

**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: **AL vs. The Personal Insurance Company, 2019 ONLAT 17-002582/AABS**

Date: January 14, 2019

File Number: 17-002582/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:

A.L.

Appellant(s)

and

The Personal Insurance Company

Respondent

DECISION [AND ORDER]

PANEL: Christopher A. Ferguson, Adjudicator

APPEARANCES:

For the Applicant: Lisa Bishop I

For the Respondent: Thelson Desamour

HEARD: In Writing on: February 26, 2018

OVERVIEW

- [1] The applicant AL was involved in an automobile accident on July 9, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "*Schedule*").
- [2] AL applied to the Licence Appeal Tribunal (the "Tribunal") when the disputed benefits were denied by the respondent ("the Personal").
- [3] The benefits in dispute in this appeal include attendant care benefits (ACBs), an attendant care needs assessment, a physiotherapy and a psychological assessment.
- [4] AL failed to attend a number of IEs scheduled by the Personal.

PRELIMINARY ISSUE

- [5] In a motion dated March 7, 2018, the Personal asked the Tribunal to determine the following issues:
 - 1. Is AL barred from commencing this application because he failed to attend insurer's examinations (IEs) requested by the respondent under s.44 of the *Schedule*?
- [6] The Tribunal ordered this preliminary issue to be re-heard after an administrative error resulted in the omission of a key piece of the Personal's evidence in a previous hearing.

FINDINGS

- [7] AL is barred from commencing his application. The Personal's motion is allowed.
- [8] The Tribunal has no jurisdiction to order the payment of the Personal's IE cancellation or any other claim adjustment costs.
- [9] AL's requests for costs associated with this proceeding are dismissed.

¹ O.Reg. 34/10

REASONS

AL's Duty to attend scheduled IEs

- [10] Section 44(1) of the *Schedule* governs IEs and prescribes as follows:
- i. S. 44(1) permits an insurer to require an insured person to be examined by one or more regulated health professionals to determine whether the insured continues to be entitled to a specific benefit, as in this case.
 - ii. S.44(9)2.ii. requires the insurer to make reasonable efforts to schedule the IE for a day, time and location that are convenient for the insured person.
 - iii. S.44(9)2.iii. requires the insured person to attend the examination and to submit to all reasonable examinations requested by the examiner(s).
- [11] The onus is on the insured person, AL in this case, to establish a reasonable explanation for not attending an IE.²
- [12] Section 55(1)2. of the *Schedule* provides that an insured person shall not apply to the Tribunal if the insurer has notified him that it requires an examination under s.44, but the insured person has not complied with that section.

AL's Failure to attend scheduled IEs

- [13] By way of an affidavit sworn by Cecilia Ledzinsky dated August 10, 2017, the Personal submits that AL failed to attend nine IEs that were required in respect of his claims on the following dates:

Date	IE type	Date of Notice
December 10, 2015	FAE ³	November 19, 2015
December 16, 2015	General	November 19, 2015
January 7, 2016	FAE	December 29, 2015
February 3, 2016	Medical	December 29, 2015
February 4, 2016	FAE	January 13, 2016
February 29, 2016	psychological	February 11, 2016
April 12, 2016	psychological	March 24, 2016
April 18, 2016	medical	March 24, 2016
April 23, 2016	unspecified in the affidavit	April 6, 2016
April 30, 2016	unspecified in the affidavit	April 6, 2016

² *Horvath v. Allstate Insurance Co. of Canada*, 2003 OFSCID No. 92, affirmed in *State Farm Mutual Automobile Insurance Company v S.R.* [2013] ONSC 2086

³ "FAE" means "functional abilities evaluation"

