



**Licence Appeal Tribunal File Number: 20-006454/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

**Fernando Carvalho**

**Applicant**

and

**Aviva Insurance Company of Canada**

**Respondent**

**MOTION ORDER**

**ADJUDICATOR:**

**Ian Maedel, Vice Chair**

## BACKGROUND

- [1] The applicant was injured in an automobile accident on **May 27, 2016** and sought benefits pursuant to the *Statutory Accident Benefits Schedule Effective September 1, 2010*.
- [2] The applicant was denied certain benefits and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").
- [3] A case conference took place on **April 14, 2021** before Adjudicator Kowal. A teleconference hearing was scheduled for December 6-10, 13-17, 2021.
- [4] The issues in dispute include a catastrophic impairment determination, income replacement benefits, housekeeping and home maintenance, medical treatment plans, the costs of examinations, an award, and interest.

## MOTION

- [5] On November 1, 2021, the applicant filed a Notice of Motion requesting that the Tribunal;
  - i. Adjourn the hearing until the catastrophic insurer's examination addenda process is completed and reports produced.

## PARTIES' POSITIONS

### Respondent's Position

- [6] The respondent is seeking an adjournment of the hearing so it can conduct s. 44 insurer's examinations ("IEs") for psychiatry and occupational therapy. Catastrophic impairment is at issue pursuant to criteria 7 and 8 and these IEs are required to respond to the applicant's rebuttal reports and updated medical documentation.
- [7] The respondent further submits it has been more than two years since the respondent's previous assessments, and in-person IEs are now required by the assessors.
- [8] The respondent submits that the addendum reports sought are relevant to the issues in dispute. Without the addendum reports, the Tribunal is left without material evidence necessary to make a proper determination. This is precisely why an adjournment is required to permit an adequate hearing to be held.
- [9] Completion of the respondent's addenda reports is essential to ensure a procedurally fair adjudication of the matter on the merits, as per *Certas Direct*

### **Applicant's Position**

- [10] The applicant submits the respondent is attempting to obtain in-person psychiatry or occupational assessments to rebut the applicant's s. 25 psychiatry and occupational therapy catastrophic rebuttal reports. The applicant has not served a s. 25 neurological rebuttal report to warrant any further respondent addenda.
- [11] The applicant did obtain a s. 25 psychiatric addendum, but this new report was required because the previous assessor passed away in June 2021 and was unavailable to provide a response or testify at the upcoming hearing.
- [12] The applicant submits the production deadlines were laid out in the previous Case Conference Report. The applicant was able to abide by the August 30, 2021 production deadline and provided productions and addenda prior to that date. The respondent was unable to meet its production deadline of October 29, 2021, and the applicant should not be prejudiced as a result.
- [13] The applicant submits the respondent is simply attempting to amass further evidence to bolster its position and stall the hearing scheduled to commence on December 6, 2021. The respondent has failed to discharge its onus in demonstrating any compelling grounds to permit an adjournment of this ten-day hearing.
- [14] Further, no new issues were raised in the applicant's s. 25 addenda that now require an adjournment for procedural fairness purposes. The hearing is less than a month away. If this matter was adjourned, it would be delayed a minimum of four to five months just to complete assessments. An additional delay of up to a year could result due to the Tribunal's availability.
- [15] The applicant submits costs should be awarded, pursuant to Rule 19, in the amount of \$300.00.

### **Respondent Reply**

- [16] The respondent was aware of the deadlines imposed in the previous Case Conference Report and Order, it was simply unable to obtain the addenda by the disclosure deadline of October 29, 2021. This Notice of Motion was filed immediately after the deadline.
- [17] The initial s. 44 catastrophic impairment reports were provided almost two and half years ago. The s. 44 neurology assessor, Dr. Sherali Esmail, has retired from conducting independent medical assessments. The respondent has also received a significant amount of additional medical documents that together paint a complicated and changing account of the applicant's circumstances, such that

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<sup>1</sup> 2011 ONSC 3986 (Div. Ct.) ("Gonsalves").

the respondent needs an in-person assessment.

