



Citation: Fard v. Economical Insurance, 2022 ONLAT 19-010239/AABS-PI

Licence Appeal Tribunal File Number: 19-010239/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:

Ghiti Iravani-Fard

Applicant

and

Economical Insurance

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: Derek Grant

APPEARANCES:

For the Applicant: Joshua Lindzon, Counsel

For the Respondent: Ryan Kirshenblatt, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Ghiti Iravani-Fard (“GIF”) was involved in an automobile accident on December 5, 2018, and sought benefits from the respondent, Economical, pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010*¹ (the “*Schedule*”).
- [2] Economical denied GIF’s claims. GIF then applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) to determine: a) whether her injuries were captured within the definition of “minor” under the Minor Injury Guideline (the “MIG”); b) her entitlement to a weekly income replacement benefit (“IRB”); and, c) her entitlement to attendant care benefits (“ACBs”).
- [3] In response, Economical raised a preliminary issue. It submits that pursuant to s. 55(1) of the *Schedule*, GIF is statutorily barred from proceeding with her application because she has not attended at four scheduled insurer’s examinations (“IEs”) as required under s. 44 of the *Schedule*.

PRELIMINARY ISSUES

- [4] The following preliminary issues are to be decided:
- a. Is GIF barred from proceeding with her claim for IRB and ACBs as she failed to submit to an IE under s. 44 of the *Schedule*?
 - b. If GIF is not barred from proceeding, should the proceeding be stayed subject to her attendance at IEs by order of the Tribunal?

FINDING

- [5] GIF is statute-barred from proceeding with her application under s. 55(1)2 because she failed to attend properly scheduled s. 44 IEs.

ANALYSIS

Section 55

- [6] Section 55(1)2 of the *Schedule* sets out that an insured person shall not apply to the Tribunal if the insurer has provided them with notice in accordance with the *Schedule* that it requires an examination under s. 44, but the insured person has not complied with its request for attendance. Section 44 sets out that an insurer may require an insured person to be examined to assess entitlement to a benefit

¹ O. Reg. 34/10, as amended.

but not more than is reasonably necessary. A notice under s. 44(5) must state the medical and any other reasons for the examination, whether the insured's attendance is required, the name, title and designation of the person conducting the IE and the date, time and location of same.

Claim for the IRB

- [7] Economical paid GIF IRBs from her initial period of eligibility up to August 22, 2019. On July 24, 2019, Economical notified GIF of four IEs scheduled to address her ongoing IRB entitlement. GIF failed to attend the IEs and, on August 22, 2019, Economical notified GIF that her IRBs were suspended due to non-compliance under s. 44. On September 4, 2019, Economical provided an opportunity for GIF to re-attend the missed IEs, however, she did not attend.
- [8] There is no dispute that GIF failed to attend any of the initially scheduled IEs (February 20, 2019; August 16, 2019; August 20, 2019; August 22, 2019; and August 27, 2019) or any that were subsequently rescheduled.

Claim for the ACB

- [9] On August 12, 2019, GIF submitted a s. 25 attendant care assessment report. On September 16, 2019, GIF submitted a second s. 25 attendant care assessment report. On September 17, 2019, GIF filed her Tribunal application. On September 30, 2019, Economical provided notice that it required GIF to attend IEs to address her entitlement to an ACB. On October 1, 2019, GIF advised Economical that she was scheduled to undergo shoulder surgery, however, no surgery date was provided.
- [10] On October 9, 2019, Economical provided GIF with notice of three IEs (October 29, 2019 – orthopaedic surgery; November 5, 2019 – neurological; and November 7, 2019 – occupational therapist) scheduled to address the ACB claim. The same day, GIF's counsel notified Economical that she refused to attend the IEs. In a letter dated October 24, 2019, Economical provided GIF with an explanation of why the orthopaedic and neurology assessments were arranged and offered an opportunity to have the occupational therapy assessment take place at a different location other than her home.
- [11] Economical paid the ACB benefit, (unclear from the evidence the duration) however, in a letter dated November 21, 2019, it advised GIF that the ACB was suspended effective October 29, 2019. In addition, Economical offered an opportunity for GIF to attend rescheduled IEs. It also informed GIF that

continued non-attendance may affect her ability to proceed with an application to the Tribunal, pursuant to s. 55 of the *Schedule*.

