

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

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



Tribunal File Number: 18-002529/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

Justin De Sousa

Applicant

and

Aviva Insurance Canada

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR:

Sandeep Johal

APPEARANCES:

Counsel for the Applicant:

Laya Witty

Counsel for the Respondent:

Suzanne Clarke

Heard in writing on:

October 5, 2018

OVERVIEW

- [1] The applicant was injured in an automobile accident on June 23, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "*Schedule*").
- [2] The applicant was riding his bicycle and was struck by a car and attended at the Humber River Hospital where he was diagnosed with a concussion. His ongoing issues include headaches and dizziness and he has been treated for both physical and psychological injuries as a result of the accident.
- [3] The applicant applied for a speech language pathology assessment that was denied by the respondent on the basis that the applicant failed to attend section 44 insurer examinations ("IE"). The applicant disagreed with that decision and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").
- [4] At the case conference on July 30, 2018 the respondent raised a preliminary issue that the applicant is barred from proceeding with the Tribunal application for a speech language pathology assessment by virtue of section 55(2) of the *Schedule*.

PRELIMINARY ISSUE TO BE DECIDED

- [5] The following is the preliminary issue to be decided as set out in the case conference order dated August 22, 2018:
 - i. Is the applicant barred by section 55(2) of the *Schedule* to commence a proceeding to the Tribunal as the applicant is non-compliant with a section 44 insurer examination request for a Speech Language Pathology ("SLP") assessment in a written notification dated July 27, 2018?

RESULT

- [6] Based on the totality of the evidence before me, I find the applicant is barred by virtue of section 55(2) from commencing his Tribunal application to dispute the SLP assessment denial for non-compliance with a section 44 IE request until such time that the applicant attends an IE assessment.

¹ O. Reg. 34/10.

ANALYSIS

Duty to participate in IE's

- [7] The applicant has a duty to participate in IE assessments that are reasonably necessary and there must be a reasonable explanation provided for non-attendance.
- [8] I find that the respondent's request for the IE assessment for the SLP was reasonably necessary and the applicant did not provide a reasonable explanation for non-attendance.
- [9] Section 44(1) of the *Schedule* governs the IE process for the purpose of assisting the insurer to determine if the applicant is or continues to be entitled to a benefit under the *Schedule* for which an application is made but not more often than is reasonably necessary. The respondent may require an insured person to be examined under this section by one or more persons chosen by the respondent who are regulated health professionals or who have expertise in vocational rehabilitation.
- [10] Section 44(4) of the *Schedule* states an examination under this section may be limited by the respondent to an examination of material without requiring the attendance of the applicant.
- [11] Section 44(5)(a) of the *Schedule* states that if the respondent requires an IE, it shall give the applicant a notice setting out the medical and any other reasons for the examination.
- [12] The respondent submits it received a treatment plan for an SLP assessment and in accordance with the *Schedule* the respondent provided the applicant with medical reasons for its denial and notice that an IE was required. The respondent further submits that applicant's counsel provided a letter stating the applicant would not attend and did not provide any explanation for failing to attend.
- [13] According to the respondent, this is non-compliance with a section 44 IE request and as a result the respondent was within its right to deny the proposed SLP assessment and treatment.
- [14] The applicant submits, the notice of examinations from the respondent did not refer to either the treatment plan or the medical evidence and there was no indication there was a review of the clinical notes and records of the treating practitioners or a review of the comments provided within the treatment plan.

[15] A review of the medical reasons for the notice of examination dated July 27, 2017 reads as follows:

“The diagnosis, prognosis, treatment plan, or medication appears to change during the treatment without an apparent documented explanation in the clinical records.”

[16] The letter then goes on to provide details of the assessment the respondent requires for the purposes of determining whether the treatment plan submitted by the applicant is reasonable and necessary.

[17] I am not persuaded by the applicant’s submission that the notice of examination was deficient because medical reasons were not provided or that there was a lack of reference to the clinical notes and records of the applicant in the notice.

[18] I find that the respondent provided a medical reason as required, namely, that the applicant’s diagnosis appears to have changed without a documented explanation in the clinical records. As a result of this explanation, I find that the respondent did review the clinical notes and records and provided a brief medical reason for the denial and also an appropriate notice for a request for an IE.

Is the IE assessment request reasonably necessary?

[19] The applicant submits that a further IE by the respondent is not reasonably necessary because previous IE’s have already been done. The previous IE assessments were for an orthopaedic assessment in August 2016, a psychological assessment in October, 2016 and a neuropsychological assessment on May 30, 2017. According to the applicant, the respondent should conduct an examination of material IE assessment rather than an in-person IE assessment based on the applicant’s own SLP assessment. I do not agree. The paper review or an examination of material as per section 44(4) of the *Schedule* is solely an option reserved for the respondent. Should the respondent feel an examination of material is not sufficient, it is entitled to have the applicant attend an in-person IE assessment in accordance with the *Schedule*.