- [18] Additional reports are essential to achieve hearing fairness and a level playing field, given the recently-obtained s. 25 addendum reports. Permitting the applicant to adduce recent, in-person s. 25 addendum reports, while denying the respondent the same opportunity, is inconsistent with hearing fairness.

## **ANALYSIS**

- [19] The respondent's adjournment request is denied. The hearing scheduled for **December 6-10, 13-17, 2021** shall proceed as previously scheduled.
- [20] The respondent has sought an adjournment for procedural fairness, such that it may conduct further in-person IEs related to the applicant's alleged catastrophic impairment, pursuant to criteria 7 and 8 of the *Schedule*.
- [21] The respondent bears the onus of establishing an adjournment is required in these circumstances. The main thrust of its argument revolves around the potential prejudice of proceeding to a catastrophic hearing when it has not had the chance to assess the applicant's impairments in nearly 2.5 years. This is particularly relevant given the applicant's recent s. 25 addendum reports provided in August 2021.
- [22] The respondent submits it requires an additional neurological assessment, because the previous assessor, Dr. Esmail, has retired and will be unable to provide evidence at the hearing. Similarly, the respondent received additional medical information which has not been forwarded to its assessors. This additional medical evidence paints a "complicated picture" regarding the applicant's current functioning, which may have changed over the past two years.
- [23] The deadlines for addenda were set at the previous case conference. The applicant was to provide any assessments, including catastrophic rebuttal reports, by August 30, 2021. In turn, the respondent was to provide any addenda by October 29, 2021.
- [24] The respondent submits it was aware of the deadline, but unable to arrange timely assessments within the deadline. The IEs it is seeking to arrange are scheduled for November 21, 2021 and April 13, 2022.
- [25] This matter turns on two factors, timing and prejudice. The respondent is a sophisticated party and proceeded with the knowledge it had only eight weeks to conduct further IEs following the applicant's August 30, 2021 deadline. It was up to the respondent to act with diligence to ensure these assessments were conducted in the time allotted, or it needed to provide a timely Notice of Motion to request an adjournment.
- [26] Instead, the anticipated assessments were both scheduled after the October 29, 2021 deadline, one even being scheduled in April 2022, nearly four months after

the anticipated commencement of this hearing. If the prejudice wrought by the additional medical information and the retirement of the previous neurological assessor was so great, why was it not apparent by early September that an adjournment would be required? Similarly, when did Dr. Esmail retire from conducting assessments? There is no evidence the respondent acted diligently to ensure a second neurological assessor was retained in a timely manner. This is in direct contrast to the applicant who ensured a second psychiatric assessor was retained after the death of the initial assessor in June 2021.

- [27] I have not been provided with any evidence by the respondent of the efforts it made, if any, to schedule these assessments in a timely manner prior to the October 29, 2021 deadline. In fact, the Notice of Examination was not dated until November 8, 2021, less than four weeks prior to the commencement of the hearing, and more than a week after the October 29, 2021 deadline had lapsed.
- [28] It is well-established at the Tribunal that the primary purpose of an IE, pursuant to s. 44, is the adjustment of the file. IE requests made in close proximity to a hearing date must undergo increased scrutiny to ensure they are not simply to bolster the evidentiary foundation of the respondent's case.
- [29] The respondent repeatedly cites the "complicated picture" related to the applicant's potential state of functioning since the previous catastrophic IEs. However, it failed to provide any evidence of a deterioration in the applicant's condition (or a material change in circumstances) to warrant additional in-person assessments. Considering the significant prejudice that would face the applicant from a lengthy delay of the proceeding, I place little weight on speculative statements that are not grounded in medical evidence.
- [30] To confuse matters further, the respondent asserts in its Notice of Examination states "there is insufficient medical documentation to make a determination in response to the OCF-19". This is contrary to its motion submissions, whereby it requires time to review the voluminous amount of additional medical information provided. This mixed messaging is in direct opposition to the requirement for clear, easily discernable reasons for an examination as required in *M.B. v. Aviva Insurance Canada*<sup>2</sup> and to the consumer protection nature of the *Schedule*.
- [31] Timing is another key consideration in my decision. The respondent's amended Notice of Motion was filed on November 1, 2021, approximately five weeks in advance of the hearing. Due to the need to provide both sides with an adequate opportunity to prepare and provide submissions for this important determination, this motion hearing was not then conducted until November 26, 2021, less than two weeks prior to the December 6 hearing date.
- [32] There is no doubt that the parties are now on the very eve of the hearing. The applicant has been awaiting a determination of these issues for almost one and a

