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: *A.M. vs. Aviva Insurance Company*, 2020 ONLAT 19-012033/AABS

Released Date: 12/08/2020
File Number: 19-012033/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:

Atasha Mayers

Applicant

and

Aviva Insurance Company

Respondent

PRELIMINARY ISSUE DECISION AND ORDER

PANEL: **Theresa McGee, Vice-Chair**

APPEARANCES:

For the Applicant: Cary Schneider
Counsel

For the Respondent: Matthew Owen
Counsel

HEARD: **By way of written submissions**

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] The applicant, ("A.M.") was involved in an automobile accident on March 18, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("the *Schedule*").

[2] The respondent, ("Aviva") denied A.M. certain benefits and she applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for a resolution of the dispute. On April 7, 2020, the Tribunal held a case conference in this matter. Aviva raised a preliminary issue that would dispose of A.M.'s application. This hearing is to consider that preliminary issue.

[3] In addition to an order dismissing A.M.'s application, Aviva seeks an order barring A.M. from proceeding with future claims for treatment outside the Minor Injury Guideline ("MIG") because she failed to attend IEs to determine whether her injuries were predominantly minor.

PRELIMINARY ISSUE

[4] I am to decide the following preliminary issue:

i. Is A.M. barred from commencing a proceeding because she failed to comply with section 44 of the *Schedule* by not attending an insurer's examination (IE)?

RESULT

[5] A.M. is barred from commencing a proceeding before this Tribunal because she failed to attend an IE that Aviva properly requested under s. 44 of the *Schedule*. This disposes of her application.

[6] I decline to issue the order Aviva seeks barring A.M. from proceeding with future claims before this Tribunal because she failed to attend an IE to determine if her injuries were predominantly minor. It is open to Aviva to bring a motion before the Tribunal requesting further relief, but it falls outside the Tribunal's jurisdiction at this preliminary issue hearing to issue the additional order sought.

ANALYSIS

[7] On February 19, 2019, Aviva sent notices of examination (NOEs) to A.M. requesting that she attend two IEs – one with a psychologist, and the other with a

general practitioner – to determine her continued entitlement to income replacement benefits (IRBs).

[8] The notice stated that Aviva was unable to determine from the updated Disability Certificate (OCF-3) A.M. had provided whether she met the disability requirement for ongoing entitlement to IRBs. The notice included the following text as the "medical reason" for requesting the IEs: "The disability period appears to be inconsistent with the diagnosis or mechanism of injury."

[9] The first of the two IEs Aviva requested was scheduled for March 13, 2019 with psychologist Dr. K. Lawson. A.M. did not attend. In a letter dated March 20, 2019, Aviva advised A.M. that the Psychological IE had been rescheduled for April 16, 2019; reminded A.M. about the upcoming Physician's Assessment IE, previously scheduled for March 26, 2019; and reiterated its medical reason for requesting the assessments.

[10] On March 21, 2019, A.M.'s counsel sent an email to Aviva questioning the request for IEs and stating her refusal to attend them on the grounds that the reasons provided did not meet the requirements of s. 44(5) of the *Schedule* and were inconsistent with applicable case law.

[11] By email dated April 3, 2019, Aviva advised that the IEs had been cancelled. It offered to reschedule the IEs to address the IRB issue and requested her response by April 16, 2019. She did not reply. On May 8, 2019, Aviva advised A.M. that her IRB would be suspended as of May 22, 2019 due to her non-attendance at the requested IEs. A.M. then applied to the Tribunal.

[12] Aviva submits that the reasons it provided for requesting IEs met the requirements set out in s. 44(5)(a) of the *Schedule*. A.M. submits that Aviva supplied boilerplate statements as reasons that failed to give meaningful notice as required by s. 44(5)(a). A.M. relies in part on the Divisional Court's ruling in in *Hedley v. Aviva Insurance Company of Canada.*[1] In *Hedley*, the court upheld this Tribunal's reconsideration decision of Executive Chair Lamoureux, who had found an insurer's reasons for denying treatment and for requesting an IE failed to satisfy the notice requirements set out in the *Schedule*. The court in *Hedley* followed the reasoning of the Court of Appeal in *Turner v. State Farm Mutual*[2] that reasons must permit an insured person to decide whether or not to challenge the insurer's determination. A.M. relies on the remark, made at para. 18 of

[1] 2019 ONSC 5318.
[2] 2005 CanLII 2551.

Hedley, that mere boilerplate statements do not provide a principled rationale to which an insured person can respond.

[13] In my view, it requires an unduly narrow reading of the court's analysis in *Hedley* to conclude that an insurer's reasons will live or die on whether they contain boilerplate language.

