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Licence Appeal Tribunal

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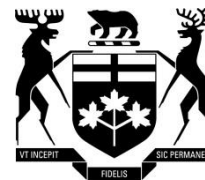
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Ontario

Date: 2017-04-03

Tribunal File Number: 16-003144/AABS

Case Name: 16-003144 v Cumis General Insurance Company

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:

G.P.

Applicant

And

Cumis General Insurance Company

Respondent

DECISION

Adjudicator:

Cynthia Pay

Appearances:

Applicant:

Counsel for the Applicant:

Representative of the Respondent:

Counsel for the Respondent:

Observer with the Respondent:

G.P.

Natalie Shykula-Clarke

Robert Seredynski

Joanne DeGroot, Adjuster

Sharla Bandoquillo

Alex Woo

Polish interpreter:

Court reporter:

Danuta Zadorecki

Matthew Dixon

Held in person: February 6, 2017

Overview and Background:

1. The applicant was involved in an automobile accident on November 9, 2013 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "Schedule"). She applied for a number of automobile accident benefits which were denied by the respondent insurer. As a result, she filed an Application with the Licence Appeal Tribunal ("the Tribunal") to dispute these denials (Tribunal file number 16-000723/AABS). The applicant also claimed that she had been catastrophically impaired as a result of the accident. She submitted two assessments in support of this claim, one by a general practitioner, Dr. Z. Marciniak, and one by a psychiatrist, Dr. Milenkovic.
2. The respondent requested that she attend five in-person insurer's examinations to assess her claim of catastrophic impairment. The applicant objected to the type and number of examinations requested and only agreed to participate in three of the five assessments: two in-person assessments by an occupational therapist, and an in-person psychiatric assessment. She objected to the in-person examinations by a physiatrist and a cardiologist.
3. The applicant is a 72 year old woman who requires a Polish interpreter to communicate in English. Her objections were on the basis that she is elderly and in a vulnerable and fragile state, and that the number of assessments requested were excessive and unreasonable.
4. The respondent maintained their position that these assessments were reasonable and necessary for them to determine entitlement to catastrophic benefits. Because the applicant refused to attend the physiatrist assessment, the respondent took the position on September 23, 2016 that the applicant's injuries remained non-catastrophic pending her participation in the assessment.
5. The applicant then filed a second application to the Tribunal (Tribunal file number 16-003144/AABS) with respect to her claim of catastrophic impairment.
6. At the case conference convened by the Tribunal to discuss both of these related files, the respondent raised a preliminary issue, claiming that the applicant is precluded from adjudicating the issue of catastrophic impairment because she had not attended all of the requested insurer's examinations.
7. The Tribunal scheduled this preliminary issue hearing to determine the issue of whether the applicant is precluded from making an application for catastrophic impairment.
8. The Tribunal also scheduled an in-person hearing to determine entitlement to the benefits claimed in the first application (Tribunal file number 16-000723/AABS). This in-person hearing will also be used to determine whether the applicant sustained a catastrophic impairment in the accident if the Tribunal finds the

applicant is not precluded from proceeding with this application (Tribunal file number 16-003144/AABS).

9. For the reasons set out below, I find that the in-person physiatry examination is not reasonably necessary, and that the applicant can proceed to a hearing.

Issue:

10. Is the applicant prevented from adjudicating her catastrophic impairment claim under s.55(1)2. of the *Schedule* because she did not attend all of the scheduled section 44 insurers' examinations?

Result:

11. The applicant is not precluded from adjudicating her catastrophic impairment claim.

Law:

12. Section 44(1) of the *Schedule* provides that for the purposes of assisting an insurer to determine if an insured person is entitled to a benefit, an insurer may require an insurer's examination "by one or more persons chosen by the insurer" but not more often than is "reasonably necessary".
13. Section 55(1)2. of the *Schedule* states that an insured person shall not apply to the Licence Appeal Tribunal if the insurer has provided notice of an insurer's examination under s.44, but the insured person has not complied with the request for an examination.
14. The sole issue in dispute in this preliminary issue hearing is whether the in-person physiatry examination requested by the respondent is reasonably necessary. I find that it is not reasonably necessary.

