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

Ontario

Tribunal File Number: 17-002921/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:

DC

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Christopher A. Ferguson**

APPEARANCES:

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Karla Gnanasegaram, Counsel

Heard in writing: **November 27, 2017**

OVERVIEW

[1] DC was involved in an automobile accident on May 1, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] The applicant applied to the Licence Appeal Tribunal (the "Tribunal") when the disputed benefits were denied by Aviva, the respondent to his appeal.

[3] The benefits in dispute in this appeal include non-earner benefits (NEBs), a medical benefit for physiotherapy and costs of examination for an attendant care needs assessment, a psychological assessment and a psychological pre-screen interview.

PRELIMINARY ISSUE

[4] Aviva has asked the Tribunal to determine the following issues:

1. Is the applicant barred from commencing this application because of his failure to attend medical examinations requested by the respondent under s.44 of the *Schedule*?

2. Is the respondent entitled to withhold payment of a non-earner benefit (NEB) to the applicant during any period when the applicant is not in compliance with s.33 of the *Schedule*?

FINDINGS

[5] The applicant DC is barred from commencing his application. The respondent's motion is allowed.

[6] Aviva is entitled to withhold payment of NEBs for any period after April 27, 2016 during which the applicant DC was not in compliance with s.33 of the *Schedule*.

[7] Aviva is liable to pay NEBs to DC for the period November 1, 2015 to April 27, 2016 with interest at the prescribed rate.

[8] DC's request for an award and costs are dismissed.

REASONS

Duty to Participate in the IE

[9] Section 44(1) of the *Schedule* governs IEs and prescribes as follows:

---

[1] O.Reg. 34/10

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(5) sets out the notice required for IEs, which includes the medical and other reasons for the examination and the name(s) of the person(s) who will conduct the examination, with their medical credentials.

iii 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.

iv 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).

[10] Section 37(1)(b) provides that if an insurer wishes to determine if an insured person is still entitled to a specified benefit, the insurer may, but not more often than is reasonably necessary, notify the insured person that the insurer requires an examination under section 44.

[11] Section 37(7) of the *Schedule* prescribes the consequences to the insured person if he fails to attend an IE: the insurer may determine that the insured person is no longer entitled to the specified benefit and it may refuse to pay the specified benefit relating to the period during which the insured person failed to comply with s.44(9).

[12] Section 37(8)(b)(ii) requires the insurer to pay all amounts withheld during a period of non-compliance if an insured person subsequently complies with s.44(9) and provides a reasonable explanation for not complying with s.44(9).

[13] The onus is on the insured person to establish a reasonable explanation for not attending an IE.[2]

[14] 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.

[15] 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*.[3]

---

[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 – submitted by the applicant

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

Is DC barred from proceeding with his appeal because he failed to attend IEs?

[16] I find that DC is barred from proceeding with his appeal of Aviva's refusal to pay the disputed medical benefits and costs of examination listed in this application: DC did not make himself reasonably available for the required IE as required by the *Schedule*, and provided no credible, reasonable explanation for his failure to attend.

[17] It is uncontested that DC did not attend any of the IEs requested and scheduled by Aviva in relation to the medical benefits and costs of examination in dispute.

[18] DC's case rests on his assertion that he had a right to ignore notices of examination that did not comply with the *Schedule*. He contends that:

i Aviva's Notices of Examination (OCF-25s) and accompanying letters did not comply with the content requirements of s.44(5) of the *Schedule* and were not clear.

ii Specifically, Aviva did not provide him with the medical reasons for requiring IEs, contrary to s.44(5).

[19] Because DC's case turns on adequacy of notice, both parties submitted similar-fact precedents[4] that provide a helpful compliance checklist for IE notices, which in turn were based on a significant body of case law. I applied these principles in reviewing the letters and OCF-25s from Aviva to DC:

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

[4] *Quinones and Unifund Assurance Company*, [2013] O.F.S.C.D. No. 108, FSCO No. A12-000866; *Mangos v. Aviva Insurance Company*, (2007) FSCO A06-0047, and *Augustin and Unifund Assurance Company*, (2013) FSCO 12-000452

explanation and ask questions.

vi The information must be overall sufficient for the reader 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.

