



Citation: McQueen v. Certas Direct Insurance, 2023 ONLAT 21-015037/AABS - P

File Number: 21-015037/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:

Shane McQueen

Applicant

and

Certas Direct Insurance

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: Theresa McGee, Vice-Chair

APPEARANCES:

For the Applicant: Youssef Jabbour, Counsel

For the Respondent: Shannon R. Wood, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] The applicant, Shane McQueen, was involved in an automobile accident on September 9, 2019, and sought benefits from the respondent, Certas Direct Insurance, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*¹ (the “*Schedule*”).
- [2] The respondent denied several of the applicant’s claims for medical benefits and discontinued his income replacement benefit. The applicant applied to the Licence Appeal Tribunal (“Tribunal”) for resolution of the dispute. At a case conference convened by the Tribunal on October 7, 2022, the respondent raised two preliminary issues that, if established, would dispose of the entire application. This hearing is to determine those preliminary issues.

PRELIMINARY ISSUES

- [3] The preliminary issues to be decided are:
- a) Is the applicant barred from proceeding with his application as he failed to submit to an insurer’s examination under section 44 of the *Schedule*?
 - b) Is the applicant barred from proceeding with his claim for the attendant care assessment because it was incurred before the OCF-18 was submitted?

RESULT

- [4] The application is barred under s. 55 of the *Schedule* because the applicant failed to attend two properly requested insurer’s examinations. In addition, the respondent is not liable to cover the cost of the disputed in-home occupational therapy assessment because the applicant incurred the expense before submitting a treatment plan (OCF-18) to the respondent as required under s. 38(2) of the *Schedule*.

ANALYSIS

The applicant failed to attend properly requested insurer’s examinations

- [5] The respondent bears the onus of establishing that the applicant is statute-barred from applying to the Tribunal for failing to comply with s. 44(9)2 of the *Schedule*. On October 21, 2022, the respondent served its initial submissions on the

¹ O. Reg. 34/10.

preliminary issues to the applicant's counsel. It submits it received no response from the applicant. The Tribunal sent email reminders to the parties to file their submissions in accordance with the timelines consented to at the case conference. To date, the applicant has made no submissions on the preliminary issues, despite being ordered to do so 28 days after the October 7, 2022 case conference.

- [6] The respondent submits that it sent Notices of Examination to the applicant on September 9, 2020, requesting that he attend a Functional Abilities Assessment with Robert Bullard, kinesiologist, on September 29, 2020 and a physiatry assessment with Dr. Alborz Oshidari, physiatrist, on October 6, 2020. The Notices of Examination stated that the purpose of the assessments was to determine whether the applicant's injuries fall outside the Minor Injury Guideline and whether the applicant was entitled to an ongoing income replacement benefit or a non-earner benefit. Specifically, the applicant's functional status would be assessed to determine his ability to perform his pre-accident employment duties.
- [7] Before the date of the scheduled insurer's examinations, the respondent submits it received correspondence from the applicant's counsel requesting that they be rescheduled. The respondent submits that it did so. The documents tendered by the respondent support the respondent's account of events. On September 25, 2020, the applicant's counsel's legal assistant notified the respondent by email that their office had experienced difficulty reaching the applicant, but that they were eventually able to confirm that he was in isolation after being in close contact with someone infected with COVID-19 and for that reason, he would not be able to attend the insurer's examinations on September 29, 2020 and October 6, 2020. The respondent rescheduled the examinations for October 26 and 29, 2020. New Notices of Examination were issued on October 7, 2020 that set out the required information.
- [8] On October 26, 2020, the applicant failed to attend the scheduled physiatry assessment with Dr. Alborz Oshidari. A "no-show notice" from Viewpoint Medical Assessments dated October 27, 2020 confirmed the applicant's non-attendance. Then, on October 29, 2020, the applicant failed to attend the Functional Abilities Assessment with Robert Bullard. Viewpoint Medical Assessments documented the applicant's non-attendance in a notice dated October 29, 2020.
- [9] The respondent submits that the notices it gave for the two assessments complied with the requirements set out in s. 44(5) of the *Schedule*: it provided the reasons for the examination; indicated whether in-person attendance was required; listed the names and occupations of the assessors and the dates, times

and locations of the examination. I have reviewed the documents and find that these details are clearly set out in the original Notices of Examination dated September 9, 2020 and rescheduled notices dated October 7, 2020. Further, the notices were provided by the respondent more than five business days before the scheduled insurer's examinations, as required by s. 44. I find the notices were valid and sufficient to trigger the applicant's attendance obligations under s. 44.

