

**LICENCE APPEAL
TRIBUNAL**

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

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

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



Citation: D.L. vs. Aviva Insurance Company, 2020 ONLAT 17-006056/AABS

Date: July 2, 2020

Tribunal File Number: 17-006056/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.L.

Applicant

And

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR:

Anita Goela

APPEARANCES:

For the applicant:

Arthur Semko, Paralegal

For the respondent:

Pamela Quesnel, Counsel

Heard by way of written submissions

OVERVIEW

- [1] D.L. (“the applicant”) was injured in an automobile accident (“the accident”) on June 13, 2015 and sought insurance benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “Schedule”). He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) when his claims for benefits were denied by the respondent.
- [2] The matter proceeded to an in-person hearing before me on April 5, 2018. In my decision, dated August 7, 2018, I found that the applicant’s injuries were to be treated under the Minor Injury Guideline (MIG) and that the applicant was not entitled to various treatment plans because of the MIG.
- [3] The applicant requested a reconsideration of my decision. On August 21, 2019, Adjudicator Neilson ordered a new hearing because of new information that was not available at the time of the hearing. Specifically, the new information was the applicant’s removal from the MIG on June 6, 2019.
- [4] Prior to the release of my decision, the applicant submitted a psychological assessment and a chronic pain assessment to the respondent.
- [5] The respondent denied those assessments and scheduled s. 44 insurer examinations (“IEs”).
- [6] The applicant attended an IE with Dr. Zakzanis on September 24, 2018 to determine his entitlement for the psychological assessment. Dr. Zakzanis’s report concludes that the applicant has an accident-related psychological impairment and that the assessment is reasonable and necessary. His report is dated October 8, 2018.
- [7] Due to an administrative error, the report was lost and not in the respondent’s possession until May 31, 2019. Because of Dr. Zakzanis’s conclusion that the applicant has an accident-related psychological impairment, on June 6, 2019, the respondent removed the applicant from the MIG, approved the psychological assessment and all of the treatment plans, except for the neurological assessment, that were argued at the April 5, 2018 hearing.
- [8] The applicant seeks a s.10 award for the treatment plans that were denied prior to his removal from the MIG. Both parties are also seeking costs.

ISSUES

¹ O. Reg. 34/10.

- [9] Is the applicant entitled to an award under s. 10 of O. Reg. 664 because the respondent unreasonably withheld or delayed the payment of benefits to him?
- [10] Is either party entitled to costs pursuant to Rule 19.1?

RESULT

- [11] I do not find that the applicant is entitled to an award with respect to the treatment plans that were argued before me at the hearing on April 5, 2018.
- [12] I find that the applicant is entitled to an award with respect to the psychological assessment recommended by Dr. Peter Waxer dated August 2, 2018 in the amount of \$2,254.71. The quantum of the award is 25% of the disputed treatment plan.
- [13] I do not find that either party is entitled to costs.

ANALYSIS

Section 10 Award

- [14] Section 10 of Regulation 664 provides as follows:
- [15] If the Licence Appeal Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Licence Appeal Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.
- [16] The applicant bears the onus of establishing, on a balance of probabilities, that the respondent acted unreasonably in withholding or delaying the payment of a disputed benefit.
- [17] I do not find that the respondent acted unreasonably in withholding or denying the treatment plans that were the subject of the hearing before me. The respondent, at the time of denial, relied on its s. 44 IE reports and my decision that the applicant's injuries were minor.
- [18] However, I do find that the respondent unreasonably withheld payment of the August 2, 2018 psychological assessment.

- [19] The respondent denied the assessment and requested the applicant to attend a s. 44 IE. Despite repeated follow-up by the applicant's representative, the respondent did not locate the report until eight months after the applicant attended the IE. Because of the delay, the applicant continued to be subject to the financial cap of the MIG and was deprived of timely access to medical treatment. I find that withholding the approval of the psychological assessment resulted in harm to the applicant.
- [20] I do find that the applicant's administrative error attracts a special award. The respondent should have made better efforts to ensure that the IE report was in its possession. The respondent did not contact the IE assessor until May 2019 to obtain another copy of the report. I do not find that the respondent had a reasonable explanation for the delay in contacting the IE assessor.

Quantum of Award

- [21] The amount of the award must rationally relate to the circumstances of the case. It should further the goals of deterrence and be proportionate to the misconduct. A 50% award should be reserved for the most egregious conduct of the insurer. This is not one of those cases.
- [22] In this case, I find that an award of 25% of the \$2,254.71 cost of the assessment plus interest is appropriate. I have considered the following in coming to this conclusion:
- (i) The respondent did not contact the IE assessor to request another copy in a timely fashion. I find that eight months from the report's completion date is a considerable length of time, especially for an insured who has been denied access to medical treatment.
 - (ii) The need to deter similar behaviour where there is a notable power imbalance.
 - (iii) The applicant's vulnerability due to his mental health condition.

Costs

- [23] Rule 19.1 of the Licence Appeal Tribunal Rules of Practice and Procedures provides as follows:

Where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs.

- [24] The applicant submits that he is entitled to costs because the respondent intentionally withheld the s. 44 report of Dr. Zakzanis and wasted the applicant's and Tribunal's resources on the reconsideration and related motions.
- [25] The respondent seeks costs for the applicant's decision not to cross-examine the respondent's IE assessors at the April 5, 2018 hearing.
- [26] I do not find that the actions of either party in the proceeding were unreasonable, frivolous, vexatious or in bad faith.
- [27] According to the chronology of events and submissions, it does not appear that the respondent intentionally withheld Dr. Zakzanis's report and intentionally continued to file submissions in the reconsideration and motions with the knowledge of what was contained in that report. I accept that it was an unfortunate administrative error that it corrected as soon as the report was in its possession.
- [28] I have already considered the respondent's claim for costs in my August 7, 2018 decisions. As stated, it was within the applicant's litigation strategy not to cross-examine the respondent's IE assessors.

CONCLUSION

- [29] For the reasons outlined above, I find that:
- (i) The applicant is entitled to an award with respect to the psychological assessment recommended by Dr. Peter Waxer dated August 2, 2018 in the amount of \$2,254.71.
 - (ii) The quantum of the award is 25% of the disputed treatment plan.
 - (iii) Neither party is entitled to costs.

(iv) Interest shall be determined by the parties in accordance with the *Schedule*.

Released: July 2, 2020

**Anita Goela
Adjudicator**