



Citation: Kydd v. Aviva Insurance, 2023 ONLAT 21-015030/AABS

Licence Appeal Tribunal File Number: 21-015030/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:

Jamie Kydd

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: Mary Henein Thorn

APPEARANCES:

For the Applicant: Jamie Kydd, Applicant (Self-Represented)

For the Respondent: Almeda Lucas, Litigation Specialist
Nathalie Rosenthal, Counsel
Brian Yung, Counsel
Jordan Hochman, Articling Student

Court Reporter: Guido Riccioni

Heard by Videoconference: August 22 & 23, 2023

OVERVIEW

- [1] Jamie Kydd, the applicant, was involved in an automobile accident on March 19, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The applicant was denied benefits by the respondent, Aviva Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [2] On February 22, 2023 the day of the hearing, as applicant’s counsel was unwell. Vice Chair Lester adjourned the hearing with a notice to the applicant that “...this adjournment request is the applicant’s last opportunity for a hearing.” The hearing was to be scheduled within 30 days of the adjournment order.
- [3] Mr. Rotondo sent an email on February 22, 2023 to the Tribunal with notification that effective immediately he will no longer be acting on behalf of Mr. Kydd.
- [4] On April 11, 2023 all parties were sent out a notice of the new hearing date scheduled for August 22, 2023.
- [5] On August 9, 2023, the applicant filed a request to adjourn the 2-day videoconference hearing scheduled to begin on August 22, 2023. The adjournment was denied.
- [6] All parties attended the hearing on August 22, 2023. At the start of the hearing, the applicant expressed that he would like an adjournment as he was unprepared to represent himself and was unable to secure counsel. The applicant was advised that the adjournment request was denied.

PROCEDURAL ISSUE

- [7] At the start of the hearing the applicant advised the Tribunal that he was self-represented and was unable to retain counsel. Mr. Kydd also noted that he sent several messages to the Tribunal requesting a further adjournment before today’s hearing and he had not heard back from the Tribunal. He submitted that he was unprepared to represent himself and speak to the issues in dispute, and an adjournment would allow him time to seek legal counsel. I advised Mr. Kydd that the file was now 622 days old and that a previous adjudicator had ruled no further adjournments would be granted. Further, according to rule 16.2 of the *Licence Appeal Tribunal Rules*, which took effect August 21, 2023, adjournments would be granted only in “compelling circumstances where the party did not and could not have known of the circumstances giving rise to the adjournment

request prior to the event.” Mr. Kydd has not presented to me a compelling reason within rule 16.2 to warrant a further adjournment. A hearing notice was sent to him on April 4, 2023. I find he had sufficient notice and time for him to have secured counsel. I advised the applicant the hearing would proceed today.

- [8] To assist Mr. Kydd, the test for each issue was read out several times and I granted a brief recess of two hours to review the respondent’s hearing brief and prepare for the hearing.

PRELIMINARY ISSUES

- [9] The respondent filed a Notice of Motion on May 10, 2023, requesting to add preliminary issues regarding the applicant’s failure to attend insurer’s examinations under section 44 of the *Schedule*, and the applicant’s non-compliance with section 33 for outstanding productions that were ordered by the Tribunal in the Case Conference Report and Order. It was ordered the preliminary issues were to be heard at today’s hearing.
- [10] The preliminary issues to be decided are:
- i. Is the applicant barred from proceeding with his claim for income replacement benefits and attendant care benefits as he failed to attend the section 44 assessor appointments?
 - ii. Is the applicant barred from proceeding to a hearing for income replacement benefits because the applicant failed to respond to the respondent’s section 33 request for information?

Result:

- [11] The applicant is not barred from proceeding with his claim for attendant care benefits (“ACB”) and income replacement benefits (“IRB”).
- [12] Mr. Kydd spoke to the preliminary issue briefly while breaking to request an adjournment throughout his testimony. His submissions were that he had no awareness of the section 44 insurer’s examinations, and while a car pulled up to take him, he did not attend due to the lack of notice.
- [13] The respondent tendered two letters noting the applicant’s failure to attend two scheduled examinations on February 24, 2022 and March 7, 2022 relating to his claims for an ACB and IRB. However, and more importantly, the respondent has not submitted into evidence the actual notices of examination sent to the applicant indicating the appointment time, date, place, etc. for my review. In order

for the respondent to seek the severe remedy of barring an applicant like Mr. Kydd from having his accident benefits claims heard by this Tribunal, the respondent must prove that it provided notices of examination to Mr. Kydd in compliance with section 44(5) of the *Schedule*. Further, section 44(6) of the *Schedule* requires that such notice be given to the applicant a minimum of five business days prior to the date of the examination.

- [14] I find the respondent has not provided me with sufficient evidence that the applicant was properly notified of the appointments, and therefore, the applicant is not barred from pursuing the income replacement or attendant care benefits at this hearing.

SUBSTANTIVE ISSUES:

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

- i. Is the applicant entitled to an IRB in the amount of \$400.00 per week from April 13, 2018, to date?
- ii. Is the applicant entitled to the treatment plans/OCF-18 ("plan") proposed by Om Sai Physiotherapy, as follows:
 1. \$2,191.43 for chiropractic services in a plan submitted on November 19, 2018; and
 2. \$2,907.50 for chiropractic services in a plan submitted on September 23, 2020?
- iii. Is the applicant entitled to the treatment, examinations, and medical goods proposed by Paramount Medical Assessments, as follows:
 1. \$2,892.98 for psychological services in a plan submitted on July 23, 2019;
 2. \$2,145.08 for psychological services in a plan submitted on August 7, 2019;
 3. \$289.98 for assistive devices in a plan submitted on July 31, 2018;
 4. \$1,996.00 for a chronic pain assessment in a plan submitted on January 7, 2020;
 5. \$1,998.32 for an attendant care assessment in a plan submitted on September 5, 2019;

6. \$4,421.20 for assistive devices in a plan submitted on September 30, 2020; and
 7. \$1,392.37 for assistive devices in a plan submitted on February 2, 2022?
- iv. Is the applicant entitled to ACBs in the amount of \$1,252.61 per month from October 6, 2020, to date and ongoing?
 - v. 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?
 - vi. Is the applicant entitled to interest on any overdue payment of benefits?