- [14] With one exception, set out below, AL does not contest the Personal's account of his failure to attend the scheduled IEs.
- [15] The Personal asserts that AL offered no explanation for the missed IEs, and again with one exception, this is also uncontested by AL. The Personal also asserts that IE notices were sent to both AL and his legal counsel, as requested.
- [16] AL makes the following claims to rebut the Personal's claims:
- i. He attempted to attend an IE on April 30, 2017 and found the examination venue closed.
 - ii. He didn't attend IEs scheduled to determine his entitlement to income replacement benefits (IRBs) because they were scheduled for dates after he withdrew his claim for IRBs.
- [17] I find that AL failed to attend scheduled IEs without an explanation contrary to s.44(9)2.iii. of the *Schedule* for the following reason:
- i. AL provides no evidence of his attempt to attend the IE on April 30, 2016. The Personal's evidence includes a letter dated May 4, 2016 in which it cited AL's failure to attend this IE; the letter is predicated on the assessor's report that AL did not show up, and I find it not credible that the assessor would have reported a "no-show" if the examination facility had been closed.
 - ii. The arguments about not attending IEs scheduled to determine his entitlement to income replacement benefits (IRBs) is moot. None of the IEs in evidence before me were scheduled for that purpose and he failed to attend them all.
 - iii. No explanation is given, except as noted above, for the failure to attend the IEs at issue in this hearing.

Did the Personal provide AL with adequate notice of its IE requests?

- [18] Section 44(5) of the *Schedule* sets out the notice required when requiring IEs, which includes the medical and other reasons for the examination.
- [19] A plain reading of s.55 of the *Schedule* indicates that an insurer cannot raise a bar to a claimant's appeal for non-attendance at an IE unless the notices of examination that it provided comply with the *Schedule*.⁴
- [20] AL raised arguments with respect to the compliance of the Personal's IE notices with the *Schedule*, arguing in effect that deficient notices prevent the Personal

⁴ *Augustin and Unifund Assurance Company*, [2013] FSCO 12-000452, submitted by AL.

from raising his attendance as a bar to his appeal. AL argues specifically that the medical reasons given in the notices were inadequate.

[21] The Personal asserts that it gave adequate notice and explanation of these IEs to AL, and includes its notice letters in its evidence.

[22] I reviewed Aviva's IE notice letters and OCF-25s⁵ to AL against the following criteria:

- i. Required content: all particulars required prescribed by s.44(5) must be provided in the notice.
- ii. Clarity: the language in the notice must be straightforward and clear, explicit, unambiguous and understandable to an unsophisticated person; for example, it should be free of unexplained acronyms.
- iii. "Medical and any other reasons" should include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires in order to determine the claim.
- iv. The notice must clearly state the claimant's obligation to attend and consequences of non-compliance (at minimum on OCF-25s).
- v. The notice must include contact information for the applicant to respond, seek explanation and ask questions.
- vi. The information must be overall sufficient for the recipient to decide if he or she wants to submit to the requested IE.
- vii. A standard of perfection is not to be expected; the overall sufficiency of notice is what should be assessed.

[23] I reviewed the Personal's IE notices to AL and found that taken together, the covering letter and OCF-25 forms met all of the above-noted criteria. Specifically, I found it important that:

- i. It was clear what medical issues the IEs were intended to determine, including the alleged existence of pre-existing medical conditions and psychological injuries that would remove AL from the Minor Injury Guideline (MIG) and the cap it imposes on medical benefits.
- ii. Contrary to AL's position, I find that the medical reasons set out by the Personal were sufficient to meet its obligations under s.44(5). AL provides no description of what he would have considered adequate medical

⁵ OCF-25s are the official forms attached to notice letters setting out the details of IE appointments, including reasons for the examination.

reasons under the circumstances of this case. Medical reasons in all of the notices submitted in evidence were clearly tied to specific benefits.

- iii. The cancellation process and consequences for no-shows are clearly marked. The notices set out the notice requirements, to assist the reader to determine whether any required information was missing.
- iv. AL's right to appeal and contact information for communicating concerns or questions is clearly set out.

[24] Based on my review of the Personal's notices of IE, I find that the Personal provided adequate and compliant notice to AL.

