

**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: 17-007036/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:

D.L.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR:

Jesse A. Boyce

APPEARANCES:

Counsel for the Applicant:

Piera A. Segreto

Counsel for the Respondent:

Jennifer Cosentino

Written Hearing:

April 17, 2018

OVERVIEW

- [1] The applicant, D.L., was injured in an accident while riding his bicycle on October 20, 2016, sustaining injuries to his neck, shoulder, back, elbow and head as a result. He missed time from work as a barber and stylist due to his injuries and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010¹ (Schedule)*.
- [2] Aviva denied the medical benefits and an income replacement benefit (IRB) on the grounds that D.L. did not attend an s. 44 Insurer's Examination (IE) and that the treatment and assessment plans were not reasonable and necessary. D.L. disagreed with Aviva's decision and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal) for resolution of the dispute. The parties participated in a case conference but were unable to resolve the issues, and proceeded to this hearing.

ISSUES TO BE DECIDED

- [3] The following are the issues to be decided, as per the case conference order of Adjudicator Ferguson, dated February 27, 2018:

Preliminary Issue

- i. Is the applicant prevented from filing an appeal in this matter pursuant to s. 55 of the *Schedule* because he failed to attend an insurer's examination (IE) as required under s. 44 of the *Schedule*?

Substantive Issues

- i. Is the applicant entitled to receive a weekly income replacement benefit for the period of October 27, 2016 to date and ongoing?
- ii. What is the amount of weekly income replacement benefit that the applicant is entitled to receive?
- iii. Is the applicant entitled to receive a medical benefit in the amount of \$4,374.90 for occupational therapy, recommended by Functionability Rehabilitation in a treatment plan dated September 29, 2017, denied by the respondent on November 29, 2017?
- iv. Is the applicant entitled to payments for the cost of examinations in the amount of \$1,995.60 for an in-home occupational therapy assessment, recommended by Functionability Rehabilitation in an assessment plan dated August 17, 2017 denied by the respondent on September 13, 2017?

¹ O. Reg. 34/10.

- v. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the Applicant?
- vi. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] On the preliminary issue, I find that D.L. is statute-barred from applying to the Tribunal pursuant to s. 55(1)2 for failing to attend a properly scheduled s. 44 IE.
- [5] As I have found that D.L. is prevented from applying to the Tribunal until such time as he attends the s. 44 IE, I have not embarked on an analysis of the substantive issues in dispute.
- [6] Accordingly, no award or interest is payable.

ANALYSIS

Is D.L. statute-barred from applying to the Tribunal under s. 55?

- [7] Yes. I find that Aviva's request for a s. 44 neurological IE was reasonably necessary in order for it to determine D.L.'s entitlement to an IRB and in-home occupational therapy (OT) treatment. Section 44 indicates that an insurer may require and request an examination to determine if an insured is entitled to a specified benefit. Section 55(1)2 then acts as a bar to the insured in the event of non-attendance at a properly scheduled IE. By requesting the IE, Aviva was within its rights and I find that its decision to have D.L. attend an IE was based not only on the alleged inconsistencies it discovered in the OCF-18's and the work history submitted by D.L., but also on the recommendation of D.L.'s own assessors. Ultimately, D.L. refused to attend and has not provided evidence that Aviva's notice or reasons were not in compliance with the *Schedule*.
- [8] D.L.'s refusal to attend was centred on the belief that an IE for services from the same provider whose assessment was previously denied was unreasonable. In a letter dated December 4, 2017, D.L. questioned the reasonableness of Aviva's IE request and indicated that he would not attend as a result. A second letter, sent ten days later, indicated that D.L. would also not attend the rescheduled IE for the same reason. D.L.'s refusal to attend the IE when his own medical professionals recommended he do so is difficult to justify. Of note: D.L.'s occupational therapist, Kathleen Lawrence, indicated in her Report that there were barriers to D.L.'s recovery and recommended a neurology assessment; this recommendation was supported by D.L.'s family doctor, Dr. Samuel, in his OCF-3 dated November 1, 2017. In my view, these facts, in context with D.L.'s well-documented psychological and emotional struggles in his personal and work life, undermine the argument that the neurological IE was unreasonable or unnecessary.

- [9] Aviva's notice and reasons for the IE also satisfy the requirements outlined in the *Schedule* and the Tribunal's jurisprudence.² For example, Aviva's notice letter of October 23, 2017 indicates that it required an updated OCF-3 from D.L. and that he would be required to attend an IE to assess his IRB entitlement. On November 30, 2017, Aviva provided notice that the IE had been scheduled, on the basis that "there appears to be pre-existing or concurrent medical conditions exists that might affect the patient's care, treatment and prognosis; The type(s) of treatment does not appear consistent with the patient's diagnosis." The Notice letter provided the date and time, the dispute mechanisms available to D.L. and arranged for transportation to the IE. Additionally, Aviva's letter of December 15, 2017, confirming that D.L. would not attend the rescheduled IE, provided unequivocal notice that non-attendance would trigger s. 55(1)2, result in the suspension of D.L.'s IRB entitlement and may prevent him from being able to apply to the Tribunal.
- [10] On these facts, I find Aviva's request and conduct to be reasonable. D.L. was on notice of the potential consequences of his non-compliance and chose not to attend the IE, despite his own medical professionals recommending he do so. Accordingly, I find that he is statute-barred from applying to the Tribunal until such time that he attends the s. 44 IE.
- [11] I note that s. 55(2) permits the Tribunal to allow an insured to apply despite being statute-barred under s. 55(1)2. As I find that D.L.'s reason for non-compliance with Aviva's s. 44 IE request was not reasonable, I decline to exercise the discretion afforded by s. 55(2).

CONCLUSION

- [12] I find that D.L. is statute-barred from applying to the Tribunal, pursuant to s. 55. As I have found that D.L. is prevented from applying to the Tribunal until such time that he attends the s. 44 IE, I have not embarked on an analysis of the substantive issues in dispute. No award or interest is payable.
- [13] The application is dismissed.

Released: June 7, 2018



Jesse A. Boyce, Adjudicator

² See, for e.g., the Tribunal's Reconsideration in *M.B. v. Aviva Insurance Canada*, 2017 CanLII 87160 (ON LAT).