

**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**

**Tribunal File Number: 17-006475/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:

**M. M.**

**Applicant**

And

**Aviva Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR: Brian Norris**

**APPEARANCES:**

For the Applicant: Olga Poznyakova, Paralegal

For the Respondent: Ramandeep Kaur Pandher, Counsel

**HEARD: In writing on August 7, 2018**

## OVERVIEW

- [1] The applicant was injured in an automobile accident on April 14, 2017 and sought benefits from the respondent pursuant to O. Reg. 34/10: Statutory Accident Benefits Schedule – Effective September 1, 2010 (the “*Schedule*”). The respondent refused to pay for certain benefits and the applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of this dispute.
- [2] The respondent has raised two preliminary issues in response to the application to the Tribunal which are the subject of this hearing.

## ISSUES

- [3] The preliminary issues in dispute are:
  - 1) Is the applicant statute barred from proceeding with the entire LAT application or some of the issues in dispute as a result of the applicant’s failure to comply with the respondent’s request pursuant to section 33 of the *Schedule*?
  - 2) Is the applicant statute barred from proceeding with the LAT application in its entirety or some of the issues in dispute as a result of the applicant’s failure to attend an insurer’s examination pursuant to sections 44 and 55 of the *Schedule*?

## RESULT

- [4] With respect to the first issue, failure to comply with section 33 does not preclude the applicant from disputing the respondent’s refusal to pay for benefits before the Tribunal. Regardless, the applicant complied with the respondent’s reasonable section 33 requests on August 24, 2018.
- [5] With respect to the second issue, the applicant is not precluded from disputing the respondent’s refusal to pay income replacement benefits (“IRBs”) because the notice of insurer’s examination is not in compliance with the *Schedule*.
- [6] Neither party is entitled to costs as no party acted unreasonably, frivolously, vexatiously, or in bad faith during the proceeding.

## BACKGROUND

- [7] The applicant was injured in an accident on April 14, 2017 and submitted an application for accident benefits (“OCF-1”) and disability certificate (“OCF-3”) to the respondent on May 19, 2017. A revised OCF-1 was provided by the applicant on May 30, 2017.

- [8] On June 1, 2017, the respondent acknowledged receipt of the application and OCF-3 and requested additional documents with respect to the applicant's claim for accident benefits.
- [9] The applicant provided the respondent with an employer's confirmation form ("OCF-2") on July 5, 2017. On July 31, 2017, the respondent advised the applicant that the OCF-2 was not dated and that a signed and dated OCF-2 was required. The respondent did not request any other documents on July 31, 2017. The applicant sent the respondent a signed and dated OCF-2 on August 23, 2017 by fax.
- [10] After receipt of the signed and dated OCF-2, the respondent requested additional information from the applicant on September 28, 2017. The respondent also requested the applicant attend an examination under oath ("EUO") on November 3, 2017, which was rescheduled and occurred on November 27, 2017. The applicant satisfied the September 28, 2017 request for additional information over the next few months and by no later than March 2, 2018.
- [11] The respondent claims the applicant is statute-barred from disputing entitlement to the disputed benefits forming the substantive issues in dispute as a result of 1) the applicant's failure to attend the section 44 insurer's examination on April 3, 2018 and 2) the applicant's failure to produce information the respondent requested pursuant to section 33. The respondent submits that, in the event the applicant is able to proceed with the application, the applicant is not entitled to IRBs for the period from May 20, 2017 to March 2, 2018 as a result of the applicant's failure to provide information requested under section 33 and pursuant to section 33(6).

## **THE SECTION 33 DISPUTE**

- [12] Listed as an issue in dispute is whether the applicant is statute-barred from adjudicating the respondent's refusal to pay the substantive benefits as a result of the applicant's failure to provide information requested pursuant to section 33. However, failure to provide information requested under section 33 is not a barrier to disputing entitlement to a benefit provided by section 55.
- [13] Section 33(1) states that, within 10 business days, an applicant shall respond to an insurer's request for information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit. Section 33(6) provides the consequence for failing to respond to a section 33 request, which is the respondent may suspend the benefit until the applicant complies with the request.

[14] According to submissions and the *Schedule*, the true issue in dispute is whether the respondent has properly suspended the benefit pursuant to section 33(6).

[15] The respondent holds the position that the applicant has failed to provide information requested pursuant to section 33 and is barred from claiming entitlement to an IRB during the period from May 20, 2017 to March 2, 2018 as a result. The applicant claims to have complied with the section 33 request and submits that regardless of the applicant's compliance with the request, the respondent cannot rely on the remedy provided by section 33(6) because the respondent did not advise that the request for information was being made pursuant to section 33. The applicant submits the hearing should proceed.

[16] I have reviewed the *Schedule* and find that section 33 does not require the respondent to expressly state a request is being made pursuant to the section.