Facts and Analysis:

15. In response to the applicant's catastrophic impairment application, the respondent stated that they did not accept that her injuries met the catastrophic definition, and requested that she attend five in-person insurer's examinations with the following health professionals:
 - i. a physiatry assessment by Dr. A. Oshidari, physiatrist;
 - ii. an in-home ADL functional assessment by M. Lee, occupational therapist;
 - iii. a community functional assessment by M. Lee, occupational therapist;
 - iv. a psychiatry assessment by Dr. H. Rosenblat; and
 - v. a cardiology assessment.

In addition, an integrated impairment rating by another physiatrist, Dr. B. Meikle, would take place, but the attendance of the applicant was not required for this assessment.

16. The applicant raised a concern about the number and type of assessments requested. She stated that five in-person insurer's examinations were excessive and unreasonable, given that she only used two assessors. The applicant submitted that granting the respondent five reports in opposition to her two reports would deny procedural fairness, and increase the power imbalance between her and the insurance company. Further, her counsel argued that she should not be subjected to an excessive number of insurer's examinations because she had sustained serious injuries from the accident, was elderly and was in a fragile state. She agreed to attend the two occupational therapist assessments and the psychiatric assessment, but objected to the psychiatry assessment by Dr. Oshidari and the cardiology assessment.
17. At the hearing the parties confirmed that they had agreed that the cardiology assessment could take place via a paper review, so attendance at the psychiatry assessment was the only examination that continued to be in dispute.
18. The respondent disagreed with the applicant's position, and maintained that the psychiatry assessment was reasonable and necessary in order for them to make a determination of the applicant's entitlement to catastrophic benefits. Without this, they submitted they would be prejudiced. They noted that chronic pain and physical impairments formed part of the basis of the applicant's catastrophic impairment claim, and argued that neither the occupational therapist or psychiatrist agreed to by the applicant had the capacity to assign a whole person index ("WPI") rating to these conditions, as required in determining catastrophic impairment. The respondent stated that they require this assessment in order to meaningfully respond to the applicant's application.
19. The applicant's catastrophic impairment assessment was completed by Dr. Z. Marciniak. In his report, Dr. Marciniak found that the applicant was catastrophically impaired as a result of the accident on the basis of his own clinical notes and records, a physical examination, numerous other clinical notes and records of other doctors and specialists, and the results of tests such as MRIs, bone scans, ultrasounds, echocardiograms and x-rays.
20. Dr. Marciniak's assessment was conducted in conjunction with a CAT (catastrophic) Assessment of Mental and Cognitive Functioning by Dr. S. Milenkovic, psychiatrist. He found that the applicant meets the test for catastrophically impaired under Criteria 7 of the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 ("AMA Guides") as she suffers from an impairment that results in 55 percent or more impairment of the whole person ("WPI"). Based on his assessment, Dr. Marciniak calculated the applicant's

impairment to reach 79% total Combined Value Whole Person Impairment. This calculation was based on the following conditions and calculations:

Post-concussion, headache:	10% impairment
Cervical spine:	18% impairment
Grip strength:	28% impairment
Lumbar spine:	11% impairment
Gait derangement:	15% impairment
Cardiac problems/hypertension:	18% impairment
Emotional/behavioural impairments:	29% impairment
Use of medications:	5% impairment
Chronic pain:	5% impairment
Total combined value:	79% WPI

