

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Tribunal File Number: 18-009821/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:

D. M.

Applicant

And

Toronto Transit Commission

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Michael Wolkowicz, Counsel

For the Respondent: Chad Townsend, Counsel

HEARD: In writing on April 8, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident on November 6, 2014 and sought benefits from the respondent pursuant to O. Reg. 34/10, the Statutory Accident Benefits Schedule – Effective September 1, 2010 (the “*Schedule*”). The respondent refused to pay for certain benefits and, in response, the applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of this dispute.
- [2] The respondent raised two preliminary issues, which are the subject of this hearing.

ISSUES

- [3] The preliminary issues in dispute are:
 - 1) Is the applicant required to attend a second, multi-discipline catastrophic insurer examination assessment?
 - 2) Is the applicant required to provide production records going back five years pre-accident as requested by the respondent?

RESULT

- [4] The applicant is not required to attend a second, multi-discipline catastrophic insurer examination assessment.
- [5] The applicant is not required to provide production records going back five years pre-accident as requested by the respondent.

BACKGROUND AND CHRONOLOGY

- [6] The applicant was struck by a streetcar while crossing a busy avenue as a pedestrian. The injuries sustained as a result of the accident have led the applicant to make an application for a determination of catastrophic impairment as defined by the *Schedule*. The applicant made the application on July 7, 2016, when an OCF-19 was submitted to the respondent (“the CAT application”).
- [7] On August 25, 2016, the respondent sought to arrange Insurer’s Examinations to determine whether the applicant sustained a catastrophic impairment (“the CAT IEs”). The CAT IEs occurred and a report was completed and delivered to the applicant on November 10, 2016. The findings of the CAT IEs were that the applicant was not catastrophically impaired as a result of the accident.
- [8] In order to rebut the CAT IEs, the applicant then sought assessments pursuant to section 25 (“the rebuttal exams”). The rebuttal exams occurred and a report was delivered to the respondent about a year and a half later, on May 18, 2018.

- [9] The parties were unable to resolve the dispute over the extent of the applicant's impairments. As a result, on October 18, 2018, the applicant filed an application with the Tribunal ("the application"). The respondent filed a response to the application on November 28, 2018 ("the response") and a case conference occurred on February 5, 2019.
- [10] However, after the response was filed and before the case conference, the respondent requested the applicant attend another round of Insurer's Examinations to determine whether the applicant sustained a catastrophic impairment ("the proposed CAT IEs"). The respondent submits the notice for the proposed CAT IEs was provided on December 20, 2018 however, the applicant contests this and submits the notice was provided on January 9, 2019, only after counsel for the applicant discovered that the proposed CAT IE's were being scheduled and contacted the respondent to request the notice. The proposed CAT IEs were scheduled with the last assessment set to occur on February 22, 2019.
- [11] Following receipt of the notice of the proposed CAT IEs, the applicant wrote to the respondent on January 21, 2019 and advised the applicant would not attend the proposed CAT IEs. The applicant has not attended any IEs since this time.

ARE THE PROPOSED CAT IEs REASONABLY NECESSARY?

- [12] Neither party contests the substance of the notice for the proposed CAT IEs. At issue is whether the proposed CAT IEs are reasonably necessary and, if so, whether the applicant is barred from proceeding with this application until the proposed CAT IEs are conducted and completed.
- [13] The parties agree that the principles outlined in the LAT decision 17-005291/AABS v *Travelers Canada*, 2018 CanLII 13172 should guide this analysis ("the *Travelers* decision"). I agree. According to the *Travelers* decision, the following are factors to consider when determining whether the respondent has requested an insurer examination more than reasonably necessary:
- 1) The timing of the respondent's request;
 - 2) The possible prejudice to either side;
 - 3) The number and nature of previous examinations;
 - 4) The nature of examination being requested;
 - 5) Whether there are any new issues being raised in the claim that require evaluation; and

- 6) Whether there is a reasonable connection between the examination requested and the applicant's injuries.

[14] After applying the principles in the *Travelers* decision, I find, on a balance of probabilities, that the proposed CAT IEs are not reasonably necessary. My analysis and reasons are as follows.

