LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Tribunal File No.:18-000467/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:

Marcia MacDonald

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

PANEL: **Nidhi Punyarthi**

APPEARANCES:

For the Applicant: Sylvia Guirguis and Imtiaz Hosein, Counsels

For the Respondent: Melinda Baxter, Counsel

HEARD: **In Person: April 25, 2019**

OVERVIEW

[1] The applicant was involved in an accident on January 15, 2015. She claimed certain benefits from the respondent under the *Statutory Accident Benefits Schedule – Effective September 2010*, O.Reg. 34/10 ("*Schedule*"). Her claim for benefits was denied by the respondent. She then applied to the Licence Appeal Tribunal ("Tribunal") for an adjudication of the dispute arising from her denied benefits.

ISSUE IN DISPUTE

[2] The application proceeded to a hearing. By the time of the hearing, only the following issue remained in dispute:

a. Is the applicant entitled to an award under Section 10 of R.R.O. 1990, Reg. 664: Automobile Insurance ("Regulation 664") because the respondent unreasonably withheld or delayed payment of a treatment plan for a psychological assessment recommended by Dr. Waxer dated September 7, 2017 (the "Assessment")?

RESULT

[3] I find that the respondent did not, in this case, unreasonably withhold or delay payment of the Assessment to the applicant. As a result, the applicant is not entitled to the award she has claimed.

ANALYSIS

A. *Legal Context and Factual Background*

[4] Section 10 of Regulation 664 provides that if the Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled to under the *Schedule*, may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest as prescribed.

[5] In the case before me, the applicant submits that the respondent unreasonably withheld or delayed payment of the Assessment. As indicated above, the Assessment was dated September 7, 2017. The respondent approved this Assessment in April, 2019, shortly prior to the scheduled date for the hearing of this matter.

[6] In order to determine whether there was an unreasonable withholding or delay of payment on the part of the respondent, it was necessary for me to examine what took place between September 7, 2017, and April, 2019 with respect to the applicant's claim for the benefit at issue.

[7] The events that took place during this time period can be summarized as follows:

a. On April 17, 2015, the respondent was sent some clinical notes and records (CNRs) from the applicant's family doctor. There were two CNRs in this package, dated February 12, 2015 and March 20, 2015, that the applicant reported "fear of driving/anxiety" and "anxiety relief", respectively.

b. The first adjuster on the file from the respondent testified at the hearing that there was no diagnosis of a psychological impairment in these CNRs. She also testified that as a result, she sought to examine the applicant under Section 44 of the *Schedule* in order to assess the reasonableness and necessity of the Assessment. To that end, the respondent sent the applicant notices of examination under Section 44 of the *Schedule*.

c. The applicant took issue with the notices that were sent by the respondent in this regard. In particular, the applicant indicated that the notices from the respondent did not meet the prescribed requirements of Section 44(5) of the *Schedule* and were, as a result, deficient.

d. Despite the fact that she took the position that the notice of examination was deficient, the applicant presented herself for the first scheduled Section 44 examination and sought to audio-record it on her end. The examiner in question refused to continue with the examination on this basis.

e. Throughout the time period identified, the applicant's lawyers were sending letters to the respondent and the respondent's agents.[1] In summary, these letters indicated that: (i) the notices of examination did not contain medical reasons as required by Section 44 of the *Schedule*, (ii) the applicant should be permitted to audio-record the examination as an accommodation for her cognitive impairment; and (iii) the respondent should be responding to their various letters instead of ignoring them. The

[1] The evidence before me contains letters from the applicant's lawyers to the respondent on various dates, for example, September 26, 2017, October 27, 2017, May 14, 2018, May 31, 2018, November 28, 2018, December 7, 2018, and January 7, 2019.

applicant's lawyers also issued letters to the frontline manager and the ombudsman of the respondent.

f. The respondent had replied to the very first letter from the applicant's lawyers in this regard and stated that it was simply seeking to examine the applicant under Section 44 of the *Schedule*. The respondent did not indicate anything further in its response and stopped responding to further letters from the applicant's lawyers.

