Citation: Kaur v. Allstate Insurance Company of Canada, 2024 ONLAT 23-010726/AABS-PI

Licence Appeal Tribunal File Number: 23-010726/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:

Gurleen Kaur

Applicant

and

Allstate Insurance Company of Canada

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

VICE-CHAIR: **Craig Mazerolle**

APPEARANCES:

For the Applicant: Darcie Sherman, Counsel

For the Respondent: Sonya Katrycz, Counsel

Heard: **By Way of Written Submissions**

OVERVIEW

[1] Gurleen Kaur ("the applicant"), was involved in an automobile accident on September 8, 2021 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 Allstate Insurance Company of Canada ("the respondent") and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("the Tribunal") for resolution of the dispute.

[2] A videoconference hearing is scheduled for October 2024. The substantive issues in dispute include: a determination of the *Minor Injury Guideline* ("MIG") and requests for an income replacement benefit ("IRB"), an attendant care benefit ("ACB"), medical benefits, an award, and interest.

PRELIMINARY ISSUE IN DISPUTE

[3] The preliminary issue to be decided is:

i. Is the applicant barred from proceeding to a hearing for all of the benefits claimed in this application because the applicant failed to attend an insurer's examination under s. 44 of the *Schedule*?

RESULT

[4] The applicant is barred from proceeding to a hearing for all of the benefits claimed in this application, pursuant to s. 55(1) of the *Schedule*.

PAGE LIMITS

[5] The case conference report and order (released April 3, 2024) set out the following limits for the preliminary issue written submissions: 10 pages for the respondent's initial submissions; 10 pages for the applicant's submissions; and 5 pages for the respondent's reply. No subsequent order amended these limits.

[6] I find that only the respondent's reply complied with the limits set out at the case conference. As such, I did not review either the respondent's initial submissions or the applicant's submissions once the party had reached their 10-page limit.

ANALYSIS

[7] I find the applicant did not attend a reasonably necessary GP insurer's examination ("IE") that was scheduled in compliance with the *Schedule*. This

breach of s. 44(1) means that the applicant is barred from proceeding to a hearing for all of the benefits claimed in this application, pursuant to s. 55(1) of the *Schedule*.

Parties' Positions

[8] The respondent submits that the applicant failed to attend IEs meant to assess her entitlement to an IRB, as well as her removal from the MIG. Several examinations were rescheduled multiple times, and yet the applicant did not attend. The applicant has not attended any IEs, and—according to the respondent—this inability to assess her condition in a timely manner has caused irreparable prejudice to its ability to participate in the upcoming hearing.

[9] The applicant claims she is not refusing to attend IEs, and there are reasonable explanations for the ones she missed. Specifically, she did not have legal representation between May 2022 and March 2023. Further, it is "conceivable" that she did not receive the notices for the GP IE she missed in March 2022. The applicant also challenges the respondent's claim of prejudice, as she attempted to work with the respondent to remedy its concerns. For instance, she moved to Prince Edward Island in 2023, so she proposed virtual assessments to accommodate the move. Finally, as there remains about $2,000.00 worth of funding under the MIG, the applicant highlights s. 44(3), which states that IEs may not be used to assess entitlement to benefits payable within the MIG.

Relevant Sections of the Schedule

[10] Section 44(1) of the *Schedule* defines an insurer's ability to require an insured person to attend an IE as follows [emphasis added]:

> For the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made***, but not more often than is reasonably necessary***, an insurer may require an insured person to be examined under this section by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation.

[11] Section 44(3)(a) states that that s. 44(1) does not apply with respect to "a benefit payable in accordance with the Minor Injury Guideline".

[12] The requirements for a compliant IE notice are detailed in s. 44(5), e.g., "medical and any other reasons for the examination", the location and time, etc.

[13] Section 55(1) disallows an insured person from proceeding with an application at the Tribunal if they did not attend a properly scheduled IE. However, s. 55(2) provides discretion to allow non-compliant applicants to continue with their applications.

[14] In short, an insured person has a duty to participate in each IE that is reasonably necessary and for which there is a compliant notice. I find the applicant did not comply with her obligation under s. 44(1), so her application may not proceed.

Applicant Did Not Attend a Reasonably Necessary IE

[15] First, I note that the applicant did not challenge the respondent's compliance with s. 44(5). I find no issue with the first IE notice sent on March 16, 2022—the notice that asked the applicant to attend an IE with a GP on March 31, 2022 to determine her entitlement to an IRB and funding for treatment outside the MIG. This GP IE will be the focus of my analysis below.