[20] The applicant also relies on Tribunal decision *16-003144 v Cumis Insurance*² for the authority that the respondent’s right to schedule IE’s are limited to those that are “reasonably necessary” and this request by the respondent in the case before me is not.

² 2017 CanLII 22315 (ONLAT) “*Cumis Insurance*”

[21] In the *Cumis Insurance* case, section 44 of the *Schedule* has been interpreted as a right of insurers to obtain IE's in order to ensure that insurers are able to assess reports provided by an applicant and to adequately respond. That right must be balanced against the privacy rights of the applicant and in balancing those rights there are a number of factors to consider:

- i. There must be a reasonable nexus between the type of examination and the claimed impairments;
- ii. The purpose and timing of the request;
- iii. The IE should be for the purpose of adjusting the claim and not solely to bolster a case for litigation;
- iv. The number and nature of previous IE's, whether there are new conditions that need to be evaluated;
- v. If there are numerous evaluations, not all may be necessary;
- vi. Acceptable reason for non-compliance, i.e.) medical reason.

[22] Other than listing the factors from the *Cumis Insurance* case the applicant has not provided any submissions on which factors apply to the applicant and which factors the respondent may not have complied with.

[23] In my analysis of applying the facts of the current situation to the factors in the *Cumis Insurance* case I find there to be a reasonable nexus between the respondent's request for an IE assessment and the applicant's request for a medical benefit for speech language treatment. The fact that the applicant obtained a medical report for the applicant's speech language issues and the subsequent treatment of it, I find there to be a reasonable nexus and the respondent should be allowed to conduct an IE on the applicant's treatment and assessment plan. As stated in *Cumis Insurance*³ the right to an IE assessment under section 44 of the *Schedule* is designed to ensure that insurers are able to assess reports provided by a claimant and to adequately respond.

[24] With respect to the purpose and timing of the IE request, it is my finding that the IE request is reasonable as it was in response to a request from the applicant for speech language treatment and the timing was in accordance with the *Schedule*. The applicant has not raised the issue that the purpose was solely to bolster the respondent's case for litigation and I do not find that to be the case in any event.

³ *Cumis Insurance* at para 13.

- [25] The applicant has attended three IE assessments previous to this one from August, 2016, October 2016 and May 30, 2017. I do not find this to be overly onerous or numerous. None were in relation to an SLP. In fact, at the Neuropsychological IE on May 30, 2017 it was mentioned that the applicant was forgetting words and stuttering and that in my opinion would make the respondent's request for an IE for an SLP reasonably necessary to have the applicant assessed with the proper IE assessor for a potential new condition that may need to be evaluated.
- [26] Lastly, I do not find that applicant's non-attendance to be reasonable. In the letter dated June 9, 2017, no explanation was provided other than to state that the applicant was in receipt of the notice of examination for the IE assessment and that the applicant would not be attending. It was not until the applicant's written submissions were due for this hearing where the applicant submits the denial of the treatment plan did not provide medical reasons which I do not find to be the case as discussed above.
- [27] As a result of finding that the applicant did not attend a reasonably necessary request for an IE assessment, I now turn to whether there should be a restriction on the proceeding at the Tribunal.

Restriction on proceedings

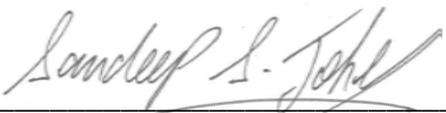
- [28] Section 55(1) 2. of the *Schedule* states that the insured person shall not apply to the Tribunal if the insurer provided the applicant with notice that it requires an examination under section 44 but the applicant has not complied with that section.
- [29] The respondent submits the applicant has not complied and in accordance with section 55(1) 2. is precluded from applying to the Tribunal for the denial of the SLP treatment and assessment plans.
- [30] The applicant submits that as a result of the respondent's unreasonable denial and in accordance with section 55(2) the Tribunal should allow the applicant to apply despite non-attendance with a section 44 request.
- [31] I agree with the respondent, I have already determined that the request for the IE assessment was reasonably necessary and the applicant did not comply. Therefore, I find the applicant is precluded from disputing the denial at the Tribunal until the applicant complies and attends an IE assessment.

ORDER

[32] For the reasons outlined above, I find that the applicant is barred by virtue of section 55(2) from commencing his Tribunal application to dispute the SLP assessment denial for non-compliance with a section 44 IE request.

[33] The applicant shall be allowed to apply to the Tribunal for the disputed treatment and assessment plan once the applicant attends a speech language IE assessment.

Released: May 3, 2019



Sandeep Johal
Adjudicator