



**Licence Appeal Tribunal File Number: 21-009709/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

**Jennifer Broome**

**Applicant**

and

**Western Assurance Company**

**Respondent**

**MOTION ORDER**

**ADJUDICATOR:** Ludmilla Jarda

**APPEARANCES:**

For the Applicant: Mark Stoiko, Counsel

For the Respondent: Jennifer Cosentino, Counsel

**Motion heard by  
Teleconference:** **August 12, 2022**

## **BACKGROUND**

- [1] The applicant was injured in an automobile accident on **July 21, 2011** and sought benefits pursuant to the Statutory Accident Benefits Schedule – Effective September 1, 2010 (“Schedule”).
- [2] The applicant was denied certain benefits and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [3] A case conference took place on **July 18, 2022** with Adjudicator Amanda Marshall. A written hearing was scheduled for April 7, 2023.
- [4] The issues in dispute are whether the applicant is entitled to income replacement benefits, medical and rehabilitation benefits, an award, and interest.

## **MOTION**

- [5] On June 22, 2022, the applicant filed a Notice of Motion requesting the following relief:
  - a. An order that the applicant may attend for any occupational therapy (OT) assessments requested by the insurer at an assessment facility as opposed to on an in-home basis.
- [6] The respondent opposed the applicant’s motion and submitted that the Tribunal did not have the statutory powers to make the order sought by the applicant.

## **RESULT**

- [7] The applicant’s motion is denied.
- [8] On December 16, 2021, the applicant submitted an Application for Determination of Catastrophic Impairment (OCF-19) along with various section 25 assessment reports. The applicant claimed that she sustained a catastrophic impairment under criteria 7 and 8.
- [9] On January 17, 2022, the respondent denied that the applicant sustained a catastrophic impairment as a result of the accident, and they advised the applicant that she was required to attend four insurer’s examinations (“IEs”) pursuant to section 44 and 45 of the Schedule. Two of these IEs consisted of OT assessments scheduled to take place on May 11 and 18, 2022 at 15 Edward Pottage Crescent in King Township (“Residence”).
- [10] The applicant rents a room at the Residence, and she has resided there for nearly a decade.

- [11] On April 5, 2022, the applicant advised that the Residence was undergoing extensive renovations. As a result, the IE OT assessments could not take place at the Residence. She requested an alternative location for the assessments.
- [12] On April 7, 2022, the respondent indicated that they required the IE OT assessments to be carried out at the Residence in order to evaluate the applicant's functional abilities. They added that it was not reasonable for these assessments to take place in an assessment facility as it could not replicate the applicant's living situation.
- [13] The applicant then took the position that since her section 25 OT assessment was carried out in an assessment facility, the respondent's IE OT assessments should also be carried out in an assessment facility. However, the respondent advised that the location of the applicant's section 25 OT assessment is the subject of a dispute.
- [14] In a further attempt to have the IE OT assessments carried out at an assessment facility, on April 21, 2022, the applicant submitted correspondence from her landlord, Renato Capitano, who also resides at the Residence. Mr. Capitano advised that the Residence was currently undergoing renovations and would be undergoing renovations for some time. He indicated that the renovations would continue through the month of May 2022 and that he did not want anyone at the Residence during that time.
- [15] As a result, the IE OT assessments did not take place on May 11 and 18, 2022, and surveillance of the Residence was conducted on those dates. According to an Investigation Report dated June 27, 2022, the investigators did not observe any activity at the Residence with respect to interior or exterior home renovations, and there was no construction noise heard emanating from the vicinity of the Residence.
- [16] In a continued attempt to prevent the IE OT assessments to take place at the Residence, the applicant later asserted that her privacy rights and her landlord's privacy rights should be protected, and that there was nothing in the Schedule that confers to an insurer the right to do an assessment in an applicant's home.

[17] The applicant relied on two decisions rendered by the Financial Services Commission of Ontario (“FSCO”)<sup>1</sup>; however, I do not find these decisions entirely helpful to the applicant’s position. Further, I am not bound by these decisions. Nevertheless, I agree with the following proposition indicated in *Martinho* at paragraph 7:

The exercise of the right to a medical examination under the No-Fault Benefits Schedule is inherently intrusive and an invasion of individual privacy. However, it is legislatively mandated.

[18] Accordingly, the applicant’s privacy rights must be balanced with the respondent’s right of examination. With respect to the latter, pursuant to section 45(3)(b) of the Schedule, when an insured person claims to have sustained a catastrophic impairment as a result of the accident and the insurer takes the position that the insured person has not sustained a catastrophic impairment, the insurer may advise the insured person that an IE is required.

[19] Section 44(1) of the Schedule defines the insurer’s ability to schedule an IE as follows:

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.

[20] Section 44(5) of the Schedule provides that the insurer shall arrange for the examination at its expense and give the insured person notice setting out, among other things, whether the attendance of the insured person is required at the examination as well as the location of the examination.

[21] Section 44(9) of the Schedule further provides that if the insured person is required to attend the assessment, the insurer shall make reasonable efforts to schedule the examination for a day, time, and location that are convenient for the insured person.

[22] Although the respondent is required to make reasonable efforts to schedule the examination for a day, time, and location that are convenient for the insured person, it remains that the respondent has the right to choose the type of assessment to be carried out. In this case, the respondent is seeking in-home IE OT assessments in order to assess the applicant’s functional abilities for the purposes of determining whether she sustained a catastrophic impairment under criteria 8. These assessments are reasonable and necessary in the circumstances, and the applicant has not provided sufficient reasons as to why

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<sup>1</sup> *M.S.D. v. Citadel General Assurance Company*, FSCO A01-01001561 (February 19, 2003) and *Martinho v. York Fire & Casualty Assurance Co.*, FSCO A98-000878 (April 12, 1999) [*Martinho*]

the IE OT assessments cannot be carried out at the Residence. Further, the applicant has not identified any sections of the Schedule that expressly empowers the Tribunal to grant the relief sought.

- [23] Additionally, given that the issue of whether the applicant sustained a catastrophic impairment as defined by the Schedule is not currently an issue in dispute, and considering the Tribunal's ability to strike an application pursuant to section 55(1)2 of the Schedule for failing to attend an IE or to stay an application pursuant to sections 55(2) and (3) of the Schedule until such time as the applicant attends an IE, it would not be appropriate for me to step beyond the powers expressly conferred to me and to exercise my discretion under the *Statutory Powers and Procedure Act, R.S.O. 1990, c. S. 22* and the *Licence Appeal Tribunal Act, 1999, S.O. 1999, c. 12, Sched. G* to grant the applicant's motion.
- [24] Accordingly, I am not satisfied that I have the ability to grant the relief sought by the applicant in the circumstances. As such, I decline to grant this motion.
- [25] **Except for the provisions contained in this Motion Order all previous orders made by the Tribunal remain in full force and effect.**

#### **OTHER PROCEDURAL MATTERS**

- [26] If the parties resolve the issue(s) in dispute prior to the hearing, the applicant shall immediately advise the Tribunal in writing.

**Released: August 17, 2022**



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**Ludmilla Jarda  
Adjudicator**