burns. The respondent exercised its right under s. 44 of the SABS to have the applicant assessed by an OT of its choosing, Dan Gauthier. Mr. Gauthier had previously assessed the applicant and was one of the assessors the applicant complained had attributed words in his report that she did not say and recorded test results for tests she did not do.

[29] The notice of appointment advising the applicant that Mr. Gauthier would conduct an assessment on November 12, 2021 is dated September 30, 2021. It includes the following statement: “If you require an interpreter or a chaperone for the upcoming examination, please contact us.” The examination was rescheduled to November 19. There was no contact from the applicant asking for anyone to be in attendance.

[30] On November 19, when Mr. Gauthier attended to conduct the examination, he found Ms. Burns was present. He asked her to leave. She refused. Mr. Gauthier then left without conducting the assessment.

[31] The respondent has taken the position that the applicant’s failure to ask Ms. Burns to leave so Mr. Gauthier could conduct his assessment amounts to the applicant’s failure to attend the assessment. I agree. Physical presence is not enough. The applicant was under a duty to cooperate with the assessor.

[32] The respondent communicated this position on non-attendance to the applicant in a letter dated December 14, 2021. Her counsel responded the same day making allegations that Mr. Gauthier conducting a perfectly routine assessment in the absence of Ms. Burns was in some manner nefarious. Counsel stated: “The assessor would not explain why he wanted the assessment to occur in secret.” He then set out six conditions under which the applicant would attend an assessment by Mr. Gauthier, five of which dealt with the presence of Ms. Burns and the sixth said she would attend without Ms. Burns only if she were given an explanation.

[33] To its credit, the respondent forwarded the conditions to Mr. Gauthier and asked if any of the conditions were acceptable. When it received his response that none of them were, the respondent wrote to the applicant’s counsel on January 12, 2022 stating: “As per our correspondence dated December 14, 2021 should Ms. Yevdokymova be willing to participate in the requested assessment without any

treating healthcare provider present we will proceed with rescheduling the assessment." Contrary to the applicant's position at the hearing that she was always willing to attend without conditions, there was no reply to this email in evidence.

[34] It is evident that the applicant was present when Mr. Gauthier attended to conduct the assessment and she was willing to be assessed. It is her attempt to impose conditions on the assessment that are problematical.

[35] Insurance assessments are addressed in s. 44 of the SABS. Section 44(1) allows for insurers to assess claimants to determine their entitlement to a benefit. It is a limited right. An insurer must not assess a claimant more often that is reasonably necessary. There are formal steps to be taken by the insurer set out in s. 44(5). Principal among these is the need to give medical and other reasons for the assessment, identify the assessor, the assessor's qualifications, and areas of expertise. Of course, the insurer must identify the location, date and time of the assessment. The applicant in this case concedes that the formalities required by s. 44 were properly fulfilled by the respondent.

[36] The applicant submits that Mr. Gauthier had previously assessed her in relation to her claim for a non-earner benefit. At the hearing, the applicant had questioned Mr. Gauthier's report and findings, arguing that he had put words into her mouth and reported test results for tests he did not carry out. As a result, she did not trust him, a position advanced in submissions by her counsel with more vigour than was seemly. She wanted her treating OT, and the expert she intended to rely on in advancing her claim for an attendant care benefit, to look over his shoulder. It was against this backdrop that she insisted on the list of conditions set out in the December 14, 2021 email.

[37] The Tribunal addressed the question of an insured's right to impose conditions on an insurance assessment in *Spiegel v Intact Insurance Company*, 2021 CanLII 111180 (ON LAT) ("Spiegel"). [upheld on reconsideration - see *Spiegel v Intact Insurance Company*, 2022 CanLII 23433 (ON LAT)]. At paragraph 45, the Tribunal stated: "In my view, ordering the conditions of attendance the applicant seeks would be beyond the jurisdiction of what the Tribunal may order. I have not been pointed to any part of the Schedule [SABS] or otherwise that would allow for such restrictions or conditions to be ordered by the Tribunal." I agree with this statement. The Tribunal has only the powers granted to it by the legislation. If the legislation is silent, then the Tribunal has no inherent jurisdiction to fill the gap.

[38] Since 2016 ss. 55(2) and (3) of the SABS permits the Tribunal to give a non-attending applicant a second chance. The applicable provisions of s. 55 state:

> (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:
>
> 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).
>
> (3) The Licence Appeal Tribunal may impose terms and conditions on a permission granted under subsection

[39] As with any discretion, the Tribunal must exercise it judicially. In the current case, the applicant has failed to attend one assessment in the mistaken belief that she was entitled to have her treating OT present. She stated her willingness to attend without conditions at the hearing. It would, in my view, be unjust to foreclose forever her right to seek an attendant care benefit. In its January 12, 2022 email, the respondent indicated a willingness to reschedule Mr. Gauthier's assessment without conditions. Accordingly, the most just and expeditious way forward is to stay the applicant's claim for an attendant care benefit until she has attended an IE as required by the respondent.

ORDER

[40] The respondent's preliminary issues motion is granted. The applicant is prohibited from proceeding with her claim for a catastrophic impairment designation on the basis that it would be an abuse of process because of the factual findings made in Tribunal file # LAT file #19-013140/AABS.

[41] The applicant's claim for an attendant care benefit is stayed pending her attendance at a s. 44 insurance examination with no preconditions to attendance. The respondent shall take reasonable steps to schedule the examination within the 120 days from the release of this decision, provided always that the parties have not settled this issue or agreed otherwise. The applicant may reapply to the Tribunal for an attendant care benefit after she attends the assessment and receives the respondent's final assessment of her claim, if such assessment is a denial or reduction in the amount of her attendant care claim.

[42] The parties having settled the remaining issues, the Tribunal file is now closed.

Released: July 4, 2022

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D. Gregory Flude
Vice-Chair