g. The further letters from the applicant's lawyers repeated and followed up on demands and positions set out in their previous letters.

h. The respondent did not get subsequent CNRs of the applicant's family doctor until August 21, 2018. None of the medical evidence tendered at the hearing supported the allegation[2] that the applicant suffered from a cognitive impairment that needed to be accommodated through an audio-recording of the Section 44 examination. Nor was there any evidence tendered at the hearing that any medical support for such an alleged cognitive impairment was provided to the respondent.

i. After receiving the second set of CNRs, the respondent maintained its position that it needed to examine the applicant under Section 44. It sent some further notices in that regard. This was followed by letters from the applicant's lawyers that continued to indicate that the applicant will not attend for reasons set out in their prior correspondence.

j. The respondent asked the Tribunal to determine that the applicant be barred from proceeding with her application because she failed to attend the examination under Section 44. The Tribunal held a preliminary issue hearing in this regard in August 2018. On September 6, 2018, the Tribunal found that the respondent's first notice of examination under Section 44 was deficient as it did not contain sufficient medical reasons for the examination. As such, the applicant was permitted to proceed with her application.

k. The respondent transferred the applicant's claim to a different adjuster in March 2019. This second adjuster approved the Assessment without conducting a Section 44 examination. This approval was done shortly

[2] The words "alleged" and "allegation" are used here to describe a statement that is not supported on a balance of probabilities by evidence tendered at the hearing.

prior to the scheduled hearing before the Tribunal on whether the Assessment should be paid.

[8] From the applicant's perspective, the respondent:

a. Ignored relevant medical records that were in its possession when it came to approving the Assessment[3];

b. Unreasonably and unnecessarily required the applicant to submit to an examination under Section 44;

c. Sent a series of deficient notices of examination[4];

d. Did not respond on point or at all to various letters sent by the applicant's lawyers which identified issues such as missing information in the notices of examination and the need to accommodate the applicant's request to audio-record the examination due to a cognitive impairment; and

e. More than a year and a half after the submission date, approved the Assessment without conducting the Section 44 examination that it was previously insisting on.

[9] From the respondent's perspective:

a. It was reasonable to require a Section 44 examination in addition to the documents received in order to assess the applicant's need for the Assessment;

b. There was no evidence of the applicant's cognitive impairment or need for accommodation through an audio-recording of the Section 44 examination;

[3] According to the evidence before the Tribunal, this evidence consisted of: the first set of family doctor CNRs sent to the respondent on April 17, 2015 (which set contained two notes from February 12, 2015 and March 20, 2015) and the second set on August 21, 2018 (which set contained the rest of the applicant's family doctor CNRs from September 2015 to June 2018); the applicant's occupational therapy report from June, 2015; the applicant's physiatry report from June, 2017; the applicant's psychological report from August, 2017; the insurer orthopedic examination from August, 2017; and a letter from the applicant's family doctor in regard to the applicant's symptoms dated August 28, 2017.

[4] According to the evidence before the Tribunal, the respondent sent four notices to examine the applicant under Section 44 with regards to the Assessment: September 18, 2017, May 8, 2018, August 24, 2018, and November 26, 2018.

c. The notices of examination were populated using standard internal guidelines until the Tribunal determined that one of the notices was deficient;

d. Following the Tribunal's decision on the deficiency of the notice of examination, the respondent sent a revised notice which included additional medical reasons, but the applicant still took the position that the revised notice was deficient;

e. It was not necessary to respond to the continued letters from the applicant's lawyers when the respondent believed it had already made its position clear; and

f. It was reasonable to transfer the file to a different adjuster who in turn had a different opinion on how the claim for the Assessment should be adjusted.

B. *Findings and Assessment of the Evidence*

[10] The applicant has asked me to find that it was unreasonable of the respondent to:

a. Ask for the Section 44 examination at various times despite medical evidence already in hand (as the first adjuster did);

b. Ultimately approve the Assessment without conducting a Section 44 examination (as the second adjuster did);

c. Repeatedly send deficient notices of examination under Section 44; and

d. Ignore the numerous letters sent by the applicant's lawyers.