ANALYSIS

- [16] The applicant testified that he pays his insurance premium, and therefore, he should be entitled to the disputed benefits. The applicant did not make any further submissions or provide documentary evidence to support his entitlement to the disputed issues. The only testimony entered into evidence was provided by the applicant.

The applicant is not entitled to any of the treatment and assessment plans in dispute (issues ii and iii)

- [17] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay medical benefits to, or on behalf of, an applicant so long as the applicant sustains an impairment as a result of an accident and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.
- [18] In order to be entitled to payment for a treatment and assessment plan under the *Schedule*, the onus is on an applicant to demonstrate that it is reasonable and necessary as a result of the accident. To be successful, an applicant should establish that the treatment goals are reasonable, that the cost of the goals are being met to a reasonable degree, and that the overall cost of achieving the goals is reasonable.
- [19] As for assessments, they are, by their nature, speculative. The purpose of an assessment is to determine if a condition exists. Nonetheless, the applicant still bears the onus of establishing on a balance of probabilities that an assessment is reasonable and necessary. To do so, an applicant must point to objective evidence that there are grounds to suspect they have the condition for which the assessment is sought.

[20] As noted above, the only evidence from Mr. Kydd is set out in paragraph 13, above. His oral testimony does not assist me in determining whether any of the treatment and assessment plans are reasonable and necessary.

[21] I find the applicant has not met his burden of proving on a balance of probabilities that he is entitled to any of the treatment and assessment plans in dispute.

The applicant is not entitled to an IRB (issue i)

[22] Section 5(1) of the *Schedule* states that an insurer is liable to pay an IRB to insured person where the insured person has, within 104 weeks of the accident, sustained a substantial inability to complete the essential tasks of their employment or self-employment, or if they were not employed, the insured person was employed for at least 26 of the prior 52 weeks before the accident, or was receiving EI benefits and suffered the substantial inability to perform the essential tasks of their employment in which they spent the most time during the 52 weeks prior to the accident.

[23] For a post-104 week IRB, section 6 of the *Schedule* makes the eligibility test stricter: whether, as a result of the accident, the insured person has a complete inability to engage in any employment for which they are reasonably suitable, based on their education, experience, or training.

[24] Likewise, Mr. Kydd's oral testimony does not assist in his meeting his burden of proving that he is entitled to an IRB.

[25] I find the applicant has not met his burden of proving on a balance of probabilities that he is entitled to an IRB.

The applicant is not entitled to an ACB (issue iv)

[26] Sections 42(1) and (2) of the *Schedule* set out the requirements to apply for an ACB and identify the documents required to apply for the ACB. Section 42(1) states the application for an ACB must be in the form of and contain the information required to be provided in a document called an Assessment of Attendant Care Needs (Form 1). The Form 1 must be prepared and submitted to the respondent by an occupational therapist or a registered nurse. Section 19(2) states that the amount of an attendant care benefit is determined in accordance with the version of the Form 1 that is required to be submitted under s. 42. In all cases, the onus is on the applicant to establish entitlement to ACBs on a balance of probabilities.

[27] Further, section 19(1) of the *Schedule* states that attendant care benefits shall pay for all reasonable and necessary expenses that are incurred by or on behalf

of an insured as a result of an accident for services provided by an aide, attendant or long-term care facility.

[28] Section 3(7)(c) of the *Schedule* provides further guidance on when an expense is “incurred”:

- i. the insured person has received the goods or services to which the expense relates;
- ii. the insured person has paid the expense, has promised to pay the expense, or is otherwise legally obligated to pay the expense; and,
- iii. the person who provided the goods or services a) did so in the course of the employment, occupation, or profession in which he or she would ordinarily have been engaged, but for the accident, or b) sustained an economic loss as a result of providing the goods or services to the insured person.

[29] As it is the applicant's burden to demonstrate entitlement to the benefits in dispute, and where the Tribunal was not presented with evidence from the applicant in support of his application, it follows that the applicant cannot be successful with his claim. I find that the applicant is not entitled to any of the benefits claimed.

[30] Mr. Kydd's oral testimony does not assist in his meeting his burden of proving that he is entitled to an ACB.

[31] I find the applicant has not met his burden of proving on a balance of probabilities that he is entitled to an ACB.

The applicant is not entitled to interest or an award (issues v and vi)

[32] Given my above findings, I conclude that no benefits are overdue and therefore no interest is payable. Further, I conclude that the respondent did not unreasonably delay or withhold payment of benefits to Mr. Kydd and therefore, no award is payable.

CONCLUSION AND ORDER:

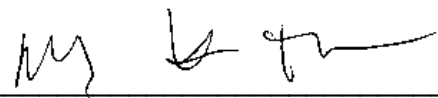
[33] The applicant is not entitled to an IRB.

[34] The applicant is not entitled to any of the treatment, examinations, and medical goods proposed by Paramount Medical Assessments.

[35] The applicant is not entitled to an ACB.

[36] Since no benefits are payable, no award or interest is due.

Released: November 16, 2023



Mary Henein Thorn
Adjudicator