



Tribunal File Number: 18-009967/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:

Craig Benson

Applicant

and

Allstate Insurance Company of Canada

Respondent

MOTION ORDER

Order made by: Terry Hunter, Vice Chair

Date of Order: January 26, 2021

OVERVIEW

- [1] The applicant was injured in an automobile accident on **Saturday, June 4, 2016**, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule").
- [2] The applicant was denied certain benefits and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").
- [3] The applicant claims catastrophic impairment designation as a result of his accident related injury which is a traumatic brain injury and cognitive deficits allegedly resulting from the injury. A number of case conferences have been held and a videoconference hearing is scheduled to commence February 16, 2021.
- [4] As detailed in the respondent's Notice of Motion, dated December 18, 2020, the respondent has significant concerns about the applicant's capacity to instruct counsel and participate in these proceedings before the Tribunal. The respondent seeks the following relief:
 - a. An order that the Tribunal declare that Mr. Benson is a party under a disability or is mentally incapable, and;
 - b. The proceeding is suspended until a Litigation Guardian is appointed on behalf of the applicant, Mr. Benson, or Mr. Benson submits new evidence that he is competent to make a decision about the litigation.
- [5] The applicant opposes the motion.
- [6] For the following reasons, the respondent's motion is denied.

PARTIES' POSITIONS

- [7] According to the respondent, the medical and legal records the parties have submitted make it abundantly clear the applicant does not possess the capacity to understand this legal proceeding, nor to instruct counsel.
- [8] In light of these well documented concerns, the respondent argues the Tribunal should assess the applicant's capacity and declare the applicant mentally incapable. The respondent concedes the Tribunal does not have the power to order the appointment of a Litigation Guardian, it submits the Tribunal does have the jurisdiction to suspend the proceedings until one is appointed, or there is new evidence of capacity.
- [9] The respondent submits the Tribunal has the jurisdiction to make orders to control its process, including the suspension of proceedings. The respondent urges the Tribunal to take on an enhanced view of the process used by the Social Justice Tribunals of Ontario. This process the respondent submits has

been adopted by the Tribunal in *Applicant v. Aviva*.¹

- [10] The respondent concedes the law presumes the applicant to be capable. There is significant evidence that rebuts the presumption of capacity. A capacity assessment has not been done however the respondent submits that there is ample evidence in the medical reporting and from applications submitted by the applicant to obtain income supports to support a finding of incapacity.
- [11] The respondent concedes that the Tribunal does not have a formal process to determine capacity nor does it have the power to appoint a litigation guardian. The respondent submits the Tribunal has the jurisdiction to control its own processes and that includes the jurisdiction to suspend these proceedings until a litigation guardian is appointed or there is new evidence the applicant is capable of instructing counsel.
- [12] The applicant opposes the respondent's request for a number of reasons. Chief amongst them is the applicant's contention that by raising the issue of capacity two months prior to the hearing is a tactical move.
- [13] The respondent has not raised the issue of capacity either during or following the Examination Under Oath of the applicant or during any of the four case conferences the parties participated in.
- [14] The applicant has undergone a number of assessments the applicant submits in regard to his injuries. He has provided consents to the assessors. None of the assessors declined to accept the consent of the applicant and they did not mention the applicant was mentally incompetent or that he should undergo a capacity assessment.

ANALYSIS

- [15] The respondent's motion is denied, as I am not satisfied that the Tribunal has the jurisdiction to provide the relief it is requesting.
- [16] The Tribunal has no explicit authority to determine capacity or to appoint a litigation guardian. The respondent points to the decision in *Aviva* which used the broad powers in Rule 14.1 of the Tribunal's Rules of Practice and Procedure to deal with capacity issues. The respondent further points to s. 23(1) of the SPPA and s. 25.0.1 which grant the Tribunal the power to make orders as it deems necessary to prevent abuse of its process. The wide latitude provided to adjudicators to make orders under Rule 14 can the respondent submits work to provide the power to assess capacity and suspend the proceedings until the capacity issue is resolved.
- [17] The respondent has cited cases from the Tribunal and the Human Rights Tribunal of Ontario, wherein adjudicators found they had the power to assign

¹ Applicant v. Aviva, 16-004144/AABS, 2017 CanLII 62157

litigation guardians.² I accept the findings in *Aviva* and *Romanchuk* that the Tribunal can issue orders that promote fair and efficient adjudication.

- [18] The difference between this proceeding and *Aviva* is the Practice Direction and Human Rights Tribunal Rule A10 referred to by the respondent specifically indicates it only applies when another person wants to be the litigation guardian and there is no dispute concerning the applicant's lack of capacity.
- [19] I do not see how the language of these general provisions, the Tribunal's Rules and Schedule A referred to in *Aviva* can be read to include the specific and highly technical power to assess an applicant's capacity. I also fail to see how they can indirectly, by suspending the proceedings, force a party to work with a litigation guardian without their consent. Without express statutory authority structuring how these kinds of exceptional processes would be conducted, I find the Tribunal does not currently have the authority to grant this remedy.
- [20] Considering the courts have the ability to assess a party's capacity and then assign a litigation guardian against their will, there is a means to receive this remedy.
- [21] In addition to the jurisdictional issues, I find it would be difficult to assess capacity based on documentation not intended to assess capacity.

Date of Issue: January 27, 2021



Terry Hunter
Vice Chair

² See Appendix A to 16-004144 and *Romanchuk v. Garda Ontario* (2009 HRT01077)