



Citation: Cao v. Allstate Canada, 2023 ONLAT 22-010567/AABS - PI

Licence Appeal Tribunal File Number: 22-010567/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:

Zhi Jun Cao

Applicant

and

Allstate Canada

Respondent

PRELIMINARY ISSUE DECISION AND ORDER

ADJUDICATOR: Tavlin Kaur

APPEARANCES:

For the Applicant: Anil Hampole, Counsel

For the Respondent: Andrew Rodrigues, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Zhi Jun Cao, the applicant, was involved in an automobile accident on October 6, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The applicant was denied benefits by the respondent, Allstate Canada (“Allstate”), and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

- [2] The preliminary issue to be decided is whether the applicant is barred from proceeding to a hearing for all of the benefits claimed in this application because the applicant failed to attend an insurer’s examination (“IE”) under section 44 of the *Schedule*?

RESULT

- [3] The applicant may proceed with her application because the notices of the IEs were deficient.

ANALYSIS

Parties’ positions

- [4] The respondent submits that the applicant was provided with a Notice of Examination that was compliant with the Schedule. The applicant’s failure to attend the insurer examination (“IE”) has prejudiced the respondent’s ability to properly respond and adjust the applicant’s claim.
- [5] The applicant submits that she informed the respondent that she was unable to attend the IE because she was out of town. No further IE was scheduled. On May 29, 2023, the applicant informed the respondent that she was available to attend the IEs. She asserts that she never refused to attend an IE. She is prepared and willing to attend.

Legislation

- [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 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] The requirements for a Notice of Examination are set out in section 44(5) of the *Schedule*:

- (1) If the insurer requires an examination under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,
 - (a) the medical and any other reasons for the examination;
 - (b) whether the attendance of the insured person is required at the examination;
 - (c) the name of the person or persons who will conduct the examination, any regulated health profession to which they belong and their titles and designations indicating their specialization, if any, in their professions; and
 - (d) if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days.

[8] Section 44(9)2. sets out the rules for an in-person insurer examination:

- (1) If the attendance of the insured person is required,
 - (a) the insurer shall make reasonable efforts to schedule the examination for a day, time and location that are convenient for the insured person,
 - (b) the insured person and the insurer shall, not later than five business days before the day scheduled for the examination, provide to the person or persons conducting the examination such information and documents as are relevant or necessary for the review of the insured person's medical condition, and
 - (c) the insured person shall attend the examination and submit to all reasonable physical, psychological, mental and functional examinations requested by the person or persons conducting the examination.

- [9] 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 section 44, but the insured person has not complied.
- [10] Given the above provisions, the *Schedule* is clear that the applicant has a duty to participate in each in-person IE that is reasonably necessary and for which there is a *Schedule*-compliant notice. If the applicant fails to comply, there must be a reasonable explanation provided for the non-compliance.
- [11] To be clear, the respondent must first prove that a Notice of Examination complies with section 44(5) of the *Schedule* in order for an applicant to be statute-barred from proceeding under section 55. In seeking such a remedy, the respondent must ensure that it provides specific details of the applicant's conditions, the benefit in dispute and any section it relies upon.¹
- [12] It is well-settled that the insurer's 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. The "medical and any other reasons" should be clear and sufficient enough to allow an unsophisticated person to make an informed decision on whether to attend the IE.
- [13] Moreover, it is trite law that boilerplate medical reasons for denials of treatment plans submitted under the *Schedule* constitute as no reasons at all. Reasons must be meaningful in order to permit the insured person to decide whether or not to challenge the insurer's determination.
- [14] I note that according to *Smith v. Co-operators General Insurance Co*, [2002 SCC 30](#) ("*Smith*"), the refusal to pay the benefit must contain straightforward and clear language, it must be directed towards an unsophisticated person, it must outline the dispute resolution process and the relevant time limits that govern the process, and it must provide valid or other reasons for the denial. **[my emphasis added]**. Defining with precision an unsophisticated person is a challenging task; however, the Court's direction in *Smith* clearly recognizes that greater accessibility of an insured person to the informational content of the denial notice

¹ The Divisional Court in *Hedley v. Aviva Insurance Company of Canada*, [2019 ONSC 5318 \(CanLII\)](#) considered the Tribunal's reconsideration decision of *B.H. v. Aviva Insurance Company*, [2018 CanLII 84051](#) (ON LAT), which in turn applied *16-003316/AABS v. Peel Mutual Insurance Company*, [2018 CanLII 39373](#) (ON LAT) ("*T.F.*"). The Court found no basis to intervene as the decision was within the reasonable range of outcomes. In *T.F.*, Executive Chair Lamoureux repeated her comments from *M.B.* in paragraph 19 in relation to medical and any other reasons.

is of paramount importance and must necessarily account for the variety of persons and backgrounds who may make claims for accident benefits.

- [15] Accordingly, *Smith* requires a denial notice to be as specific and accessible as possible, to ensure that there is no ambiguity in what they mean when read by an unsophisticated person.
- [16] In my view, the notice at the very least should explain what the insured person's medical conditions are, and why for example, those conditions do not justify removal from the Minor Injury Guideline. An individual might not understand why their medical conditions are considered to be minor if they are not provided with more context. By providing this information, the insured person will have a better understanding of the insurer's determination. It is then that the consumer protection mandate of the *Schedule* is achieved.
- [17] Therefore, the notice requirements set out in section 44(5) should be strictly construed and the notice should be closely examined to ensure it complies. If the respondent's notice does not comply with section 44(5), an insurer cannot rely on the severe remedy available in section 55 of the *Schedule* to bar an insured's application from proceeding before the Tribunal.

The notices of examination ("NOE") for the treatment plans in the amount of \$2,200.00 and \$3,981.88 are deficient

- [18] On September 6, 2021, the respondent informed the applicant that they wished to address the reasonableness and necessity for the treatment plans for a psychological assessment in the amount of \$2,200.00, and psychological therapy in the amount of \$3,981.88.
- [19] The NOE states that "Injuries appear to be predominantly minor in nature and can be treated within the Minor Injury Guideline. As there is no supporting medical documentation to indicate injuries are not MIG injuries, we require you to be assessed as outlined in Sections 38(10) and 44 of the Statutory Accident Benefit Schedule (SABS) in order to assist us in determining if your injuries can be treated within the \$3,500.00 Minor Injury medical and rehabilitation policy limit and to determine if the goods and services being proposed are reasonably required as a result of the accident."
- [20] The NOE does not mention the applicant's conditions and nor does it identify the information that it required. An individual who is not familiar with the *Schedule* cannot be expected to understand what the Minor Injury Guideline is. The reasons should have been clear and sufficient enough to allow an

unsophisticated person to make an informed decision to either accept or dispute the decision at issue. In my view, the respondent should have used plain language to explain what the Minor Guideline is, and how her injuries fall within it.

- [21] As I have determined that the notice was deficient, it is not necessary for me embark on an analysis as to whether or not the IEs were reasonably necessary, and whether the applicant had a reasonable explanation for the non-attendance.
- [22] For the reasons above, I find that the applicant is not precluded from applying to the Tribunal.

ORDER

- [23] The applicant may proceed with her application before the Tribunal.

Released: July 24, 2023

**Tavlin Kaur
Adjudicator**