

**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: **Subanathini Muthulingam vs. Aviva Insurance Canada, 2019 ONLAT 18-009779/AABS**

**Date: July 26, 2019
File Number: 18-009779/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:

Subanathini Muthulingam

Appellant(s)

and

Aviva Insurance Canada

Respondent

DECISION AND ORDER

ADJUDICATOR: Kate Grieves

APPEARANCES:

For the Appellant: Subanathini Muthulingam, Applicant
Michael Hoffman, Counsel
Ha Vu, Accident Benefits Coordinator

For the Respondent: Harkirat Shardra, Adjuster
Geoffrey Keating, Counsel

Court Reporter: Greg Vaughan

HEARD: In-Person: July 22, 2019

OVERVIEW

- [1] The applicant was involved in an automobile accident on October 8, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (the “Schedule”)*. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [2] The parties participated in a case conference and a hearing was scheduled for July 22, 23, 24 and 25, 2019.
- [3] On June 28, 2019 the respondent brought a motion requesting a stay of proceeding because the applicant had not attended a s. 44 assessment. Adjudicator Maedel conducted a teleconference on July 18, 2019 and ordered the parties to address the motion at the hearing on July 22, 2019.

MOTION

- [4] The respondent filed a notice of motion seeking the following relief:
 - i. An order staying the application until the applicant attends a psychological Insurer’s examination to address the income replacement benefits (“IRBs”) in dispute.

RELIEF

- [5] At the hearing I delivered my decision and reasons orally and advised that I would provide supplemental reasons in writing with my order. I ordered as follows:
 - i. The application is stayed pursuant to s. 55(1) of the *Schedule* until the applicant attends the psychological assessment to address the income replacement benefits.

ANALYSIS

- [6] The respondent conducted three insurer’s examinations with respect to the IRB in October 2016—a psychological assessment, an orthopedic assessment and a functional abilities evaluation. Income replacement benefits were stopped on November 7, 2016 in accordance with these reports.
- [7] On January 10, 2019, the applicant submitted to the respondent new medical records including three new reports and clinical notes and records from a pain clinic the applicant was attending. There are references in these records to psychological impairments and recommendations for treatment.
- [8] The parties participated in a case conference on February 6, 2019. The adjudicator ordered productions to be exchanged by April 5, 2019, including numerous further medical records.

- [9] Upon receipt of the new documents in January 2019, given its ongoing obligation to continue to adjust the file and consider new documentation, the respondent determined that further assessments were required. The respondent decided it was prudent to wait to conduct the assessments until after April 5, 2019 -- the deadline for productions ordered by the Tribunal. The respondent considered whether paper reviews were possible, but the vendor advised that was not feasible and in-person assessments were required.
- [10] The respondent scheduled two new assessments: a psychiatry assessment on April 23, 2019 and a psychological assessment on May 1, 2019. The applicant attended the psychiatry assessment but refused to attend the psychological assessment.
- [11] I am persuaded by the Divisional Court's decision in *Certas Direct Insurance Co. v. Gonsalves* [2011] O.J. No. 3290. This decision dealt with an insurer's request for a stay of a FSCO arbitration. With respect to procedural fairness Justice Lederer stated at paragraph 8:

"Fundamental to any administrative process, is the requirement that it be fair. At its most basic, procedural fairness requires that a party have an opportunity to be heard and that it be able to respond to the position taken against it.

In the circumstances of this case, if this arbitration is allowed to proceed in the absence of a further orthopedic examination by a doctor of the insurer's choosing, the insurer will have no practical ability to respond to the opinions with which it was provided thirty-one days before the commencement of the arbitration.

In our view, the insurer would be denied the right to make a full response and would not be heard as the dictates of procedural fairness require. It is not enough to say that the delivery of these reports was made within the permitted time frame (in this case one day before the last day the Code, clause 39.1 says is acceptable) when, as the arbitrator found, they provide new evidence supporting a new position. This is trial by ambush. This is not overcome, as counsel for Denise Gonsalves suggested by saying that we are adjusting a claim, rather than resolving a dispute between the insurer and the insured.

In understanding our concern, it is helpful to consider what is likely to happen in the absence of the adjournment. The arbitration will proceed. The most recent orthopedic reports will be presented. The insurer will have nothing current with which to respond."

- [12] The respondent submitted that if it were forced to proceed to the hearing without the psychological assessment, it would have no practical ability to fairly respond to the

updated records provided by the Applicant in 2019, given that the previous reports are almost three years old.

- [13] I find that the respondent has been denied procedural fairness if the assessment is not completed. If the applicant was allowed to proceed to the hearing without completing the psychological assessment, the respondent will have no practical ability to respond to the opinions it was provided shortly before the case conference.
- [14] If the proceeding continued, the applicant would rely on its recent reports and medical evidence, and the respondent would have nothing current with which to respond, except its almost three-year-old reports.
- [15] The applicant relied on *17-005291/AABS v Travelers Canada*. The Tribunal set out a series of factors to consider when determining if the requested examinations were reasonably necessary. The criteria to consider are:
- i. the timing of the insurer's request;
 - ii. the possible prejudice to both sides;
 - iii. the number and nature of the previous insurer's examinations;
 - iv. the nature of the examination(s) being requested;
 - v. whether there are any new issues being raised in the applicant's claim that require evaluation; and
 - vi. whether there is a reasonable nexus between the examination requested and the applicant's injuries.
- [16] I find that there is a reasonable nexus between the examination requested and the applicant's injuries. The requested assessment is just one psychological assessment – it is not a battery of new testing. The timing is reasonable – the prior assessment reports are from 2016. The request for a new assessment was prompted by the recent submission of new medical documentation. The respondent is attempting to fulfill its ongoing obligation to assess the applicant's condition based on this new information.
- [17] I also distinguish the subject case from one relied upon by the applicant: *17-004109 v Intact*. The applicant in that case had already participated in 13 assessments. There was evidence that the applicant would have been negatively affected by participating in further assessments and had threatened suicide during a prior assessment.

CONCLUSION

[18] I find that the proposed assessment is reasonably necessary in the circumstances. Without the proposed assessment the respondent would be denied the right to make a full response to the case against it.

[19] The application is stayed until the applicant attends the psychological assessment to address the income replacement benefits.

Released: July 26, 2019



**Kate Grieves
Adjudicator**