[11] For the reasons explained below, I find that it was not unreasonable of the respondent to undertake the above-listed actions in this case. I find that the conduct of the respondent with respect to the adjustment of the claim for the Assessment at issue did not constitute unreasonable withholding or delay of payment under Section 10 of Regulation 664.

(i) ***The actions of the first adjuster were reasonable***

[12] It was reasonable for the first adjuster on the file to ask for an examination under Section 44. This applied to all of the times that the notices of examination were sent. There were some medical records in file when these notices were sent.

However, as the first adjuster pointed out during her cross-examination at the hearing, she did not see a confirmed diagnosis in these records. She was therefore of the view that it would be prudent to conduct a Section 44 examination to determine whether the Assessment was reasonable and necessary.

[13] This was not a case where relevant medical evidence was disregarded. The first adjuster was instead of the view that she could not approve the Assessment without first seeing evidence of a medical diagnosis and having an opinion from an assessor engaged under Section 44. It was therefore reasonable of her to ask for an examination under Section 44 at the various stages identified in the evidence.

(ii) ***The actions of the second adjuster were reasonable***

[14] It was also reasonable for the second adjuster to have a different opinion as to how the Assessment at issue should be handled (i.e., to approve it without conducting a Section 44 examination). She was of the view that given the medical records on file and the finding of the Tribunal with respect to the deficiency of the notice, the Assessment should be approved. Her approval of the Assessment was done within approximately a month of her take-over of the file, and shortly prior to the scheduled hearing.

[15] The second adjuster came on the file when it was very advanced in the litigation process. In this regard, I note that different adjusters should be permitted to have different opinions based on the same set of facts, as long as their opinions on how the file should be adjusted can be reasonably supported. Both of the adjusters in this case were reasonable in their assessment of the matter. One adjuster chose to take a more prudent approach; the other made a decision to issue a good faith approval in a very advanced stage of litigation.

[16] I do not, therefore, make any finding that the respondent unreasonably withheld or delayed payment of the Assessment because the two adjusters had different approaches. Both of their approaches with respect to whether and when the Assessment should be approved fell within the realm of reasonable conduct expected of an insurer.

(iii) ***The deficient notice of examination does not lead to a finding that the respondent unreasonably withheld or delayed payment of a benefit***

[17] In addition, the fact that the respondent's notice of examination was found to be deficient does not, in and of itself, amount to unreasonable withholding or delay

of payment of a benefit. As Adjudicator Gosio observed at para. 29 of *16-002346 v. Unifund Assurance Company*, 2017 CanLII 81583 (ON LAT) that was referred to by the respondent, an insurer will not face a special award just because an arbitrator finds that the insurer got it wrong. There are remedies available for a deficient notice of examination under the *Schedule*. In this case, the applicant already availed herself of the remedy resulting from the finding of the deficient notice of examination: she was permitted to proceed with her application despite her non-attendance at a Section 44 examination. A notice of examination that has been found to be deficient by the Tribunal does not attract an award under Section 10 of Regulation 664. I make no finding as to the other notices of examination that were sent in this case, as the question of whether they were deficient was not put before me as an issue to decide at this hearing.

(iv) ***Ignoring the specific letters in this case does not lead to a finding that the respondent unreasonably withheld or delayed payment of a benefit***

[18] When I look at the series of events that took place between the submission and the approval of the treatment plan, I see a fairly long period of time during which the parties maintained opposing positions in respect of what was the most appropriate method of dealing with the Assessment. The parties were at a standstill as they maintained these positions.

[19] On the respondent's end, it was seeking to conduct an examination under Section 44. On the applicant's end, she would submit to such an examination provided she was given the requisite information in the notice, information as to why such an examination was reasonable and necessary, and the opportunity to audio-record the examination.

[20] In the evidence, this period during which the parties were at a standstill is characterized by a series of letters from the applicant's lawyers in which the applicant's positions are being set out. The respondent, after re-iterating its request to examine the applicant, which was essentially its position, stopped responding to further letters from the applicant's lawyers.