- [12] On December 4, 2019, GIF submitted a third s. 25 attendant care assessment and Form 1 that was prepared after she underwent shoulder surgery on November 7, 2019. On December 18, 2019, Economical partially approved the Form 1. It agreed to pay attendant care for a total of \$2,119.89 per month. I note this is after previously paying the ACB and subsequently suspending same in October 2019. Economical provided notice that it required GIF's attendance at IEs to address entitlement to the ACB. In a letter dated January 10, 2020, Economical provided the notices of s. 44 IEs with the previously mentioned orthopaedic surgeon, neurologist and occupational therapist. In addition, Economical provided GIF with a Form 1 to be submitted by February 7, 2020.
- [13] Economical rescheduled the orthopaedic surgery and neurology IEs to March 9, 2020 and March 18, 2020. Notice of the rescheduled dates was provided in a January 30, 2020 letter. On February 7, 2020, GIF submitted another s. 25 attendant care assessment. By way of correspondence dated February 19, 2020, Economical agreed to pay \$1,679.00 in monthly ACBs, and reminded GIF of the scheduled March 2020 IEs.
- [14] On March 3, 2020, GIF's counsel advised Economical that she would not be attending any of the scheduled IEs. The reason provided was that "they are neither reasonable nor necessary."
- [15] On June 22, 2020, Economical provided GIF with correspondence regarding notice and the reasons for the orthopaedic, neurology and occupational therapy IEs scheduled for July 7, 17 and 24, 2020. On June 25, 2020, GIF's counsel again notified Economical she would not attend the IEs, with no reason for non-attendance provided. September 22, 2020, Economical notified GIF of rescheduled IEs (October 7, 2020 – orthopaedic surgery; October 9, 2020 – neurological; and October 22, 2020 – occupational therapy), including its reasons for the IEs. On October 1, 2020, GIF's counsel again notified Economical that she would not attend the IEs.

Were the IE requests in accordance with s. 44(5) of the Schedule?

- [16] I find that Economical's requests for GIF's attendance at its scheduled IEs complied with the requirements set out in s. 44(5) of the *Schedule*.
- [17] The medical and other reasons set out in the July 24, 2019 notice is as follows:

On March 7, 2019 Dr. Boozary reported you were not able to work for the next two to three months. As a result of your accident-related injuries, you have engaged in treatment, on an ongoing basis. We understand a referral has been made to Dr. Jha, Neurosurgeon, however, no records have been supplied in this respect to support ongoing disability.

- [18] The notice goes on to set out GIF's eligibility for the IRB. It further notes the purpose of the s. 44 IE, that Economical requires GIF to attend the IE and the details regarding whether transportation is required. The notice additionally set out the details regarding rescheduling, non-attendance and the required details of the assessors and specialties.
- [19] In my view, the medical and any other reasons are clear and sufficient to allow an unsophisticated person to make a fully informed decision to either accept or dispute the notice. Indeed, GIF refused to attend, so, I find any argument that it was not clear that her attendance was required, is weakened by this fact.
- [20] Similarly, I find the October 9, 2019 notice regarding attendance at s. 44 IEs for the ACB to be reasonably necessary. In the October 9, 2019 notice, Economical set out the concussion-based medical reasons, as well as the outstanding request for further medical records regarding her concussion and scheduled shoulder surgery. Again, the notice included the details regarding the specialists conducting the IEs, rescheduling, non-attendance and transportation.
- [21] On the evidence, I find that the October 9, 2019 notice provided clear medical and other reasons that clearly and sufficiently allow an unsophisticated person to make a fully informed decision to either accept or dispute the notice.

Is GIF in non-compliance with the s. 44 IE requests?

- [22] I find that on the facts and evidence, Economical's s. 44 IEs are reasonably necessary, and that GIF is barred under s. 55 from proceeding with her application until the IEs are completed.
- [23] Economical relies on the following six criteria from the Tribunal decision of *A.G. v. Allstate Insurance*² when determining whether a request for an IE is reasonably necessary:
- a. The timing of the insurer's request;

² 2019 CanLII 125858 (ON LAT) at para. 18.

