Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Silvera v. Aviva General Insurance, 2021 ONLAT 20-000483/AABS

Released Date: 04/26/2021
File Number: 20-000483/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:

Lavern Silvera

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Avril A. Farlam, Vice Chair**

APPEARANCES:

For the Applicant: Marc Golding, Paralegal

For the Respondent: Alexander Dos Reis, Counsel

Heard By Way of Written Submissions

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] Lavern Silvera ("applicant") was involved in an automobile accident on October 28, 2017 ("accident") and sought benefits pursuant to the *Statutory Accident Benefits Schedule*[1] *- Effective September 1, 2010* (the "*Schedule*").

[2] Aviva General Insurance ("respondent") denied the applicant's claim for various benefits and required her to attend s. 44 insurer's examinations ("IEs"). The applicant disagreed with the respondent's decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal).

[3] The respondent requested a preliminary issue hearing to determine whether the applicant is precluded from proceeding with her application (save and except for substantive issue 1 set out in the Tribunal's June 30, 2020 Order (whether the applicant sustained predominantly minor injuries) and substantive issue 4 (entitlement to a medical benefit of $2,000.00 for psychological treatment) set out in the Tribunal's June 30, 2020 Order) because she failed to attend s. 44 insurer's examinations ("IEs").

PRELIMINARY ISSUE TO BE DECIDED

[4] The preliminary issue to be decided is:

i. Is the applicant barred from proceeding with the claim for medical benefits identified as issues 2, 3, 5, 6, and 7 in the Tribunal's Order made June 30, 2020, as she failed to submit to an insurer's examination under s. 44 of the *Schedule?*

RESULT

[5] I find that the applicant is barred from proceeding with her application for medical benefits identified as issues 2, 3, 5, 6, and 7 in the Tribunal's June 30, 2020 Order, because she failed to attend s. 44 insurer's examinations.

LAW

[6] Section 44(1) of the *Schedule* provides that, for the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit

[1] O.Reg. 34/10.

for which an application is made, but no more often than is reasonably necessary, an insurer may require an insured person to be examined by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation.

[7] Section 55(1)2 of the *Schedule* provides that an insured person shall not apply to the Tribunal if the insurer has provided the insured person with notice that it requires an examination under s. 44, but the insured person has not complied.

[8] Section 55(2) of the *Schedule* provides that the Tribunal may permit an insured person to apply despite paragraph 2 or 3 of s. 55(1). Section 55(3) provides that the Tribunal may impose terms and conditions on a permission granted under s. 55(2).

[9] The onus is on the insured person to put forward a reasonable explanation for non-attendance at an IE.[2]

Respondent's position

[10] The respondent requests an Order dismissing the applicant's application regarding issues 2, 3, 5, 6, and 7 in the Tribunal's June 30, 2020 Order pursuant to s. 55 (1) of the *Schedule* because the applicant has failed to attend six s. 44 assessments without explanation and, in reply, submits that insufficient explanation and evidence has been put forward at this hearing. Further, the respondent states it would suffer prejudice if the applicant was permitted to attend now. The respondent submits in the alternative that the applicant's application be stayed pursuant to s. 55 (2) and (3) pending her attendance at s. 44 general practitioner and psychological assessments.

[11] Still further, in reply, the respondent seeks to strike paragraphs 10 to 13 of the applicant's submissions on the basis of settlement privilege.

Applicant's position

[12] The applicant takes no issue with the respondent's statement that she failed to attend six s. 44 assessments.[3] The applicant takes issue with the respondent's assertion that she offered no explanation for having missed these assessments. One was missed due to the applicant attending to the death of a family member, another was missed due to the applicant being out of the country and submits

[2] *Horvath v. Allstate Insurance Co. of Canada,* 2003 OFSCID No. 29, affirmed in *State Farm Mutual Automobile Insurance Company v. S.R.*, 2013 ONSC 2086 (Div. Ct.).
[3] Applicant's submissions dated November 20, 2020, para 5.

that the respondent refused to reschedule the missed assessments because it wanted updated medical records. The applicant denies prejudice to the respondent.

Respondent's Request to Strike Paragraphs 10 to 13 of the Applicant's Submissions

[13] Paragraphs 10 to 13 of the applicant's submissions and tabs 9, 10 and 11 of the applicant's document brief refer to an exchange of correspondence which the applicant in paragraph 13 refers to as an "offer" ultimately withdrawn by the respondent.