[25] I further find that AL's objections to the Personal's notices are unpersuasive because his submissions indicate that, with advice from legal counsel, he acknowledged the Personal's IE notices and had his legal representatives respond to them with rescheduling requests and conditions.

[26] As the result of my findings, I find AL's submissions on the adequacy or compliance of the Personal's notices to be without any merit. There is no justification on this basis for dismissing the Personal's motion.

The Tribunal's discretion with respect to non-compliance with s.44

[27] Under s.55(2) of the *Schedule*, the Tribunal may permit an insured person to proceed with an appeal despite his or her failure to comply with s.44.

[28] Section 55(3) of the *Schedule* permits the Tribunal to impose terms and conditions on a permission granted under s.55(2).

[29] AL did not ask the Tribunal to exercise this discretion in his submissions.

[30] I decided to consider s.55(2),(3) and to deny AL permission to proceed with his appeal because:

- i. I find that the evidence that AL simply failed to attend IEs without reasonable explanation is too strong to make a case that barring his appeal would be a disproportionate response to his conduct.
- ii. While I don't purport to establish a suggested "time limit" or number of missed IEs against which to weigh the merits of allowing appeals to proceed, I find in this case that nine missed IEs over five months of scheduling and rescheduling by the Personal, without credible explanations and while retaining legal counsel suggests a wilful refusal to cooperate with the IE process established by s.44.
- iii. The Personal's right to conduct IEs to assess AL's entitlements to accident benefits should be respected and enforced. There is no

suggestion from AL that the Personal's IEs requests were excessive, unreasonable or unnecessary.

Recovery of the Personal's Cancellation and other Costs

- [31] The Personal asserts that it incurred "at least \$4,840.45" in costs for cancelled IEs, including failure to provide notice of cancellation.⁶ It includes copies of payment confirmation letters to service providers for missed IEs in its evidence: the costs were clearly incurred.
- [32] The *Schedule* does not include a provision that specifically addresses reimbursement of fees paid by an insurer for an IE where the insured person fails to attend.
- [33] The Personal submits that the *Professional Services Guideline*, September 2014 states that insurers are not liable to pay for the costs of appointments missed or cancelled by insured persons. It goes on to suggest that this provides a basis on which the Tribunal should order the payment of these costs by AL.
- [34] I have not been provided with any authority or provision of the *Schedule* or *Insurance Act* confirming that I have jurisdiction to order payment of fees for missed IEs. I believe that such authority does not exist. Accordingly, I decline to order reimbursement to the Personal.

Costs of Proceeding

- [35] Rule 19.1⁷ permits a party to request that the Tribunal order the other party to pay costs, where the requesting party "believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith".
- [36] The Personal requested costs in this matter. It argues that because AL missed so many IEs, despite its warnings that this could lead to a bar on any appeal, his whole appeal is frivolous and vexatious.
- [37] I deny the Personal's cost request because:
- i. I am not convinced that attempting an appeal in this case meets the level of conduct contemplated by Rule 19.1 for the cost remedy, especially as the behaviour complained of did not occur after the proceeding commenced.
 - ii. The statute bar to his appeal strikes me as an adequate consequence for AL's conduct with respect to IEs in this matter.

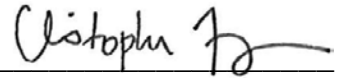
⁶ Affidavit of Cecilia Ledzinsky, sworn August 10, 2017.

⁷ All references to a "Rule" are made to the *Licence Appeal Tribunal Rules of Practice and Procedure, Version I (April 1, 2016)*

CONCLUSIONS

- [38] AL's appeal is barred as the result of his failure to attend IEs.
- [39] The Personal's request to recover costs of IE cancellation or no-show fees is dismissed for lack of jurisdiction.
- [40] The Personal's requests for costs under Rule 19.1 is denied.

Released: February 1, 2019



Christopher A. Ferguson
Adjudicator