[20] Based on my review of Aviva's letters and Notices of Insurer's Examination (OCF-25s) against the above-noted principles, I find that the applicant's claim of that Aviva's notices of examination were non-compliant with the *Schedule* is baseless -- because they were not:

i Aviva's letters and Notices of Insurer's Examination (OCF-25s) were are complete and compliant with the notice content requirements of s.44(5).

ii I find that these documents meet the qualitative criteria set out in *Quinones*[5] for clarity and lack of ambiguity: they would in my view be clear to the unsophisticated reader.

iii I find that the information in Aviva's notices was sufficient to inform a reasonable claimant to decide whether or not he wanted to attend or at least to seek clarification about the IEs.

iv Contrary to DC's position, I find that the medical reasons set out by Aviva were sufficient to meet its regulatory obligations under s.44(5). DC did not provide me with any description of what he would have considered adequate medical reasons under the circumstances of this case. I am persuaded by and follow the reasoning in a case called *Augustin*, submitted by Aviva that:

a) For the purposes of the *Schedule*, Aviva's statement that it lacked medical information or documentation necessary to determine the applicant's claim or his coverage by the MIG is a valid medical reason for requiring an IE.[6]

b) Aviva's "medical reason" does not require the opinion of a medical practitioner or a medical practitioner's review of documentation to be valid.[7] It would be impractical and unfair to insist that an insurer provide more specific, detailed medical reasoning if doesn't have the information needed to do so, as in this case.

[21] The applicant asserts that Aviva's purported non-compliance with notice

[5] *Quinones and Unifund Assurance Company*, [2013] O.F.S.C.D. No. 108, FSCO No. A12-000866
[6] Consistent with the reasoning in *Augustin and Unifund Assurance Company*, [2013] FSCO 12-000452, submitted by Aviva
[7] Ibid.

requirements entitled him to simply ignore their notices. He contends that the onus was entirely and solely on Aviva to ensure that he understood the notice and to follow up with him to facilitate his attendance at the IE appointments. In his view, he cannot be held responsible for failing to attend the IEs because he never got proper notice.

[22] I reject DC's position with respect to his decision to ignore Aviva's notices because:

i He provides no legal authority or basis for the notion that a claimant is legally entitled to simply ignore notices from his insurer because they are "non-compliant". Such an entitlement does not exist.

ii Section 44(9)2.iii of the *Schedule* creates an obligation on the insured to make himself reasonably available for IEs[8]. While I agree with DC that Aviva, by virtue of its greater sophistication and resources, may be subject to a stricter standard of care and compliance, I do not agree that this absolves DC of any and all obligation to address issues relating to Aviva's request for an IE. A reasonable person would respond by accepting appointment dates or proposing ones and/or by asking for more information about the examinations. I find that by simply ignoring Aviva's notices for a year, DC himself failed to comply with the *Schedule*, and fatally weakened his claim of non-compliance by Aviva as his explanation for failing to attend the IEs as required.

iii I find that DC's position is further weakened because his submissions do not indicate that he did not understand Aviva's notices. The purpose of notice and disclosure requirements is to ensure that claimants are provided the information they need to make good decisions. Alleged deficiencies or omissions in notices should not be accepted as excuses for an insured's own complete inaction or non-compliance without evidence that he was actually misled or confused by the documents or was unable to understand them.

iv I find that DC's position, even if it had merit, is rendered moot in a situation where Aviva's notices were, in fact, compliant.

Does DC's current willingness to comply with s.44 defeat Aviva's motion to bar his appeal?

[23] On June 21, 2016, the applicant wrote to Aviva, indicating that he had decided to attend IEs, that he stood by his earlier non-compliance based on deficient notice and setting out some preconditions for scheduling IEs. He reiterated his position in a letter dated June 9, 2017 – after failing to attend an IE scheduled for May 26, 2017.

[24] DC submits an alternative contention that his current willingness to attend an IE

[8] Based on my own reading of the subsection, shared by other adjudicators, including for example in *Hashi and Security National Insurance Management Inc.*, 2006 FSCO A05-001275, submitted by DC.

has brought him into compliance with the *Schedule* and defeats Aviva's motion. I disagree for the following reasons:

i The case cited by DC, *Hashi*,[9] does not stand for any broad principle that a claimant's offer of availability effectively "cures" non-compliance and lifts the statute bar. The reasoning in *Hashi* was explicitly tied to circumstances in which the insurer actively frustrated attempts by a claimant to comply with attendance obligations.[10] It is not alleged that Aviva has set up any such barrier to the applicant's compliance with s.44 of the *Schedule*.

ii The applicant waited a year after the initial IE was scheduled before providing an explanation for his non-attendance at required IEs. While the *Schedule* does not prescribe a timeline for "subsequent compliance" under s. 37(8)(b)(ii), the applicant cannot (and in fact does not) reasonably argue that he has an unlimited time within which to comply with his obligations under s.44. He does not deal effectively with Aviva's concern about the prejudice to its ability to determine his claims with significantly delayed IEs.