[21] What I find somewhat surprising about the evidence on this time period is that there is no indication that either party attempted to pick up the telephone and have a conversation with the other, in which attempts could have been made to clarify any requests and concerns on either side. The standstill between the two parties could have been avoided by a simple telephone conversation and a brainstorming for solutions, but that did not take place in this case.

[22] Rather, the evidence before me shows that the opposite of that scenario took place in this case. A series of legal letters were sent by one side and ignored by the other side.

[23] It can be said that the respondent should have replied to the series of letters from the applicant's lawyers. However, it is also important to ask what these letters from the applicant's lawyers entailed. Did the several demand and follow-up letters from the applicant's lawyers add any real value or help make progress in the matter? Based on my review of these letters in the context in which they were sent, they did not add value or make progress. These letters reiterated previous positions and did not provide supporting evidence of, for example, the applicant's alleged cognitive impairment that required an audio-recording of the Section 44 examination.

[24] In this case, the respondent was bombarded by a series of letters from the applicant's lawyers that carried a very litigious tone to them. The series of letters from the applicant's lawyers, instead of proposing solutions, created a litigious and stressful environment between the parties. The interactions between the parties became quite the opposite of a scenario where a phone conversation could have been had and solutions could have been addressed. These letters made it so that the proceedings had to be litigated step by step as opposed to addressed outside of the litigation process. The letters placed the respondent in the position of deferring to its legal counsel and having the file run the course of litigation.

[25] The respondent's first adjuster testified that the subsequent legal letters were not responded to and were forwarded to the legal department. There were no actual responses to the several subsequent letters, from either the respondent, its legal department, its frontline manager, or its ombudsman.

[26] However, given the nature of these letters from the applicant's lawyers, and the fact that these letters only served to maintain an unresolved litigious standstill, I find that the respondent's failure to respond to these letters does not amount to an unreasonable withholding or delay of payment of the Assessment.

[27] The applicant pointed me to the decision of Adjudicator Paluch in *17-006757 v. Aviva Insurance Canada,* 2018 CanLII 81949 (ON LAT). Adjudicator Paluch found in that case that the insurer should have responded with reasonable promptness to all professional communications.

[28] The determination of whether an award is payable is fact-specific[5]. The facts in the case before me are different from the facts that Adjudicator Paluch had before him.

[29] Earlier in this decision, I found that the series of letters sent by the applicant's lawyers, without evidence of a telephone conversation to address solutions, did not add value or make progress in the matter. This finding distinguishes the case before me from the facts that Adjudicator Paluch had before him. The scenario before me not only involves an insurer who stopped responding to legal letters; the specific legal letters that were sent in this case did not add value and ultimately helped create an impasse between the parties that could not be addressed without litigation.

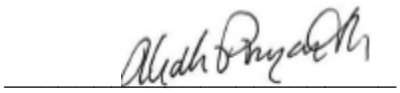
[30] The conduct of the respondent in not responding to the subsequent legal letters of this nature did not rise to the level of unreasonable withholding or delay that Section 10 of Regulation 664 was intended to capture. I can see the rationale behind the first adjuster's testimony in that that the subsequent legal letters led the respondent to forward them to its lawyers as opposed to respond to them directly. I do not find the respondent's approach to the letters in the particular factual circumstances before me to amount to unreasonable conduct or "behaviour that was excessive, imprudent, stubborn, inflexible, unyielding, or immoderate."[6]

[31] For the reasons given above, I do not find that the respondent unreasonably withheld or delayed payment of the Assessment to the applicant.

CONCLUSION

[32] The applicant is not entitled to the award or interest as claimed.

Date of Decision: August 7, 2019



Nidhi Punyarthi
Adjudicator

[5] See *17-006757 v. Aviva Insurance Canada*, 2018 CanLII 81949 (ON LAT), at para. 31.
[6] See *17-008585 v. Certas Direct Insurance Company*, 2018 CanLII 83532 (ON LAT), at para. 49.