The timing of the respondent's request

- [15] The respondent submits any delay in the proceedings is as a result of the applicant's untimely delivery of the rebuttal IEs and failure to attend the proposed CAT IEs. The applicant submits the delay by the respondent in requesting the proposed CAT IEs is the result of the respondent's own failure to continually adjust the applicant's claim.
- [16] While I recognize the applicant took about a year and a half to provide the rebuttal exams, I am also aware it took the respondent over seven months to request the proposed CAT IEs in response to the rebuttal exams. For this reason, I agree with the applicant and find the respondent's delay in requesting rebuttal IEs – which is solely what this factor requires me to examine – is a result of its own inaction.
- [17] Not only did the respondent wait seven months after receiving the rebuttal IEs to request the proposed IEs, but the request came more than two months after the applicant initiated this application. I find the untimeliness of the respondent's request for rebuttal IEs, coupled with the fact that the request was made after the application was initiated, suspect. This leads me to believe that, considering the respondent has already conducted CAT IEs, the purpose of the proposed IEs has more to do with bolstering the respondent's evidence rather than investigating the applicant's impairment.

The possible prejudice to either side

- [18] The respondent submits it would be prejudiced if it were forced to proceed to a hearing without having an opportunity to reply to the rebuttal exams. The respondent further submits that, due to the amount of time that has passed since the CAT IEs and on the advice of the assessment company, in-person assessments are required.
- [19] The applicant submits there is no prejudice to the respondent because the respondent has already completed CAT IEs as well as other in-person examinations. Rather, the applicant suggests further delay would prejudice the applicant.
- [20] I agree with the applicant and find the respondent is not materially prejudiced by the inability to conduct the proposed IEs. This is because the respondent has

previously conducted in-person examinations with respect to whether the applicant is catastrophically impaired as well and in-person examinations concerning the applicant's entitlement to non-earner benefits.

The number and nature of previous examinations

- [21] The applicant attended CAT examinations in 2016 and a summary report was produced and dated November 4, 2016. Examinations were conducted by health professionals in the following disciplines: orthopaedics, neurology, psychiatry, neuropsychology, and occupational therapy.
- [22] The applicant commissioned CAT examinations and produced a report dated May 16, 2018. Examinations were conducted by health professionals in the following disciplines: neurology, neuropsychology, and occupational therapy.
- [23] The respondent submits the proposed IEs are required because it is difficult to assess the applicant's level of psychological or psychiatric impairment by paper review only. The respondent also submits catastrophic impairment ratings are based on function, and the applicant's function would likely have changed in the year prior to the proposed IEs.
- [24] The applicant submits the respondent has enough information to determine the level of the applicant's impairments. In addition to the CAT IEs and the rebuttal IEs, the applicant has attended an additional two in-person assessments to determine eligibility for non-earner benefits. In the applicant's view, this is sufficient information for determining whether the applicant has sustained a catastrophic impairment as a result of the accident.
- [25] To-date, and within a span of about a year and a half, the applicant has attended eight separate examinations in five different disciplines in order to help determine whether the applicant has been catastrophically impaired as a result of the accident. I find this is a reasonable amount of examinations based on the injuries and impairments reported by the applicant.
- [26] Although I find the applicant has already attended a reasonable number of in-person examinations, it does not automatically make any further examinations unreasonable. It was about a year and half between the CAT IEs and the rebuttal IEs, and it is possible, although not evidenced in this matter, that new information or new issues may have arisen which require evaluation.
- [27] For these reasons, I find neither party is more successful than the other on this factor.