[25] As the result of the foregoing analysis, I conclude that:

i DC is barred from proceeding with his appeal of Aviva's refusal to pay the disputed medical benefits and costs of examinations listed in this application. I summarize my main reason to be that DC did not make himself reasonably available for the required IE as required by the *Schedule*, and provided no credible, reasonable explanation for his failure to attend.

ii The bar to his appeal does not extend to his claim for NEBs, because there is no evidence in the submissions that he was asked and then refused to attend an IE to assess his claim for NEBs.

Is Aviva entitled to withhold payments for DC's NEB claim because he failed to provide information requested under s.33 of the *Schedule*?

DC's duty to provide information

[26] Section 33(1)1. of the *Schedule* requires the applicant to provide the insurer with any information reasonably required to assist it in determining entitlement to a benefit.

[27] Under s.33(6), the respondent is not liable to pay for a benefit in respect of any

[9] *Hashi and Security National Insurance Management Inc.,* 2006 FSCO A05-001275

[10] In *Hashi* the insurer had insisted on immediate payment of no-show fees as a precondition for setting up a subsequent examination – an action that the arbitrator noted it was not legally entitled to take. Another distinguishing feature is that the claimant in *Hashi* was found to have reasonable explanations for missing at least one of the IEs.

period during which the applicant fails to comply with s.33(1).

[28] Section 33(8)(b) requires the respondent to pay all amounts that were withheld during the period of non-compliance if the applicant provides the required information and a reasonable explanation for the delay in compliance.

Aviva's duty to provide sufficient notice about election of benefits

[29] Section 32(2)(d) of the *Schedule* requires the insurer to promptly provide the insured person with information on the election relating to income replacement, non-earner and caregiver benefits, if applicable.

[30] Section 35(1) of the *Schedule* prescribes that if an application indicates that the applicant may qualify for either the IRB or NEB, the insurer must notify the applicant that he or she must elect the benefit – IRB or NEB – that he or she wishes to receive. In practice, this is done by requesting an election of benefits form (OCF-10).

[31] Section 36(6) of the *Schedule* prescribes that if the insurer fails to provide the required notice ("failure" includes providing a deficient notice), it must pay the specified benefit[11] for the period starting on the day it received the application and completed disability certificate and ending of the day it gives the required notice.

[32] The parties agree as to the sequence of events in this matter. They agree that:

i. DC sent Aviva an application for accident benefits (OCF 1) on May 12, 2015. In it he declared his status as "unemployed and have worked 26 weeks in the last 52 weeks."

ii. In response to DC's application for benefits, Aviva requested in a letter dated May 28, 2015 that he provide more employment information and a disability certificate (OCF-3) and advised him based on what he had submitted that he did not qualify for NEBs – but asked DC to notify it if this advice was incorrect.

iii. DC supplied an OCF-3 indicating that he met the test for both IRBs and NEBs. This was received by Aviva on June 2, 2015.

iv. On June 10, 2015, Aviva sent a letter telling DC that he <u>might</u> qualify for IRBs, and asked for an employer's confirmation form (OCF-2) plus pay stubs. It reiterated its position that DC did not qualify for NEBs, based on information supplied by him, and asked him to contact it if that information was incorrect.

[11] Defined by s.36(1) as "an IRB, NEB, caregiver benefit or a payment for housekeeping or home maintenance services … "

v. In a s.33 request dated April 13, 2016, Aviva reiterated its request for employment information and an amended OCF-3.

vi. On May 10, 2017, Aviva sent DC another letter requesting the same information.

[33] Aviva claims that it is entitled to withhold payment of claimed benefits, whether IRBs or NEBs because it has made two requests under s.33 of the *Schedule* for employment information and other information required to determine his claims for income replacement benefits (IRBs) or alternatively, NEBs. It asserts that up to the date of the hearing submissions, the requested information has not been received.

