

**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**

**Citation: Kanagaratnam Kulapragasam vs. Aviva Insurance Canada, 2020 ONLAT
18-010454/AABS**

Released Date: 04/07/2020 File Number: 18-010454/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:

Kanagaratnam Kulapragasam

Applicant

and

Aviva Insurance Canada

Respondent

DECISION [AND ORDER]

ADJUDICATOR:

Paul Gosio

APPEARANCES:

For the Applicant:

Kanagaratnam Kulapragasam, Applicant
Lisa Bishop, Counsel

For the Respondent:

Aviva Insurance Canada
Sonya Katrycz, Counsel

HEARD: In Writing

May 13, 2019

OVERVIEW

- [1] The parties dispute the applicant's entitlement to a non-earner benefit and three treatment and assessment plans.
- [2] The applicant was injured in a motor vehicle accident on May 31, 2016. He applied for a non-earner benefit and three medical benefits for physiotherapy and chiropractic services pursuant to the *Statutory Accident Benefit Schedule – Effective September 1, 2010* ("Schedule").
- [3] The respondent, pursuant to s. 44 of the *Schedule*, requested that the applicant attend in-person insurer's examinations in order to assess his entitlement to these benefits. The applicant failed to attend the insurer's examinations as he claims that the Notices of Examination were deficient.
- [4] The applicant submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") in order to dispute his entitlement to the disputed non-earner benefit and three treatment and assessment plans. The applicant also seeks an award as he claims that the respondent unreasonably withheld payment of these benefits.
- [5] The respondent argues that it met the statutory requirements provided in s. 44 of the *Schedule*, that the applicant failed to attend the insurer's examinations and, that, pursuant to s. 55 of the *Schedule*, he should be barred from proceeding with his application. The respondent also seeks costs because the applicant "has now submitted identical LAT applications twice," which the respondent claims is an abuse of process, frivolous and/or vexatious.

ISSUES IN DISPUTE

- [6] The following issues are in dispute:
 - I. Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week from November 30, 2016 to date and ongoing?
 - II. Is the applicant entitled to a medical benefit in the amount of \$4,256.50 for physiotherapy treatment recommended in a treatment plan dated August 4, 2016, and denied by the respondent on August 22, 2016?
 - III. Is the applicant entitled to a medical benefit in the amount of \$4,456.50 for physiotherapy treatment recommended in a treatment plan dated July 7, 2016, and denied by the respondent on July 18, 2016?
 - IV. Is the applicant entitled to a medical benefit in the amount of \$3,149.97 for chiropractic treatment recommended in a treatment plan dated November 3, 2016, and denied by the respondent on November 16, 2016?

- V. Is the applicant entitled to interest on any overdue payment of benefits?
- VI. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?
- VII. Is the respondent entitled to cost?

RESULT

- [7] I find that the applicant is barred from proceeding with this application until he attends the insurer's examinations as outlined in the notices. Consequently, the applicant is not entitled to interest or an award.
- [8] I also find that the respondent is not entitled to costs as I have found that the applicant did not act unreasonably, frivolously, vexatious or in bad faith during the proceeding.

FACTS

Attempts to Assess Entitlement to the Non-Earner Benefit and Treatment and Assessment Plans

- [9] The applicant submitted Treatment and Assessment Plans for physiotherapy services on July 7 and August 4, 2016, and for chiropractic services on November 3, 2016. The applicant then applied for non-earner benefits by way of an OCF-3 submitted on November 7, 2016.
- [10] On November 16, 2016, the respondent issued Notices of Examination for orthopaedic, neurological, and occupational therapy assessments pursuant to s. 44 of the *Schedule* in order to assess the applicant's entitlement to the three Treatment and Assessment plans in dispute and the non-earner benefits.
- [11] The applicant failed to attend the occupational therapy in-home assessment scheduled for December 2, 2016, the orthopaedic assessment scheduled for December 16, 2016, and the neurological assessment scheduled for January 19, 2017.
- [12] By correspondence dated January 11, 2017, the respondent issued Notices of Examination for the rescheduled occupational therapy and orthopaedic assessments. The applicant failed to attend the rescheduled occupational therapy assessment on January 26, 2017 and the rescheduled orthopaedic assessment on January 31, 2017.
- [13] As a result of the applicant's failure to attend the insurer's assessments, the respondent suspended entitlement to the non-earner benefit pending compliance with its requests to assess the applicant.

- [14] On November 5, 2018, the respondent issued new Notices of Examination advising the applicant of the rescheduled insurer's examinations. The applicant failed to attend the rescheduled neurology assessment on November 14, 2018, the orthopaedic assessment on November 20, 2018, and the occupational therapy assessment on November 24, 2018.
- [15] By letter dated December 12, 2018, the applicant explained that the assessment that had been scheduled for November 14, 2018 had not been "a convenient time" for him. He did not address the other missed assessments.

