**CITATION**: Hedley v. Aviva Insurance Company of Canada, 2019 ONSC 5318
**DIVISIONAL COURT FILE NO.:** DC-18-638-00
**DATE:** 2019-09-23



**SUPERIOR COURT OF JUSTICE – ONTARIO**
**DIVISIONAL COURT**

**RE:** BRIAN HEDLEY, Respondent

**AND:**

AVIVA INSURANCE COMPANY OF CANADA, Appellant

**BEFORE:** Sachs, Kurke and Ryan Bell JJ.

**COUNSEL:** D. Donnelly, for the Respondent

T. McCarthy and R. Campbell, for the Appellant

**HEARD at Toronto:** September 10, 2019

## ENDORSEMENT

**RYAN BELL J.**

### Overview

[1] In June 2016, Brian Hedley made a claim to his insurer, Aviva Insurance Company of Canada, for statutory benefits under the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 (the "Schedule") as outlined in two treatment and assessment plans. Aviva denied the plans and requested an insurer's examination. Mr. Hedley refused to attend the insurer's examination and commenced an application before the License Appeal Tribunal.

[2] Section 38(8) of the Schedule provides that within 10 business days after it receives the treatment and assessment plan, the insurer shall give the insured person a notice that identifies the goods, services, assessments and examinations the insurer agrees to pay for, and those it does not agree to pay for. In the case of the latter, the insurer is required to provide in the notice "the medical reasons and all of the other reasons why the insurer considers any goods, services, assessments and examinations, or the proposed costs of them, not to be reasonable and necessary."

[3] If the insurer requires an insurer's examination, the insurer "shall give" the insured person a notice setting out "the medical and any other reasons for the examination" and whether the attendance of the insured person is required at the examination (s. 44(5) of the Schedule).

[4] At the Tribunal, Adjudicator Gregory Flude agreed with Aviva that its reasons denying the plans and requesting the insurer's examination complied with ss. 38(8) and 44(5) of the Schedule. In approving the reasons offered by Aviva, Adjudicator Flude expanded upon or interpreted the reasons offered by Aviva by reference to the "medical documentation on file." Mr. Hedley requested a reconsideration of the Tribunal's decision.

[5] On reconsideration, Executive Chair Linda Lamoureux decided in favour of Mr. Hedley. She cancelled the Tribunal's decision on the basis that it involved a "significant error of law" because Aviva's reasons for denying the treatment plans submitted by Mr. Hedley and for requesting that Mr. Hedley attend an insurer's examination were inadequate.

[6] Aviva appeals the Reconsideration Decision and asks that it be set aside and the Tribunal's decision be reinstated.

[7] For the following reasons, the appeal is dismissed.

**Background**

[8] Mr. Hedley was injured in a motor vehicle accident in March 2014. He sustained assorted lower back and neck injuries. Mr. Hedley was approved for treatment from a chiropractor in May 2014, and for a functional abilities assessment in March 2016. As a result of this assessment, an occupational therapist submitted treatment and assessment plans in June 2016 to Aviva on Mr. Hedley's behalf for various recommended assistive devices, among other things.

[9] On July 8, 2016, Aviva provided notice to Mr. Hedley that funding for these treatment plans was denied. Aviva informed Mr. Hedley that it was "unable to determine whether the recommendations are reasonably required for the injuries you received in this motor vehicle accident." Aviva advised that it had scheduled an insurer's examination. In a box labelled "Medical Reason", Aviva wrote "The type(s) of treatment does not appear consistent with the patient's diagnosis."

[10] Mr. Hedley repeatedly asked Aviva to clarify its reasons. No clarification was provided.

**Standard of Review**

[11] Aviva's position is that whether the standard of review is correctness or reasonableness, the Reconsideration Decision should be overturned. Mr. Hedley submits that the Reconsideration Decision should be upheld because it is both legally correct and within the range of reasonable outcomes.

[12] At the hearing before this court, Aviva's counsel also raised as an issue for the first time that the Executive Chair ought to have shown deference to the Adjudicator. We did not permit counsel to make submissions in relation to this issue because it was not addressed in Aviva's factum. However, I note that one of the criteria for granting reconsideration under Rule 18.2 of the Tribunal's *Rules of Practice and Procedure* is that the Tribunal "made a significant error of law or fact such that the Tribunal would likely have reached a different decision had the error not been made." That is the standard that the Executive Chair applied.

[13] The issues on this appeal of the Executive Chair's decision relate to the interpretation of ss. 38(8) and 44(5) of the Schedule, which is a home statute of the License Appeal Tribunal. The correct standard of review by the court is the reasonableness standard (*S.H. and H.S. v. Northbridge Personal Insurance Corporation*, 2018 ONSC 1801, at para. 12).

**Analysis**

[14] In the Reconsideration Decision, Executive Chair Lamoureux relied on her own decision in 16-*003316/AABS v. Peel Mutual Insurance Company*, [2013] O.F.S.C.D. No. 211, with regard to the evaluation of the sufficiency of notice under ss. 38(8) and 44(5) of the Schedule:

> In evaluating the sufficiency of such notice, the Tribunal should be mindful of those who adjust insurance files. It would be naïve or impractical or to expect them to articulate something resembling a medical opinion. Likewise, their reasons should not be measured by the inch or held to a standard of perfection. Moreover, reasonable minds may disagree about the content of an insured's file. Those allowances should be made. If it offers a principled rationale based fairly on an insured's file, an insurer will have satisfied its obligation under s. 38(8).

[15] The Executive Chair found that Aviva's denial letter fell short of this mark. She observed that both reasons proffered raise obvious questions concerning what medical information was relied on by Aviva to make its determination, and what, specifically, was the inconsistency between that information and the recommended benefits. She also found that the benefits included in the second treatment and assessment plan, together with the assistive devices and part of the therapy included in the first plan, were entirely consistent with Mr. Hedley's diagnosis of low back pain.

[16] Executive Chair Lamoureux also observed that to provide content and give effect to a justification not provided in the "sparse reasons" that Aviva offered, as Adjudicator Flude had done, would "run counter to the Schedule's consumer protection objective."

[17] In the view of Executive Chair Lamoureux, the Adjudicator's interpretation of Aviva's obligation under s. 38(8) would "essentially allow an insurer to justify any denial of a plan by merely stating that it had reviewed the plan in light of the medical documentation on file, and without providing any meaningful detail, assert that the plan was not appropriate given the

insured's condition." She concluded that the Adjudicator's interpretation constituted a "significant error of law" and granted the request for reconsideration.

[18] It is clear from the decision of the Ontario Court of Appeal in *Turner v. State Farm Mutual Automobile Insurance Company*, 2005 CanLII 2551, at para. 8, that where reasons are required, they must be meaningful in order to permit the insured to decide whether or not to challenge the insurer's determination. Mere "boilerplate" statements do not provide a principled rationale to which an insured can respond. In essence, such statements constitute no reasons at all.

[19] Based on the record before her and having regard to the governing legal principles, it was reasonable for Executive Chair Lamoureux to conclude that the Adjudicator erred in his interpretation of ss. 38(8) and 44(5) of the Schedule in evaluating the sufficiency of the notice provided to Mr. Hedley. The Reconsideration Decision is within the range of reasonable outcomes.

[20] Accordingly the appeal is dismissed. On agreement of the parties, Aviva shall pay costs of the appeal to Mr. Hedley, fixed in the amount of $3,500 all inclusive.

_____
Ryan Bell J.

I agree _____
Sachs J.

I agree _____
Kurke J.

**Date:** September 23, 2019