21. Despite the applicant's refusal to attend some of the requested examinations, the respondent carried out its catastrophic impairment assessment, which was compiled in a report dated December 8, 2016 authored by Dr. Meikle in his capacity of clinical coordinator. Three in-person assessments were completed: a psychiatry assessment by Dr. Rosenblat, an ADL (activities of daily living) functional assessment by M. Lee, and a community functional assessment, also by M. Lee. As part of the assessment, Dr. Meikle also provided an Integrated Impairment Analysis report, which included a summary of the findings of the various examiners. He notes in this "final consensus report" that the applicant did not meet the criteria for catastrophic impairment in any of the applicable categories. With respect to category 7, under which Dr. Marciniak found the applicant to be catastrophically impaired, Dr. Meikle reports that the applicant is rated at 11- 14% WPI with respect to her psychiatric impairments, but that he was unable to determine the applicable physical impairment rating because she declined to attend the psychiatry and cardiology assessments.
22. Dr. Meikle testified at the hearing. He has been a physiatrist since 2002 and has extensive experience in assessments such as catastrophic impairment assessments. He works mainly on behalf of insurance companies. There was no dispute about his expertise in this field, and he was accepted as an expert witness by the Tribunal.
23. Dr. Meikle explained that he had recommended an in-person psychiatry examination in order to respond to the physical conditions claimed by the applicant, including musculoskeletal issues and chronic pain. He stated at the hearing that an orthopaedic surgeon could also carry out the assessment, but noted that they deal more often with issues such as broken bones. The recommended psychiatry examination would include document review, a 45 minute clinical interview, and a physical examination, including looking at range of motion, strength, palpation for tenderness, and sensation testing. He explained that he usually recommends an in-

person examination and interview as part of the assessment to permit the applicant to provide more information to the physiatrist, and to allow for a physical examination.

The “reasonably necessary” test

24. Under s.44 of the *Schedule*, an insurer may require insurer’s examinations by the health professionals of its choice, but this right is limited to those examinations that are “reasonably necessary”. This section has been interpreted as a right of insurers to obtain insurer’s examinations. This right is based on principles of procedural fairness, in order to ensure that insurers are able to assess reports provided by a claimant and to adequately respond.¹ There is no explicit limit to the number of examinations that the insurer can request.²
25. On the other hand, the insurer’s right to insurer’s examinations must be balanced with the privacy rights of applicants. Insurer’s examinations are inherently intrusive, and constitute an invasion of individual privacy.³ The onus is on the insurer to establish that a proposed examination is reasonable.⁴
26. In balancing these rights, a number of factors can be considered. There must be a reasonable nexus between the type of examination requested and the claimed impairments.⁵ The purpose and timing of the request should be considered.⁶ Insurer’s examinations should be for the purpose of adjusting the claim, not solely to bolster a case for litigation.⁷ Some other factors to consider include the number and nature of previous and requested examinations, whether there are new conditions that need to be evaluated, and whether either side will be prejudiced by the examination or non-compliance with a request for an examination.⁸ If there are numerous examinations, the insurer should proceed cautiously, as all of the assessments may not be necessary.⁹ There must also be an acceptable reason for

¹ *Deschambault v. Wawanesa Mutual Insurance Co.*, 2015 CarswellOnt 16109 [2015] OFSCD No. 265, at paras. 9, 11; *Certas Direct Insurance Company v. Gonsalves*, 2011 ONSC 3986, at paras. 9-12; *Ismail v. State Farm Mutual Automobile Insurance Co.*, [2016] CarswellOnt 20663 (FSCO) (Arb. Dec.), at para. 24.

² *Deschambault*, supra, at para. 9.

³ *S. (P.) v. Toronto Transit Commission*, 1992 CarswellOnt 3343, [1992] O.I.C.D. No. 36 at 10; *Al-Shimasawi v. Wawanesa Mutual Insurance Company*, 2007 CarswellOnt 3473, [2007] O.F.S.C.D. No. 82, at 8.

⁴ *Al-Shimasawi*, supra, at 7.

⁵ *S. (P.)*, supra, at 10.

⁶ *S. (F.) v. Belair Insurance Company*, 1996 CarswellOnt 2382 [1996] O.I.C.D. No. 92, at 7.; *Al-Shimasawi*, supra, at 7.

