Licence Appeal Tribunal File Number: 20-008347/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:

Gul-e Firdaus

Applicant

and

TD Insurance Meloche Monnex

Respondent

MOTION ORDER

Order made by: **Craig Mazerolle, Adjudicator**

Date of Order: **August 2, 2022**

BACKGROUND

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

[2] A videoconference hearing is set to start on August 22, 2022.

[3] The issues in dispute include requests for an income replacement benefit ("IRB"), medical benefits, and an award.

[4] The respondent filed a Notice of Motion (signed June 30, 2022) seeking to bar the applicant's application from proceeding to a hearing, pursuant to s. 55(1) of the *Schedule*. Briefly, the respondent alleged that the applicant did not attend a series of insurer's examinations ("IE") meant to test her entitlement to the IRB.

[5] For the reasons to follow, I will not grant the respondent's requested relief.

PARTIES' POSITIONS

[6] The respondent claimed the applicant failed to attend a series of "reasonably necessary" IEs it scheduled to test her entitlement to an IRB after the 104 week post-accident mark. Specifically, the applicant provided her own IRB reports in early 2022 (along with a significant amount of medical disclosure), so, the respondent argued, fairness required it to have the chance to obtain its own responding reports—in line with *Certas Direct Insurance Company v. Gonsalves* ("*Gonsalves*")[1]. The respondent also noted that, while it has IE reports focused on the post-104 week IRB standard, these reports are now dated, and they were completed without comprehensive disclosure of the applicant's clinical notes and records. Finally, though the applicant claimed its responding reports could have been completed through paper reviews, the respondent's assessment company provided an expert opinion that concluded the IEs had to be done in-person.

[7] The applicant opposed the motion by claiming that the respondent's request is untimely. The original hearing dates were adjourned to allow the parties to complete this testing (order dated April 25, 2022). The applicant informed the respondent shortly after this adjournment that she would object to these IEs, so it was unreasonable to wait several months to file this motion (especially since the due date for the respondent's reports was July 21, 2022). Additionally, the respondent has already obtained 7 IEs focused on her entitlement to the post-104 week IRB. There is also no indication that the respondent provided its

[1] 2011 ONSC 3986 (Div. Ct.) (CanLII).

assessment company with her 2022 IRB reports in advance of its suggestion that the IEs should take place in-person. Finally, the applicant argued the respondent's IE notices are not compliant with the *Schedule*.

[8] In reply, the respondent stated that it could not file this Notice of Motion until it received the letter confirming the applicant's non-attendance at the IEs on May 20, 2022.

ANALYSIS

[9] Section 44(1) of the *Schedule* defines an insurer's ability to require an insured person to attend an IE as follows [emphasis added]:

> For the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made***, but not more often than is reasonably necessary***, an insurer may require an insured person to be examined under this section by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation.

[10] Section 55(1) disallows applicants from pursuing a benefit if they did not attend a properly scheduled IE.

[11] Though the parties provided arguments about the sufficiency of the IE notices and the "reasonably necessary" nature of this testing, I find the key factor at play is the timing of the respondent's motion. As detailed above, the parties were provided with an adjournment to conduct the IEs now at issue. This timeline was tight, as the original hearing dates were moved from May 2022 to late August 2022—with a due date for these further reports set for July 2022. This strict timeline is in line with the Tribunal's mandate for efficiency under Rule 3.1 of the *Common Rules of Practice and Procedure*, and it was imperative that the parties do everything they could to ensure another adjournment was not needed.

[12] Though the respondent claimed it could not file this motion until there was confirmation of the non-attendance, the urgency of this timeline meant that action needed to be taken as soon as the applicant indicated she would not attend. This failure to act in a timely manner has meant this stay request was filed only weeks before this second set of hearing dates—a set of circumstances the imperils the Tribunal's mandate for efficiency.

[13] Efficiency alone cannot dictate the Tribunal's actions, as there is always a need

to ensure procedural fairness for all parties. This need for fairness is especially pressing when there are allegations of evidentiary disparities. Therefore, if the respondent faced the possibility of attending the hearing with no IE reports addressing the post-104 week IRB, the need for fairness would have likely overcome the need for efficiency. This balancing act underpins the finding from *Gonsalves*, as the insurer in this earlier case was asked to attend a hearing without the ability to test an insured person's condition under a new discipline.

[14] However, unlike the late addition of a new report in *Gonsalves*, I am not satisfied that procedural fairness is similarly imperiled in this dispute. The respondent has its own series of IE reports addressing the post-104 week IRB, and the disciplines it is now seeking for its new IEs are the same as those assessors who conducted its earlier testing. I understand the respondent has concerns about how its reports may be seen as dated when compared to the applicant's (as its IEs took place in late 2019). However, fairness does not require the parties to have the best available evidence at their disposal. Instead, the need for updated expert opinions must be weighed against the interest of having this dispute addressed in a timely manner. I am satisfied that the difference in the dates of the parties' assessments does not require another delay to this hearing.

[15] I would also note that the respondent was provided a chance to address these evidentiary issues when the Tribunal adjourned the original hearing dates. Again, this timeline was tight from the outset, but a fair opportunity was provided to the respondent to obtain updated testing. It was, therefore, essential for the respondent to alert the Tribunal that it would contest the applicant's stated intention not to attend its IEs as soon as possible.

[16] Turning to the respondent's claim that it conducted its previous IEs without the aid of comprehensive medical disclosure, I reach similar findings about this argument based on my earlier observations about the timing of this motion. However, I also do not accept the respondent's reasons for why it could not obtain paper reviews based on these records. While the respondent stated that its assessment company required in-person IEs, I note that the wording from the company's May 19, 2022 letter described this testing format as a "recommendation", e.g., "…the most recent recommendation for the conduct of in-person assessments…".

[17] Beyond the fact that insurers have control over their assessments pursuant to s. 44(1) of the *Schedule*, it was imperative that the respondent take all necessary and reasonable steps during the time allotted by the adjournment order to ensure this medical disclosure was reviewed in some fashion by its experts. While I

accept the reasoning provided in the May 2022 letter for why in-person assessments were recommended (e.g., “direct objective… examinations” will allow for a better understanding of the applicant’s condition), this recommendation alone does not affect my findings about the urgency of the timeline set out in the adjournment order. Put another way, with only a few months to complete this testing, the respondent had to take all reasonable steps to facilitate some form of testing once the applicant opposed the in-person IEs.

[18] The respondent cited *S.M. v. Aviva Insurance Canada* (“*S.M.*”)[2] in support of its position that the assessment company’s recommendation for in-person IEs needed to be given serious weight. I do not find this case is analogous to the present dispute, because the insurer in *S.M.* only had IE reports that addressed the pre-104 week standard for the IRB, not the post-104 week standard. As I noted above, the balance of fairness and efficiency would have most likely leaned in favour of staying the application if the present respondent did not have any reports addressing the post-104 week standard. However, since it does have these reports, I do not find the reasoning in *S.M.* alters my analysis.

[19] Taken together, I find the respondent has missed its opportunity to obtain further IEs in advance of the hearing. I am also satisfied that, with its 2019 IRB IEs, the evidentiary disparity between the parties is not so significant as to affect the procedural fairness of the proceeding. Rather, the need for efficient resolution of this dispute leans heavily in favour of allowing the hearing to proceed as scheduled.

DISPOSITION

[20] The respondent’s motion is denied.

Released: August 2, 2022

Craig Mazerolle
Adjudicator

[2] 2019 CanLII 83581 (ON LAT).