

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Tribunal File Number: **19-007389/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:

Hiu-Wan Lo

Applicant

and

Aviva General Insurance

Respondent

MOTION ORDER

Order made by: Ian Maedel, Adjudicator

Date of Order: July 29, 2020

Appearances:

For the Applicant: Luis Quail, Counsel

For the Respondent: Lynda Mantha, Senior Litigation Specialist

Brendan Sheehan, Counsel

Motion Hearing conducted via teleconference July 29, 2020.

OVERVIEW

- [1] The applicant was injured in an automobile accident on March 3, 2016 and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 ("*Schedule*").
- [2] The applicant filed an application before the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal") on July 12, 2019.
- [3] A case conference was held on January 9, 2020 before Adjudicator N. Ferguson. The matter was set for a written hearing on June 29, 2020.
- [4] The issues in dispute are a MIG determination, a treatment plan for chiropractic, interest and an award.
- [5] In a Motion Order dated May 5, 2020, Vice Chair Hunter altered the submission dates and adjourned the written hearing to July 31, 2020.

MOTION

- [6] The respondent filed a Notice of Motion dated June 26, 2020 and sought the following relief:
 - i. An order that the applicant is barred from proceeding with a hearing as she failed to attend a s. 44 in-person insurer's examination;
 - ii. In the alternative, an order adjourning the timetable and hearing of this matter.
- [7] The respondent submits the majority of the medical records for this matter were not served until late December of 2019, just prior to the January 9, 2020 case conference. The respondent submits this delay is particularly egregious, as the applicant had more than three years to obtain, review these documents, and for an examination to take place. The respondent submits it has not conducted any assessments of the applicant and an in-person assessment is required in this case to determine if chiropractic treatment is reasonable or necessary. Due to the Covid-19 pandemic, the applicant was unwilling to attend the rescheduled in-person assessment on June 17, 2020. The respondent maintains that an in-person assessment is necessary and a paper review is not possible, as the applicant has not previously been assessed by the respondent.
- [8] The applicant did not provide any written submissions in reply but provided oral submissions at the Motion Hearing. The applicant is opposed to attendance at any in-person assessment due to Covid-19. The applicant submits the five-year limitation period for benefits expires in March of 2021, therefore any further delay in

the adjudication of this matter will imperil her ability to obtain treatment. The applicant further submits that an assessment could be conducted virtually and she is not agreeable to any further adjournment of the hearing or the associated timelines.

DISPOSITION

- [9] The respondent's motion to bar this application from proceeding is denied.
- [10] This matter shall be adjourned to permit the respondent to conduct a s. 44 insurer's examination.

ANALYSIS

- [11] Each case must be evaluated on a contextual basis as per the six factors laid out in *Al-Shimasawi*¹, and echoed in *L.F. v Aviva Insurance Company*.² The factors assist in assessing the reasonableness and necessity of a s. 44 request. The factors are:

- i. The timing of the request;
- ii. The possible prejudice to both sides;
- iii. The number and nature of the previous examinations requested;
- iv. The nature of examinations requested;
- v. Whether there are any other new issues raised in the applicant's claim that require further evaluation;
- vi. Whether there is a reasonable nexus between the examination requested and the applicant's injuries.

This is not an exhaustive list; an adjudicator must take into account the totality of the contextual factors when determining if a s. 44. Assessment is required.

The Timing of the Request

- [12] This matter was previously set for a written hearing on June 29, 2020. The hearing was adjourned and in light of the Covid-19 pandemic, the respondent was given additional time to complete the assessment, a hearing was re-scheduled to July 31, 2020. The respondent was served with the applicant's medical documents in December 2019 and has been unable to conduct an assessment of the applicant since that time. I do not find the assessment request was made in close proximity or at the last moment prior to the hearing. Had the original assessment proceeded

¹ *Al-Shimasawi v. Wawanesa Mutual Insurance Co.*, 2007 CarswellOnt 3473.

² *L.F. v Aviva Insurance Canada*-008308/AABS, 2019 CanLII 83593 (ON LAT).

as scheduled, I do not believe it otherwise would have delayed the original written hearing.