[14] Read holistically, *Hedley* does not stand for the proposition that the presence of boilerplate statements is determinative in assessing the sufficiency of reasons under the *Schedule*. If this were the case, an insurer's reasons for denying a benefit or for requesting an IE could be found inadequate if they consisted of standardized text of any kind. This is not supported by the full rationale articulated by the *Hedley* court. In its judgment, the court cited with approval the standard Executive Chair Lamoureux applied in the reconsideration decision below, drawing from her earlier decision in *16-003316/AABS v. Peel Mutual Insurance Company*:[3]

> In evaluating the sufficiency of such notice, the Tribunal should be mindful of those who adjust insurance files. It would be naïve or impractical or to expect them to articulate something resembling a medical opinion. Likewise, their reasons should not be measured by the inch or held to a standard of perfection. Moreover, reasonable minds may disagree about the content of an insured's file. Those allowances should be made. <u>If it offers a principled rationale based fairly on an insured's file, an insurer will have satisfied its obligation under s. 38(8)</u>.
>
> [Emphasis added.]

[15] Requiring insured persons to prove the existence of boilerplate statements in reasons would place upon them an impossible evidentiary burden. A.M.'s March 21, 2019 letter to Aviva illustrates the difficulty of establishing the boilerplate nature of an insurer's reasons. In the letter, A.M. states that the reasons for the request for an IE "*seem* like a boiler plate comments [*sic*] chosen from a precedent" [emphasis added]. As A.M.'s own evidence demonstrates, an insured person can do little more than speculate as to whether the reasons given for an insurer's determination contain boilerplate language. An analysis of the sufficiency of reasons simply cannot begin and end with the presence of boilerplate statements, and the court's reasoning in *Hedley* makes this clear.

[3] [2013] O.F.S.C.D. No. 211.

[16] To conclude on this point, it is my respectful view that the operative part of the court's holding in *Hedley* that mere boilerplate statements do not provide a principled rationale to which an insured can respond, and therefore constitute no reasons at all, is that reasons must provide a principled rationale to which an insured person can respond. To the extent that boilerplate language can effectively communicate the basis of the insurer's decision and provide a principled basis for an insured person to challenge the denial of a benefit or decide whether to attend an IE, that language may be sufficient to meet the requirements for reasons under the *Schedule*.

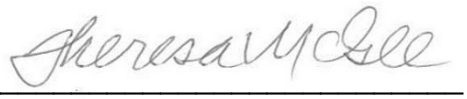
[17] On the facts of this case, I find that the notice Aviva gave A.M. satisfied the requirements of s. 44(5) of the *Schedule*. The requirement for reasons in s. 44(5) is designed to allow the insured to make an informed decision about whether or not to pursue her claims and attend an IE, which by its nature is inherently intrusive. I find that the "medical and any other reasons" Aviva cited in the February 19, 2019 NOEs set out a principled rationale based fairly on A.M.'s file. It was clear from the notice that based on the Disability Certificate (OCF-3) dated February 5, 2019, Aviva was unable to determine that A.M. had ongoing entitlement to a specified benefit. Since she was only claiming one specified benefit, (she had elected IRBs) I find that the notice was clear as to the benefit at issue. It was also clear that Aviva's inability to determine entitlement related to the period of disability (nine to 12 weeks) indicated in the second Disability Certificate (OCF-3) – it appeared to be inconsistent with A.M.'s "diagnosis": her condition, or "mechanism of injury": the causes of that condition. Aviva could have elaborated by stating that it questioned why A.M. required IRBs for an additional nine to 12 weeks in addition to the nine to 12 weeks recommended in the first Disability Certificate (OCF-3) given Aviva's expectation of some medical improvement in the period covered by the previous Disability Certificate (OCF-3). However, even without further articulating its rationale, I find that Aviva meaningfully relayed the essential components of the reasons for its request, and that those reasons were fairly based on A.M.'s file. The details set out in the notice were capable of enabling A.M. to make an informed decision about whether to pursue her claims and attend the IE or not. Aviva's reasons were sufficient, and A.M.'s failure to attend the IEs subjects her to the restriction on proceedings set out in s. 55(1)2 of the *Schedule*.

[18] The Tribunal has discretion under s. 55(2) of the *Schedule* to permit an insured person to apply to the Tribunal despite the bar in s. 55(1). However, A.M. has given me no basis upon which to exercise my discretion in this regard.

ORDER

[19] Pursuant to s. 55(1)2 of the *Schedule*, A.M. is statute-barred from proceeding with her application before the Tribunal because she failed to comply with a notice given under s. 44. Her application is dismissed.

Released: December 8, 2020



Theresa McGee
Vice-Chair