- b. The possible prejudice to both sides;
 - c. The number and nature of the previous insurer's examinations;
 - d. The nature of the examination(s) being requested;
 - e. Whether there are any new issues being raised in the claim that require evaluation; and
 - f. Whether there is a reasonable connection between the examination requested and the applicant's injuries.
- [24] Economical submits that the multiple requests for the IEs were timely.
- [25] Economical submits that it would be significantly prejudiced if it were to proceed to a hearing without the opportunity to obtain s. 44 IE reports. Further, it submits that there is no prejudice to GIF, as she has participated in three attendant care assessments by her own assessor.
- [26] According to Economical, it has not had an opportunity to conduct any IEs, as a result, there have not been any previous IEs.
- [27] Economical submits that there is no issue with the nature of the IEs being requested, as they involved disciplines that are reasonably related to GIF's accident-related injuries and impairments with respect to her ability to work and participate in her activities of daily living and self-care tasks. Its position is that it requires the IEs to allow it to determine ongoing entitlement to benefits.
- [28] Although GIF has not raised any "new" issues, Economical's position is that it requires an opportunity to evaluate the impairments. Specifically, an orthopaedic exam for the right shoulder impairment following surgery, a neurologist to evaluate her alleged concussion/traumatic brain injury and an occupational therapist to address her ability to engage in her activities of daily living and address her attendant care needs.
- [29] Lastly, Economical submits there is a reasonable connection between its IEs and the injuries GIF suffered as a result of the accident. For example:
- a. Regarding the orthopaedic IE – The OCF-3 submitted post-accident noted a right shoulder injury. A full thickness tear was revealed through diagnostic imaging. GIF underwent post-accident shoulder surgery and treatment. GIF worked as a Personal Support Worker, as such, there is a reasonable connection between her right shoulder impairment and her

ability to engage in her pre-accident employment. Further, her own occupational therapist has continued to recommend attendant care assistance due to GIF's limitations of her right arm/shoulder;

- b. Regarding the neurology IE – According to the medical documentation, GIF was diagnosed with a traumatic brain injury as a result of the accident. She was diagnosed with symptoms that were consistent with post-concussive syndrome. Further, the s. 25 attendant care assessor noted cognitive symptoms; and
- c. Regarding the occupational therapist IE – As GIF has undergone several s. 25 assessments by her own occupational therapist, it is reasonable that Economical similarly rely on an occupational therapist to address the issue of the ACB.

[30] GIF submits that Economical failed to comply with s. 38(8) because it did not provide the “medical and any other reasons” in its notices.

[31] I disagree for the following reasons:

- a. First, s. 38(8) applies to treatment and assessment plans. Although there is a requirement under s. 44(5) for medical and any other reasons to be provided, that relates to the obligation on the insurer when it requests IEs. There is no provision under s. 38(8) as it relies to IEs or that failure under s. 44(5) results in the consequences of the s. 38(11) provision that the “insurer shall pay”. There is no treatment to pay for under s. 44;
- b. Second, there is no evidence that Economical failed to provide notice within the required five business days in accordance with s. 44(6);
- c. Third, there was no reasonable explanation for her refusal to attend the initial IEs requested in the July 24, 2019 letter; and
- d. Lastly, I find the s. 44 IEs were reasonably necessary, which is the only test that Economical has to meet.

[32] While I am not bound by previous Tribunal case law, the Tribunal has been consistent in its findings regarding the scheduling of IEs, which I find compelling. I agree with the notion that in scheduling IEs under s. 44, the *Schedule* does not provide that any input or consent is required from the insured person. The right to request an IE is solely at the discretion of the insurer as long as: a) the IE is reasonably necessary, b) the requirements of the notice are in accordance with s. 44, and c) that the IE is in accordance with s. 44(9) to make all reasonable

efforts to schedule the examination for a day, time and location that are convenient for the insured person.

- [33] I find that Economical's requests for its IEs were reasonably necessary and complied with the requirements set out in s. 44(5).

Is GIF precluded from disputing the denials?

- [34] Section 55(1)2 of the *Schedule* precludes an insured person from applying to the Tribunal for dispute resolution if the insurer requires an IE assessment and the insured person fails to comply.
- [35] GIF is required to attend all reasonably necessary IE assessments. I find that the requests for the orthopaedic surgeon, neurologist and occupational therapist assessments are reasonably necessary. GIF's failure to attend has precluded Economical from properly adjusting her file and prevented it from being able to assess GIF's ongoing entitlement to IRBs and ACBs.
- [36] Section 55(2) provides that the Tribunal may permit an insured person to proceed with their application despite being statute-barred under s. 55(1)2. Pursuant to s. 55(3), the Tribunal may impose terms and conditions where permission is granted to proceed. On the evidence, I find that it is not appropriate that GIF's application be allowed to proceed under s. 55(2) because Economical has not be provided the reasonable opportunity to fully assess her claims due to GIF's failure to attend any IEs.

ORDER

- [37] GIF is statute-barred from proceeding with her application under s. 55(1)2 as she failed to attend properly scheduled s. 44 IEs.

Released: February 9, 2022

**Derek Grant
Adjudicator**