The nature of examination being requested

- [28] The respondent argues that an in-person psychiatric assessment is required because a psychiatrist is best to comment on any potential impairment(s) under Chapter 14 of the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition (“the AMA Guides”). Further, the respondent argues that a neuropsychologist is best suited to comment on cognitive impairment where as a psychiatrist is better-suited to assess mental and behavioural impairment under Chapter 14 of the AMA Guides. The reason for an in-person assessment, according to the respondent, is because too much time has passed since the CAT IEs occurred and the assessors prefer an in-person evaluation after such time has passes.
- [29] The applicant submits that the proposed IEs are insensitive and intrusive because they were scheduled to take place over several days and in different cities from the applicant’s residence.
- [30] While I agree it would be best to conduct in-person assessments with the applicant and that the discipline of the proposed assessors is reasonable, I am not convinced the in-person assessments must be conducted relative to any other option such as over the telephone or by videoconference for example. Simply put, best practices are only recommendations and each claim must be adjusted according to the applicant’s needs.
- [31] In addition, the applicant claims catastrophic psychiatric and psychological injuries which the applicant submits would be aggravated if the applicant were required to personally attend at all the examinations. I see no evidence the respondent has attempted to address or accommodate the applicant’s travel concerns.

Whether there are any new issues being raised in the claim which require evaluation

- [32] The respondent submits the proposed IEs are reasonably necessary because the applicant has provided new information in the form of the rebuttal IEs.
- [33] The applicant disagrees and submits the respondent has failed to outline any new issues raised in the rebuttal examinations which require an in-person examination. I agree.
- [34] The applicant has given the respondent additional information by providing the rebuttal examinations. However, the respondent has not met its onus to prove that this new information, the rebuttal examinations, has raised any new issues. In fact, the information provided by the applicant in the rebuttal examinations falls under disciplines for which the respondent has already conducted IEs. For these reasons, I find the respondent has not provided any evidence to show that new issues are being raised and/or need to be examined.

Whether there is a reasonable connection between the examination and injuries

- [35] Although the parties did not specifically address this factor in their submissions and my decision does not turn on this factor, I will address this to be thorough.
- [36] I am able to find there is a reasonable connection between the proposed examinations and the applicant's injuries based on the evidence before me. The applicant claims a catastrophic impairment on account of neurological, psychiatric, and psychological injuries. The proposed IEs seek assessments in the following disciplines; neuropsychology, neurology, psychiatry, and occupational therapy.

THE SECTION 33 REQUEST

- [37] The respondent seeks an order compelling the applicant to produce information and documentation relating to any counselling or therapy the applicant has attended in the five years prior to the accident.
- [38] The respondent maintains that the applicant has a history of psychological and behavioural issues prior to the accident and, to that end, refers to the applicant's self-reported history outlined in a neuropsychological assessment report as evidence of these issues. The respondent submits the OHIP summary produced by the applicant does not account for therapy for which the applicant paid out of pocket or which occurred outside of Ontario. The respondent believes the applicant has this information and it is reasonably required to assist the respondent in determining the applicant's entitlement to catastrophic benefits.
- [39] The evidence cited by the respondent includes:
- 1) The applicant attended anti-addiction programming at the Centre for Addiction and Mental Health (CAMH) as a teenager for cannabis consumption;
 - 2) The applicant was expelled from high school in grade 11; and
 - 3) The applicant attended an anger management program as a result of domestic violence charges.
- [40] The applicant submits this request is overly broad and is an unwarranted infringement of privacy rights. According to the applicant, an OHIP summary and the clinical notes and records of two family doctors were provided to the respondent. The applicant submits the records show there is nothing indicating the applicant had psychological or behavioural issues or, likewise, received treatment for the same in the pre-accident period. In his view, the request is prejudicial and disproportionate.

- [41] I agree with the applicant and find the respondent's request is too broad and amounts to an infringement of the applicant's privacy. I find the evidence cited by the respondent is not relevant to the issues in dispute. Two of the three incidents occurred more than 20 years ago. The last is a single incident which is not an indication of a pattern of behaviour. The time period for which the respondent seeks records is too long before the accident to be relevant to the issues. In the event there was a relevant behavioural pattern, as the respondent suggests, the pattern would manifest in the two years prior to the accident, a period for which the respondent has been provided records.
- [42] Lastly, I find the request for documents from all counselling or therapy is too broad. This is because the terms counselling or therapy may relate to circumstances where the applicant has engaged in counselling or therapy which are unrelated to behavioural or psychological issues, let alone the issues in dispute.

ORDER

- [43] The motion for productions is dismissed.
- [44] The application will proceed as scheduled.

Released: May 28, 2019

Brian Norris
Adjudicator