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<sup>2</sup> 2017 CanLII 87160 (ON LAT).

half years since the filing of this application, and more than five years since the date of the accident. He has expended his benefits up to the non-catastrophic limit, and he has outstanding loans and financial obligations as a result of the delay already incurred.

- [33] I am also very mindful of the additional delay wrought by institutional factors at the Tribunal. In the event this matter was adjourned on today's date, the Tribunal would likely be unable to reschedule a ten-day videoconference hearing until December 2022. Twelve months of additional delay in these circumstances is excessive and will exponentially increase the prejudice wrought to the applicant.
- [34] In addition to the delay, the issue of procedural fairness is not as central to the adjournment request as the respondent submits. This matter is distinguishable from *Gonsalves*. This is not a circumstance where the respondent has been denied procedural fairness because it has been completely unable to assess the applicant in relation to catastrophic impairment claim. This is a matter where the respondent is seeking updated rebuttal reports to respond to s. 25 rebuttal reports, which, in turn, were originally obtained in response to the respondent's IE reports.
- [35] I am similarly persuaded that the respondent is not seeking further in-person examinations to adjust the file, but in order to obtain additional information about the applicant's state of functioning for the hearing. Given the inherently intrusive nature of IEs, the passage of time should never be the sole determinant of whether an additional examination should be conducted. There has otherwise been no additional evidence adduced of a material change in circumstances to warrant last-minute IEs, so the presumption—at this late stage in the proceeding—is that this request is primarily motivated by the upcoming hearing.
- [36] The respondent has not met its onus of establishing an adjournment is warranted in the circumstances. It has not acted with diligence in arranging the assessments following the applicant's August 30, 2021 production deadline. Similarly, it has failed to provide key evidence in support of the adjournment request, including when (and what steps were taken when) it first became aware that its neurological assessor, Dr. Esmail, was retiring? None of this evidence is before me. Therefore, in the face of compelling evidence of prejudice to the applicant, I simply cannot grant an adjournment of the hearing based on the evidentiary record provided by the respondent in this motion.
- [37] I would also add that, when I weigh the totality of the evidence before me, I must conclude that an adjournment in these circumstances would compromise the Tribunal's mandate to ensure an efficient, proportional, and timely resolution of matters, pursuant to Rule 3.1(b) of the Tribunal's *Common Rules of Practice & Procedure* (the "LAT Rules").

## Costs

- [38] The applicant's motion for costs is denied.
- [39] Costs are a non-compensatory remedy which are rarely imposed, and only when a party has acted unreasonably, frivolously, vexatiously, or in bad faith, pursuant to Rule 19.1 of the LAT Rules. Put another way, the threshold for costs is a high bar.
- [40] Although I have not been persuaded that the respondent acted with diligence in ensuring its IEs were completed within the timelines set, I cannot conclude it acted unreasonably or in bad faith. I am similarly unpersuaded that the respondent acted in a manner that deliberately sought to mislead the Tribunal. Given these facts, and the totality of evidence, I am not prepared to order costs as a result of this motion.

## ORDER

- [41] The respondent's motion to adjourn the videoconference hearing is denied.
- [42] The videoconference hearing shall proceed as scheduled on **December 6-10, 13-17, 2021, commencing at 9:30 am on each date.**
- [43] The applicant's motion for costs is denied.
- [44] **Except for the provisions contained in this Motion Order all previous orders made by the Tribunal remain in full force and effect.**
- [45] If the parties resolve the issue(s) in dispute prior to the hearing, the applicant shall immediately advise the Tribunal in writing.

**Released: November 30, 2021**

  
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**Ian Maedel**  
**Vice Chair**