The Possible Prejudice to Both Sides

- [13] Prejudice is the most significant factor in this matter. The respondent may be prejudiced if forced to proceed to a hearing without assessing the applicant's physical limitations pursuant to the chiropractic treatment plan at issue. I note the respondent has not previously conducted *any* in-person assessments for this matter. Without this assessment the respondent would be unable to accurately gauge the applicant's level of function or whether the treatment plan is reasonable and necessary pursuant to the *Schedule*. Aside from concerns related to the limitation or expiry of benefits in March 2021 and general concerns regarding the Covid-19 pandemic, the applicant has otherwise not provided any cogent reasons for non-attendance at the in-person assessment.

The Number and Nature of the Previous Examinations Requested

- [14] As stated above, the applicant has not attended any previous insurer's examinations. Aside from the clinical notes and records provided, the respondent has had no opportunity to examine or review the applicant physically. Otherwise, I do not view this request as an attempt to bolster the respondent's case.

The Nature of Examination Requested

- [15] The respondent has indicated an assessment is required by a General Practitioner relating to the applicant's physical limitations related to the chiropractic treatment plan provided to the respondent and denied October 4, 2018. I am satisfied the respondent must be provided an opportunity to physically assess the applicant pursuant to the threshold set out *Schedule*. Had there been a previous in-person assessment, I would have permitted a paper review addendum, but there has been no previous opportunity to assess the applicant regarding the treatment plan in dispute. I do not believe the applicant can be adequately assessed in a virtual format, as the applicant has suggested.

New Issues Raised in the Applicant's Claim that Require Further Evaluation

- [16] I do not specifically find there are new issues that now require evaluation. These are the same issues there were evident at the case conference conducted in January 2020. Unfortunately, the respondent has been unable to assess the applicant with regard to the chiropractic treatment plan that is in dispute.

A Reasonable Nexus between the Examination Requested and the Applicant's Injuries

[17] I find there is a reasonable nexus between the examination requested and the applicant's alleged injuries. The applicant is alleging that chiropractic treatment is required as a result of the accident. It is procedurally fair for the respondent to have the ability to assess the applicant based on this treatment plan at issue.

[18] When I weigh the totality of the circumstances, I am persuaded that an in-person assessment is reasonably necessary. Assessments are inherently intrusive, particularly during the risks associated with the Covid-19 pandemic. However, as regions around the province enter stage 3 of the emergency, I am satisfied this assessment can be safely undertaken with precautions. The applicant has not made me otherwise aware of any pre-existing medical conditions or otherwise any reasons the applicant is unable to attend. In permitting the assessment, I am acutely aware of the potential prejudice that may be wrought to the respondent if it is unable to undertake this assessment. However, I am also aware of the impending March 2021 deadline for benefits. As a result, I am only prepared to adjourn this matter a short time in order to complete the assessment.

[19] The written hearing scheduled for July 31, 2020 shall be vacated.

[20] A written hearing shall be scheduled for **November 16, 2020**.

[21] The respondent shall provide its IE report by **September 14, 2020**.

[22] The parties shall provide their written submissions and evidence according to the following timeline:

Applicant's submissions due: **October 13, 2020**

Respondent's submissions due: **October 26, 2020**

Applicant's reply due: **November 9, 2020**

[23] As per the previous Order, submissions shall not exceed **fifteen (15)** pages and reply submissions shall not exceed **five (5)** pages. All submissions shall be double-spaced, twelve-point, Arial or Times New Roman font. No affidavit evidence shall be relied upon by the parties.

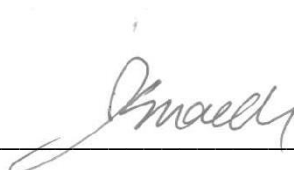
[24] As per Vice Chair Hunter's Order of May 5, 2020, the hearing process shall be expedited to ensure a decision is available as soon as possible following the hearing date of **November 16, 2020**.

[25] Except for the provisions contained in this order, all previous orders made by the Tribunal remain in full force and effect.

OTHER PROCEDURAL MATTERS

[26] If the parties resolve the issues in dispute prior to the hearing, the applicant shall immediately advise the Tribunal in writing.

Released: July 30, 2020



Ian Maedel, Adjudicator