[34] DC claims that he never received a proper notice in response to his claims. He asserts that although Aviva requested employment information, it never provided him with the notice of election required by s.35(1) of the *Schedule* or the OCF-10 form. He also argues that this failure means that Aviva effectively denied his NEB claim without reasons – despite having received evidence in the form of the OCF-3 that he met the test for NEBs.

[35] DC asserts that Aviva's failure to comply with s.35(1) of the *Schedule* means that it is liable to pay him the disputed NEBs under s.36(6).

[36] DC asserts in the alternative that even if he was non-compliant with s.33 of the *Schedule*, he is owed NEBs for the period between November 1, 2015 and April 23, 2016 when his response to Aviva's first s.33 request would have been due. He further argues that Aviva's second request of May 10, 2017 effectively re-set the clock on compliance, making Aviva liable to pay NEBs up to May 25, 2017.[12]

[37] I find as follows:

i. Aviva's notice was deficient in not providing clear, specific information about DC's election of benefits options and an OCF-10 form pursuant to s.32(2)(d). It was obligated to pay him benefits under s.36(6) of the *Schedule* because of its deficient notice.

ii. DC failed to comply with his obligation under s.33 of the *Schedule* to provide information to Aviva. He offered no convincing explanation for this failure. Aviva's requests were simple, clear, warranted in order to adjust the file and if honored would have led to progress in adjusting the claim and clearing up misunderstandings. DC didn't need to know about his election options to submit the information requested, and he was invited to correct any misunderstanding if Aviva's initial position on his NEB entitlement was wrong. Aviva is entitled to rely on the remedy provided by s.33(6) of the *Schedule*.

[12] That is, ten business days after the request, which is the timeline for compliance prescribed by s.33.

iii. There is no basis – none is offered by DC -- on which to determine that a defective explanation of benefits relieves a claimant such as DC of his obligation to comply with a s.33 request from an insurer which, as he acknowledges, was continuing to adjust his claim.

iv. I do not accept that Aviva's reiterating a s.33 request and making efforts to resume adjusting a claim restarts the "compliance clock". DC offers no persuasive evidence that this is so, and such a position leads to the absurd result that an insurer must simply abandon efforts to deal with a claim if an applicant decides not to meet an initial s.33 request or expose itself to losing its s.33(6) remedy.

v. DC was entitled to be paid NEBs during the period in which he suffered from lack of sufficient notice. That "insufficient notice entitlement" period ended when he failed to comply with Aviva's s.33 requests.

[38] Based on my findings, I have determined that:

i. Aviva is liable to pay DC the claimed NEBs for the period from November 1, 2015 and April 27, 2016[13] as the result of my finding set out in paragraph [35]i. above.

ii. Aviva is not liable to pay DC the claimed NEBs for any period after April 27, 2016, when he was not in compliance with s.33 of the *Schedule*, as the result of my finding expressed in paragraph 37ii-iv above.

Award

[39] DC requested both costs and an award as a penalty against Aviva for including, in its submissions, information relating to case conferences in this matter.

[40] Section 10 of *Regulation 664, Automobile Insurance*[14] ("the Regulation") permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer has "unreasonably" withheld or delayed payments.

[41] DC's submission does not address whether or not Aviva's adjustment of DC's claim meets the threshold for an award under the Regulation. I find that it does not and I dismiss the award request.

[13] April 27, 2016 was ten business days after Aviva's IE request of April 13, 2016.
[14] R.R.O. 1990, Reg. 664

Costs

[42] Rule 19.1[15] 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".

[43] DC requested costs in this matter as a penalty against Aviva for including, in its submissions, information relating to case conferences in this matter.

[44] I don't believe that Aviva's error in including case conference information was intended to be frivolous, vexatious or in bad faith. The information had no persuasive value or impact on my decision because I ignored it.

[45] DC's costs request is dismissed.

CONCLUSIONS

[46] DC's appeal is statute-barred. He is precluded from appealing Aviva's denial of medical benefits and costs of examinations listed in his appeal.

[47] Aviva must pay DC NEBs for the period from November 1, 2015 and April 27, 2016, with interest at the prescribed rate[16]. Aviva is entitled to withhold payment of NEBs for any period after April 27, 2016.

[48] DC's requests for an award and costs are dismissed.

Released: May 2, 2018

Christopher A. Ferguson

Adjudicator

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

[16] Pursuant to s.51(4) of the *Schedule*.