ANALYSIS

- [16] The respondent's request for assessments is governed by s. 44 of the *Schedule*. The applicant submits that the respondent's Notices of Examination are deficient as they fail to state "the medical and any other reason for the examination" as mandated by s.44(5)(a) of the *Schedule*. Section 44(5)(a) states:
- (5) 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;
- [17] In *MB v. Aviva Insurance Canada*, 2017 CanLII 87160 (ON LAT), the Executive Chair stated that an insurer satisfies its obligation to provide its "medical and any other reasons" by explaining its decision with reference to the insured's medical condition and any other applicable reason. This framework preserves the "consumer protection goal" of the *Schedule* by ensuring that an insured person can make an informed decision about whether to participate in an insurer's examination. The respondent bears the onus of establishing on a balance of probabilities that it complied with section 44(5)(a) of the *Schedule*.
- [18] The Notices of Examination dated November 16, 2016, Notices of Rescheduled Examinations dated January 11, 2017 and Notices of Examination dated November 5, 2018 (collectively referred to as the "Notices") include the following information under the heading "Medical Reason": "the disability period appears to be inconsistent with the diagnosis or mechanism of injury."
- [19] The applicant submits that this medical reason fails to meet the requirements of s. 44(5)(a) of the *Schedule* because it provides no specificity with respect to the noted inconsistency nor any indication that the inconsistency is material to the applicant's entitlement to the claimed benefit.
- [20] I disagree with the applicant's submission and find that the respondent provided a medical reason for the examinations that satisfies the requirements of section 44(5)(a) of the *Schedule*.

- [21] The Notices highlighted an inconsistency in the applicant's disability certificate, i.e., between the expected length of recovery and the "diagnosis or mechanism of injury" listed in the certificate being soft tissue injuries. It is clear then why the examinations were being requested.
- [22] The Notices should have alerted the applicant to how the respondent was seeking information about what it believed to be an inconsistency in his medical records. I also find the insurer's "Medical Reason" to be clear and sufficient enough to allow an unsophisticated person to make an informed decision to either accept or dispute the decision and, as such, satisfies the consumer protection goal mandated by the *Schedule*.
- [23] The respondent seeks an order precluding the applicant from proceeding with his application pursuant to s. 55(1)2 of the *Schedule*. Section 55(1)2 of the *Schedule* states that an insured person cannot apply to the Tribunal for resolution of a dispute over accident benefits if: "[t]he 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."
- [24] Since I have found that the applicant failed to attend the insurer's examinations wherein valid s. 44 Notices were provided, pursuant to s. 55 of the *Schedule*, he is barred from proceeding with the issues in dispute.
- [25] The applicant is not entitled to an Award or interest as I have found that no benefits are owing.

Costs

- [26] *The Licence Appeal Tribunal Rules of Practice and Procedure* includes a provision in Rule 19.1 for the parties to request costs if they believe the other party has acted unreasonably, frivolously, vexatiously or in bad faith in the course of the proceeding. Reference to the proceeding encompasses a time period that begins when the applicant submits its application to the Tribunal and ends when the Tribunal issues its final decision. Rule 19.4 further sets out the requirements for that request, which must include the reason for the request and the particulars of the alleged conduct.
- [27] The respondent submits that the applicant's repeated non-attendance constituted frivolous behaviour in that he acted without regard to the charges accruing to the respondent with each non-attendance.
- [28] The respondent also submits that the applicant's decision to re-submit a second, identical LAT application without attending the assessments he agreed to attend at the case conference on August 21, 2018 is inherently an abuse of process and demonstrates frivolous and vexatious behaviour.
- [29] Aviva submits that the applicant's explicit promises to attend assessments in November 2018, which were scheduled around his travel schedule and in

accordance with his preference for morning examinations, and with repeated assurances from his lawyer that he would attend, amounts to vexatious behaviour.

- [30] While I agree that the number of assessments the applicant has missed is alarming, that the expenses incurred by the respondent are unfair, and that the applicant's excuses for non-attendance are unconvincing, I do not find that the respondent is entitled to costs at this stage.
- [31] I note that the proceeding commenced on November 1, 2018 and that much of the behaviour cited by the respondent occurred prior. Behaviour that occurred prior to the commencement of the hearing cannot form part of the consideration for a cost award. When I analyse the applicant's conduct during the proceeding, I find that he did not act unreasonably, frivolously, vexatious or in bad faith.

CONCLUSION

- [32] For the reasons outlined above, I find that the applicant is barred from proceeding with this application and consequently, he is not entitled to interest or an award.
- [33] I also find that the respondent is not entitled to costs as I have found that the applicant did not act unreasonably, frivolously, vexatious or in bad faith during the proceeding.

Released: April 7, 2020



**Paul Gosio
Adjudicator**