⁷ *Worthman v. Assessmed Inc.*, 2006 CarswellOnt 1398, [2006] O.J. No. 925, 146 A.C.W.S. (3d) 713, 265 D.L.R. (4th) 682, 32 M.V.R. (5th) 135, 36 C.C.L.I. (4th) 297, 80 O.R. (3d) 249, at 16; *Campeau v. Liberty Mutual Insurance Co.*, 2001 CarswellOnt 5132 (FSCO) (Arb. Dec.), at paras. 11, 16; *S. (F.)*, supra, at 11.

⁸ *Al-Shimasawi*, supra, at 7.

⁹ *T. (H.) v. Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, 2009 CarswellOnt 975 (2009) (FSCO), at 13-18.

non-compliance with requests for insurer's examination requests, such as a medical reason for non-attendance.¹⁰

The in-person physiatry examination was not reasonably necessary

27. I find that the in-person physiatry examination was not reasonably necessary. Dr. Marciniak testified at the hearing that an in-person physiatry examination is not necessary to prepare a whole person impairment rating, and that in fact, there is no regulation or certification regarding who is permitted to do so. Even non-health professionals can and do prepare these ratings, if they have the appropriate training and expertise. The AMA Guides are aimed at making the rating process as objective as possible, as the ratings are based on objective criteria. All that is needed is expertise in the rating system. There is no "ownership" of WPI ratings by physiatrists. I accept Dr. Marciniak's evidence on this point, for the reasons outlined below.
28. Dr. Marciniak is a medical doctor with expertise in impairment ratings, noting in his report that he contributed to the development of the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment*. He has previously worked on behalf of insurance companies and currently is involved in assessing and treating accident and other injuries, including assessing catastrophic injuries. There was no dispute about his expertise in this field, and he was accepted as an expert witness by the Tribunal.
29. Dr. Marciniak testified that there are two methods of assessing whole person impairment under the AMA Guides: the Diagnostic Related Estimate (or "DRE") and the Range of Motion method ("ROM"). In his view, the DRE method is more accurate because it is based on objective, diagnostic testing, such as MRIs or bone scans, rather than on a physical assessment looking at range of motion, such as that carried out by a physiatrist. Further, the ROM approach is not applicable to some conditions, such as cardiological conditions or headaches. The assessor can also rely on the reports of other health professionals who have carried out physical examinations, such as an occupational therapist or chiropractors, to contribute to the assessment process and to supplement the more objective information such as MRIs or bone scans, as Dr. Marciniak did in this case.
30. Dr. Marciniak did carry out a physical examination of the applicant in his assessment, but stated that he only did so in order to be thorough and in order to be able to respond if necessary to any additional in-person insurance examinations. Most of the physical assessments that he relied upon, such as grip strength, were carried out by other members of his team. The same could have been done by the respondent's examiners, who had the benefit of a two separate in-person

¹⁰ *Maude v State Farm Mutual Automobile Insurance Co.*, 2014 CarswellOnt 14043, [2014] O.F.S.C.D. No. 210; T. (H.), supra.

assessments done by their occupational therapist, which Dr. Marciniak testified would be more than enough to use as the basis of their assessment. Further, he testified that he found the applicant was often confused when answering questions, even though he speaks to her in her mother tongue of Polish, and therefore an in-person interview may be of limited value to an assessor.

31. In his testimony, Dr. Meikle stated that he recommended an in-person psychiatry examination as the “most optimal” means of assessment in light of the physical complaints raised by the applicant, including musculoskeletal issues, chronic pain and medication side-effects. He testified that occupational therapists are fine to observe the patient, and in this case had observed many of the same activities that a psychiatrist would, but that they are unable to comment on diagnoses or causation. In Dr. Meikle’s view, general practitioners have less training and expertise on issues such as chronic pain than psychiatrists. A psychiatrist is able to do a paper review of a case like the applicant’s, but again, an in-person examination would be optimal. Under cross examination, Dr. Meikle conceded that professionals other than psychiatrists are able to do the WPI assessment. He testified further, however, that he believed an assessment by a psychiatrist would be better because they can provide an assessment that will “stand up in court”. He stated that general practitioners can do assessments of catastrophic impairments, but that he was asked to do an “ideal” assessment.
32. I found the testimony of both experts to be forthright and based on significant experience and expertise. They both agreed that anyone with expertise in the rating system can conduct a WPI assessment, but disagreed on the type of assessors that were appropriate to conduct an assessment of the applicant’s impairments. I prefer Dr. Marciniak’s opinion for the following reasons.