[17] At issue is whether the respondent's request was reasonably required to determine the applicant's entitlement to an IRB. For the following reasons, I find the respondent's requests go beyond those which are reasonably required to determine the applicant's entitlement to an IRB. As a result of the respondent's overreach and for the reasons that follow, I find the applicant is compliant with section 33 as of August 24, 2017.

[18] In the letter dated June 1, 2017, the respondent requested seven documents:

- 1) A completed employer's confirmation form (OCF-2);
- 2) Clinical notes and records from Mount Sinai from April 14, 2017 to present;
- 3) A decoded OHIP summary;
- 4) Notice of assessment from 2016;
- 5) T4's from 2016 for all jobs worked;
- 6) 4 weeks of pre-accident paystubs and/or 52 weeks of pre-accident paystubs; and
- 7) Any post-accident paystubs.

[19] Of the documents requested, I find that the OCF-2, 4 weeks of pre-accident paystubs or 52 weeks of pre-accident paystubs, and any post-accident paystubs are reasonably required to determine the applicant's eligibility for IRBs. The remaining items, albeit helpful in determining the applicant's

entitlement to medical and rehabilitation benefits and on-going entitlement to IRBs, are not required to initially determine the applicant's entitlement to IRBs.

- [20] It appears the respondent came to the same conclusion by July 31, 2017, when it acknowledged receipt of the OCF-2 but stated it was incomplete because it was not dated. This is the only reason the respondent listed for not paying the benefit. I find the applicant complied with the respondent's reasonable section 33 requests when the applicant provided a dated OCF-2 by fax shortly before 6:00 p.m. on August 23, 2017, deeming it received on August 24, 2017, pursuant to section 64(20).
- [21] In addition to the positions outlined above, the applicant submits the respondent failed to comply with section 36(4) by not responding to the applicant's OCF-3 within 10 business days of receipt. I disagree. The OCF-3 was submitted on May 19, 2017 and was responded to on June 1<sup>st</sup>, 2017, which is within 10 business days and in accordance with the schedule.
- [22] I make no finding on the applicant's entitlement to IRBs because the issue is not properly before me. I leave the issue with the parties to resolve and, if necessary, the hearing on the substantive issues.

#### **SECTION 55 AND THE RESPONDENT'S SECTION 44 NOTICE**

- [23] The respondent submits, pursuant to section 55, the applicant is not entitled to dispute the respondent's refusal to pay the benefit at the Tribunal because the applicant did not attend a properly scheduled section 44 assessment. The applicant submits the notice is not proper because it is not clear whether the applicant is required to attend the assessment. The applicant submits the respondent is not entitled to subject the applicant to a section 44 assessment until a proper notice is provided and the benefit is paid to-date.
- [24] Section 55(2) provides that an applicant may not commence an application for dispute resolution if the applicant has failed to attend a section 44 insurer's examination that complies with the requirements of the *Schedule*, including notice. Section 44, among other things, provides that notice of an insurer's examination must include whether attendance is required or not.
- [25] The issue before me is whether I find the March 27, 2018 notice of an insurer's examination ("the notice") is compliant with the *Schedule*. I find the notice is not compliant with the *Schedule* because it is not clear whether the applicant's attendance is required at the insurer's examination.
- [26] Paragraph 3 of the notice states the applicant's attendance is not required. It reads:

“The assessors will conduct a file review of existing documents, their original reports and the new documents as noted above. As such your attendance is not required.”

- [27] The respondent submits that it was clear the applicant’s attendance was required because the type of examination was listed as “In-Person Addendum”. I disagree and find paragraph 3 clearly states that attendance is not required and that there is no other information so clear as to override this part of the notice.

## **COSTS**

- [28] In responding submissions, the applicant requested costs but did not provide any reasons for the request. The respondent did not address this in reply submissions.

- [29] Pursuant to Rule 19 of the Tribunal’s *Common Rules of Practice and Procedure*, costs may be awarded in the event that a party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith. I find no evidence of such behaviour by either party and dismiss the applicant’s request.

## **CONCLUSION**

- [30] Failure to comply with a section 33 request does not preclude the applicant from disputing entitlement to IRBs.
- [31] Regardless, the applicant satisfied the respondent’s reasonable section 33 requests on August 24, 2017.
- [32] The March 27, 2018 notice of insurer’s examination is not in compliance with the *Schedule*. The applicant is not required to attend an examination before a compliant notice is provided.
- [33] The applicant is not precluded from disputing the respondent’s refusal to pay IRBs.

**ORDER**

[34] The applicant may proceed with the appeal.

[35] The Tribunal will schedule a case conference as soon as reasonably possible to address the substantive issues in dispute.

**Released: January 10, 2019**

---

**Brian Norris  
Adjudicator**