[16] Second, there is no dispute between the parties that the applicant has not attended any of the IEs described in the respondent's submissions, including the March 31, 2022 IE. There may be a dispute between the parties over the applicant's attempts to remedy this non-compliance (e.g., proposing virtual assessments to accommodate her move). However, I do not find this dispute over the applicant's efforts to remedy the breach is relevant to my findings.

[17] Third, I find the missed GP assessment was "reasonably necessary" for assessing entitlement to an IRB and funding for treatment outside the MIG. As stated in the March 16, 2022 notice, the applicant provided the respondent with treatment plans that detailed a series of physical, neurological, and psychological impairments. Despite these records, the respondent determined that the applicant had sustained "predominantly soft tissue minor injuries" that could be treated within the MIG. It also found there was "no compelling medical evidence" to support her entitlement to an IRB.

[18] With this discrepancy, it was reasonably necessary for the respondent to seek its own assessment of the applicant's condition. Further, considering the scope of the impairments listed in the treatment plans, I find there was a reasonable nexus between having a GP assess the applicant and the benefits at issue. That is, the GP would be able to assess the applicant in a holistic manner that could account for physical, neurological, and psychological complaints. There had also been no IEs completed, so the request was not excessive. Taken together, I find the requested GP IE was "reasonably necessary".

[19] In finding she did not attend a reasonably necessary IE that was requested through a compliant notice, I then turn to the applicant's explanations for the failed attendance. I find these explanations are not compelling.

[20] To start, I do not see how the applicant's later lack of legal representation impacted her ability to attend the IE in March 2022. Further, and as a general point, I also fail to see how an insured person's obligation to attend an IE is impacted by whether they have legal representation. This obligation is a mandatory requirement under the *Schedule*, regardless of legal representation.

[21] Then, without evidence to support the applicant's submission that she did not receive the March 16, 2022 notice, I find this argument cannot stand. Section 64(18) of the *Schedule* states: "In the absence of evidence to the contrary, a person is deemed to receive anything delivered by ordinary mail… on the fifth business day after the day the document is mailed". Without "evidence to the contrary", I find the applicant is deemed to have received the March 16, 2022 notice. In turn, I conclude she was aware of her obligation to attend this GP IE.

[22] As noted above, the applicant also highlights s. 44(3) of the *Schedule* in support of her position. Beyond the fact that her submissions do not provide a compelling explanation for why this section applies to the preliminary issue, I conclude that none of the benefits relate to "a benefit payable in accordance" with the MIG. Even if there is funding left under the MIG, none of the benefits that were the subject of the GP IE appear to have been "payable in accordance" with the MIG. Put another way, the applicant has not demonstrated that she was seeking funding for benefits that form part of the MIG's treatment regime. In fact, for the ACB, this benefit is only payable if an insured person is outside of the MIG.

[23] The applicant also highlighted what she believed to be "erroneous statements" in the respondent's preliminary issue submissions. According to the applicant, these statements provide "clear evidence of the Respondent's bias" against her. I find there is no rational connection between this submission and the applicant's non-attendance at the GP IE.

[24] Finally, s. 55(2) grants the Tribunal the discretion to allow an application to proceed, despite an insured person's non-compliance with s. 44(1). Neither party made submissions on this section, so I find it is not appropriate to engage this discretionary power. I would also note that I accept the respondent's position that the applicant's failure to attend any IE has caused it irreparable prejudice. It was unable to assess the applicant's pre-104 week condition for the purposes of the "substantial inability" standard. It also lost the opportunity to assess the applicant in and around the same time when some of the disputed treatment plans were

submitted. This inability to assess the benefits in a contemporaneous fashion means the respondent is prejudiced in both its ability to adjust the claim, as well as its ability to present a fulsome case at the upcoming hearing.

[25] Taken together, the respondent has satisfied me that the applicant failed to attend a reasonably necessary IE that is scheduled with a compliant notice. For this reason, the applicant is barred from proceeding to a hearing for all of the benefits claimed in this application, pursuant to s. 55(1) of the *Schedule*.

ORDER

[26] Pursuant to s. 55(1) of the *Schedule*, the applicant is barred from proceeding to a hearing for all of the benefits claimed in this application.

[27] The Tribunal shall vacate the videoconference hearing set to start on October 28, 2024.

[28] The applicant's file is closed with the Tribunal.

Released: July 16, 2024

Craig Mazerolle
Vice-Chair