“Optimal” vs. “reasonably necessary” assessments

33. First, Dr. Meikle testified that he recommended an in-person psychiatry assessment because it was the “optimal” assessment to assess the applicant’s impairments. The *Schedule* provides, however, that the insurer has a right to insurer’s examinations that are “reasonably necessary”. It does not provide a right to “optimal” assessments. In this case, the applicant had attended three in-person examinations, including two separate in-person occupational therapy examinations. As conceded by Dr. Meikle in cross-examination, the occupational therapist would have assessed many of the same activities that a psychiatrist would, and a psychiatrist would be able to conduct a paper assessment by using the occupational therapist results as well as other medical documentation. In addition, it should be noted that the focus of the two occupational therapy assessments was on assessing the applicant’s level of functional independence in accordance with the AMA Guides, which form the basis of the WPI ratings. Dr. Meikle’s opinion, however, was that a paper review would be sub-optimal. But this is not the test set out in the *Schedule*. The test is what is “reasonably necessary”. Given the wealth of relevant information

provided in the in-person occupational therapy assessments, I do not agree that an in-person psychiatry examination is reasonable or necessary in this case.

Purpose of insurer's examinations – not primarily for litigation

34. Part of the reason that an in-person psychiatry examination was viewed as “optimal” by Dr. Meikle was, as he testified, because this type of examination would have a stronger chance of “standing up in court”. This is not the purpose of insurer’s examinations. These examinations are supposed to be aimed at assessing a claim, not for the purpose of litigation. Examinations are required when “reasonably necessary”. The type of examination chosen should not be on the basis of ensuring that the insurer has a stronger case. Dr. Marciniak testified that despite not believing it would be necessary or even useful, he included an in-person element in his assessment so that he would be able to respond to further assessments done by the respondent. It should also be noted that, despite her concern about the impact of numerous in-person assessments, the applicant was willing to attend an additional in-person examination by a general practitioner as an alternative to an in-person psychiatry examination. This was because she was concerned that attending a psychiatry examination would contribute to the escalation of the process, as she believed she would then be required to provide her own psychiatry rebuttal report, as her own assessment had been done by a general practitioner.
35. It is concerning when all participants in the accident benefit application process must tailor their approach based on the spectre of looming litigation, and if insurer’s examinations result in a need for further reply reports by additional specialists. This in turn can lead to escalation of the proceedings¹¹, which may cause delay and also increase the cost of accident benefit dispute resolution. This appears to thwart the very purpose of this process, which is aimed at being as expeditious and accessible as possible.

Intrusiveness of insurer's examinations

36. A request for unnecessary examinations is especially concerning because insurer’s examinations are inherently intrusive and an invasion of privacy.¹² In this case, the applicant had already agreed to participate in an in-person psychiatry examination and two separate in-person occupational therapy examinations. Three in-person examinations, one of which took place in the applicant’s home, are significantly intrusive. An in-person psychiatry examination was also ordered by Dr. Meikle because it was deemed “optimal”, even though it appears that it would overlap considerably with the occupational therapy examinations, and that a paper review would have been possible instead. There does not seem to have been any

¹¹ *J.V. v. State Farm Mutual Automobile Insurance Co.*, at 21, 23.

¹² *Id.*, at 22; *Augustin v. Unifund Assurance Company*, 2013 CarswellOnt 15809 [2013] O.F.S.C.D. No. 211, at para. 52.; *S. (F.)*, supra, at 11.

consideration of the intrusive nature of the examinations and the impact on the applicant of being subjected to five in-person insurer's examinations in the assessment of which specialists to use, and how many examinations to order, especially when the applicant had only relied on two examinations for her own catastrophic impairment report.