- [10] Section 55(1)2 of the *Schedule* provides that a person may not apply to the Tribunal if an insurer has provided them with a notice that it requires an examination under s. 44 and the person has not complied with that section. The respondent submits that the applicant is barred under s. 55 because he failed, without notice or explanation, to attend the rescheduled insurer's examinations.
- [11] To date, the applicant has not filed submissions explaining why he failed to attend the IEs. Based on the record before me, the respondent's position on this preliminary issue is clearly established. In my view, the first preliminary issue disposes of the applicant's claims for medical benefits and an income replacement benefit in their entirety, and the application cannot proceed.
- [12] For the sake of completeness and because Member Kaur ordered this issue to be decided in the Tribunal's November 17, 2022 consent order, I will also determine whether the applicant is precluded from claiming the disputed in-home assessment on account of his failure to first submit a treatment plan for this expense. I turn to that issue next.

The applicant incurred the cost of an examination before submitting it in a treatment plan

- [13] Section 38(2) of the *Schedule* provides that an insurer is not liable to pay an expense in respect of a medical or rehabilitation benefit or an assessment or examination that was incurred before the insured person submits a treatment and assessment plan, except in certain limited circumstances. The disputed in-home assessment is an expense in respect of a medical benefit. None of the limited exceptions to the requirement in s. 38(2) apply in this case.
- [14] The respondent submits that the in-home assessment was claimed in a treatment plan (OCF-18) dated September 12, 2019 but not submitted through the Health Claims for Auto Insurance (HCAI) system until October 29, 2019. The OCF-18 tendered by the respondent establishes these dates to be correct. The evidence shows that the submission date on HCAI was several weeks after the preparation of the treatment plan. On September 16, 2019, well before the HCAI

submission date, Jag Dhirayain, an occupational therapist, conducted an in-home assessment with the applicant. This is evidenced by the cover page of his assessment report, tendered by the respondent.

- [15] Again, the applicant has failed to file submissions with respect to this second preliminary issue.
- [16] Thus, the record before me clearly establishes that the disputed in-home assessment was incurred on September 19, 2019 before it was submitted to the respondent in a treatment plan on October 29, 2019. As such, under s. 38 of the *Schedule*, the respondent is not liable to pay this expense.

Conclusion

- [17] The applicant is barred from proceeding with his application before the Tribunal as he failed to attend two insurer's examinations that were properly requested by the insurer under s. 44 of the *Schedule*. The disputed in-home occupational therapy assessment would not have been payable in any event, as the cost of the assessment was incurred before the treatment plan was submitted.
- [18] The respondent has made additional submissions that the applicant's claim for an income replacement benefit should be barred because the applicant failed to comply with its requests for information under s. 33 of the *Schedule*. I have limited my analysis to the issues set out in Member Kaur's November 17, 2022 order and have not engaged in an analysis of the s. 33 issues. Given my conclusions on the s. 55 and s. 38 issues, an analysis of s. 33 is unnecessary.
- [19] As my determinations on the preliminary issues entirely dispose of the application, there is no need for a full hearing on the merits.
- [20] The application is dismissed.

COSTS

- [21] Rule 19 of the Tribunal's *Common Rules of Practice and Procedure* provide that a party may seek costs where it alleges that another party has engaged in conduct that is unreasonable, frivolous, vexatious, or in bad faith.
- [22] Rule 19.5 provides that in deciding whether to order costs and the amount of costs to be ordered, the Tribunal shall consider all relevant factors including: the seriousness of the misconduct; whether the conduct was in breach of a direction or order issued by the Tribunal; whether or not a party's behaviour interfered with the Tribunal's ability to carry out a fair, efficient, and effective process; prejudice

to other parties; and the potential impact an order for costs would have on individuals accessing the Tribunal system. Costs are limited to \$1000.00 for each full day of attendance at a motion, case conference or a hearing.

- [23] The respondent seeks costs in the amount of \$1,200.00 for the preliminary issue hearing on the grounds that the applicant has frivolously and unreasonably advanced a claim without merit, resulting in clear and significant prejudice to the respondent.
- [24] I find that the respondent has failed to establish a basis for a costs award. I fail to see the applicant's decision to bring an application for dispute resolution as serious misconduct that is vexatious or unreasonable. While I accept that the respondent has incurred expenses in defending this application before the Tribunal to date, given that the outcome of this preliminary issue hearing is a full dismissal of the application without a full hearing, I am not persuaded that the respondent has suffered any undue or excessive prejudice.
- [25] The applicant's failure to provide submissions on the preliminary issues does not rise to the level of frivolous conduct captured by Rule 19. If the applicant's lack of submissions on the preliminary issues is a result of him abandoning his application or acquiescing to the respondent's position after the case conference, I acknowledge that he might have saved the respondent and the Tribunal time and expense by withdrawing his application in full before the respondent's submissions were due. However, in the absence of conclusive evidence of unreasonable conduct, I decline to order costs.

ORDER

- [26] The application is dismissed. No hearing is required to consider the merits of the dispute.
- [27] The Tribunal file will be closed. The Tribunal shall vacate any date that has been scheduled for a substantive issue hearing.

Released: January 9, 2023



**Theresa McGee
Vice-Chair**