[14] The Ontario Court of Appeal has outlined the test for whether communications are settlement privileged. Firstly, is there a litigious dispute? Secondly, were the communications made with the express or implied intent that they not be disclosed? Thirdly, was the purpose of the communication to attempt to effect a settlement?[4] The Supreme Court of Canada has made it clear that the parties do not have to mark the documents as being without prejudice to invoke the privilege.[5]

[15] I find that the applicant's submissions at paragraphs 10 to 13 and documents at tabs 9, 10 and 11 of the applicant's document brief meet the test for communications that are settlement privileged. As a result, I find them inadmissible at this hearing and I strike them from the record for the following reasons.

[16] It is clear from a review of the applicant's submissions at paragraphs 10 to 13 and documents at tabs 9, 10 and 11, that at the time of the communications, there was a dispute between the parties which was pending before the Tribunal, that the express or implied intent of the communications from the respondent is that they not be disclosed to the Tribunal absent a settlement, and that the purpose was to effect a settlement of the applicant's application.

[17] To encourage settlement, it is important that communications made with a view to settling a matter in dispute before the Tribunal remain settlement privileged if a settlement is not reached, and not be disclosed in a hearing before the Tribunal absent some compelling reason or the consent of both parties. Here there is no compelling reason given by the applicant for the disclosure and the respondent does not consent to the disclosure.

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[4] *Re Hollinger Inc.,* 2011 ONCA 579 (Ont. CA)
[5] *Union Carbide Canada Inc. v. Bombardier Inc.,*2014 SCC 35 (CanLII), [2014] 1 S.C.R. 800 (SCC).

[18] The disclosure by the applicant is in support of her submission that the respondent was not unfairly prejudiced by her non-attendance at the IE's. However, statements made in this settlement privileged communication are part of the respondent's settlement offer and, even absent the settlement privilege, which clearly applies to these communications, is not persuasive evidence of a lack of prejudice but instead the respondent's willingness to abandon it's legal position in order to reach a settlement. Concessions to a party's formal legal position are routine in settlement discussions and it is unfair to attempt to hold a party to these concessions if a settlement does not occur. By putting these concessions before the Tribunal as evidence, the applicant is unfairly attempting to hold the respondent to these concessions.

Is the Applicant's Application Barred Regarding Issues 2, 3, 5, 6, and 7 Because She Did Not Attend s. 44 IEs?

[19] I find that the applicant is barred from proceeding with issues 2, 3, 5, 6 and 7 of her application because she failed to attend s. 44 IEs without reasonable explanation.

[20] Although the applicant does not dispute that she failed to attend six s. 44 assessments, the applicant takes issue with the respondent's assertion that she offered no explanation for having missed these assessments.

[21] The applicant submits that one was missed due to the applicant attending to the death of a family member and that another was missed due to the applicant being out of the country. However, the applicant submitted no evidence to establish either of these facts.

[22] Instead of reasonable explanation for her non-attendance, the applicant submits that the respondent refused to reschedule the missed assessments because it wanted updated medical records. This submission does not constitute a reasonable explanation for non-attendance. Section 55 of the *Schedule* places the onus on the applicant to put forward a reasonable explanation for non-attendance, not on the respondent. Further, even after the applicant's legal representative wrote to the respondent February 11, 2019 to "please reschedule any and all missed IE's", the applicant failed to attend a psychological IE on July 2, 2019 and a general practitioner IE on July 4, 2019 without explanation.

[23] Although the applicant denies prejudice to the respondent, I find this submission unpersuasive. These missed examinations relate to the applicant's non-earner benefit ("NEB") claim from 2017 and chiropractic, shockwave therapy and chronic pain treatment plans from 2018. The applicant offers no persuasive evidence in

support of her submissions that the respondent is not prejudiced by the failure to attend the IE's. I accept the respondent's submission that it is prejudiced by the passage of time and it has now been deprived of the opportunity to have it's physicians reasonably assess whether the applicant would meet the eligibility test for NEB and also whether the disputed treatment plans are reasonable and necessary.

[24] Although s. 55(2) of the *Schedule* permits the Tribunal to allow an insured to apply despite being barred and s. 55(3) provides that the Tribunal may impose terms and conditions on any permission granted, I decline to exercise my discretion under these sections. The applicant has not put forward any reasonable explanation for her non-attendance at the IEs or advanced any reasons why issues 2, 3, 5, 6, and 7 in her application should be allowed to go forward.

ORDER

[25] The applicant is barred from proceeding with issues 2, 3, 5, 6, and 7 in her application pursuant to s. 55 of the *Schedule* because she failed to attend IEs without reasonable explanation.

[26] The parties may contact the Tribunal within 30 days of the release of this Decision to schedule a resumption of the case conference with respect to substantive issues 1 and 4 set out in the Tribunal's June 30, 2020 Order.

Released: April 26, 2021

Avril A. Farlam
Vice Chair