37. It should be noted that the applicant is an elderly woman who requires an interpreter to communicate in English during her assessments. Both psychiatric assessors, Dr. Milenkovic and Dr. Rosenblat (the respondent's examiner) agree that she has a mental health diagnosis. According to the report of M. Lee, occupational therapist, the applicant cried during her ADL Functional Assessment and asked to terminate the assessment, and "appeared agitated" and reported she was "afraid to continue with the assessment" during her Community Functional Assessment.
38. Dr. Marciniak testified that the applicant suffers from numerous health conditions, and is often confused and crying during her appointments with him. As a result, I find that it is likely that additional in-person examinations would cause at least some form of discomfort or distress to the applicant. While I do not find that medical reasons alone would be enough to make the in-person psychiatry examination unreasonable, I do find that this is a factor that should have been considered. In balancing the interests of both parties, and weighing the necessity of an in-person examination against the intrusiveness and impact on the applicant, I find that the intrusiveness of this additional examination is not outweighed by its necessity or reasonableness, especially given the fact that other, overlapping examinations were requested.

Use of judgment in determining which assessments are reasonably necessary

39. Even though the insurer can delegate the design of the assessment process, they should use judgment in determining the number and nature of the examinations requested. There should not be a process of rounding up the "usual suspects".¹³ In this case, however, there seems to be an element of this approach. Dr. Meikle testified that he ordered the occupational therapy examinations to support the psychiatric examination. In doing so, he testified that he was following the process under the former DAC system, which has long been discontinued. He candidly admitted that two occupational assessments were ordered rather than one to permit billing for each.
40. I find this approach to determining the type and number of assessors seems to be based on considerations that are not valid, rather than on what would be the most appropriate and least intrusive means of assessing the applicant's impairments.

¹³ T. (H.), *supra*, at 14.

41. The insurer should make reasoned decisions regarding which examinations it requests, and should be particularly cautious when ordering multiple insurer's examinations. In this case, there is no question that some type of in-person physical examination would have been appropriate in assessing the impact of the applicant's physical health conditions. It is not clear, however, why three different in-person physical examinations, two by an occupational therapist and one by a physiatrist, would be required. Requesting three overlapping physical examinations is certainly not the least intrusive approach.¹⁴

No prejudice to the insurer

42. Denying the respondent an in-person physiatry examination does not prejudice the respondent. The applicant participated in two in-person physical assessments by an occupational therapist. As Dr. Marciniak testified, these assessments would provide more than enough information for a physiatrist or other health professional to complete a WPI analysis through a paper review. Dr. Meikle also agreed that a physiatrist could use the occupational therapy findings to complete their assessment. He was just concerned that this would not be "optimal". Neither expert testified that an in-person physiatry examination would be "necessary".
43. This case can be distinguished from a number of the cases raised by the respondent in support of its position that the examination is reasonably necessary. In this case, there is no unfairness to the respondent, because they have had an opportunity to conduct three in-person examinations. This is not a case where the applicant had the benefit of in-person examinations but the insurer was limited to a paper review only.¹⁵ Similarly, there was no change of circumstances after the insurer's examinations such as the change of benefits from pre-104 to post-104 income replacement benefits.¹⁶

Remedies

44. The parties made submissions on possible remedies should I find that the in-person physiatry examination was reasonably necessary, but because I have found in favour of the applicant, I do not need to determine this issue.

¹⁴ *T. (H.)*, supra, at 14-15.

¹⁵ Compare *Ballabani v. TD Home and Auto Insurance Co.*, 2015 CarswellOnt 13738 [2015] OFSCD No. 229.

¹⁶ Compare *Albanese v. State Farm*, 2011 CarswellOnt 12357 [2011] OFSCD No. 87.

Conclusion:

45. For the reasons set out above, I find that the in-person psychiatry examination is not reasonably necessary, and the Application can proceed to a hearing. I am not seized.

Released: April 3, 2017

**Cynthia Pay,
Adjudicator**