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**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: **O.G. vs. Security National Insurance Company, 2019 ONLAT 18-001429/AABS**

**Date: February 25, 2019
File Number: 18-001429/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:

OG

Appellant

and

Security National Insurance Company

Respondent

DECISION

PANEL: Christopher A. Ferguson, Adjudicator

APPEARANCES:

For the Applicant: Alexei Antonov

For the Respondent: Ilya Kirtsman

HEARD: In Writing on: November 5, 2018

OVERVIEW

- [1] The applicant, OG was injured as a passenger in an automobile accident on August 12, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "Schedule").
- [2] OG applied for benefits from the respondent Security National Insurance Company (Security National) and then applied to the Licence Appeal Tribunal (the "Tribunal") when the disputed benefits were denied.
- [3] OG claimed income replacement benefits (IRBs), among other benefits. OG claims that he is entitled to weekly IRB in the amount of \$400.00 for the period of August 19, 2015 to November 2016. Security National discontinued OG's IRBs on October 25, 2017, citing his failure to attend insurer's examinations (IEs) as required by the *Schedule*.
- [4] The dispute at hand involves a request by Security National to bar OG's appeal of its decision to discontinue IRBs, because of his failure to attend IEs.
- [5] This matter has been set down for a resumption of case conference on March 28, 2019 by an Order dated February 19, 2019.

PRELIMINARY ISSUE

- [6] The issue before me is:
 1. Is OG barred from commencing his appeal of Security National's refusal to pay disputed IRBs under s.55(1)2., because he failed to attend insurer's examinations (IEs) requested by the respondent under s.44 of the *Schedule*?

FINDINGS

- [7] I find that OG is barred from proceeding with his appeal under s.55(1)2., because he failed, without a reasonable explanation, to attend IEs as required by s.44(9)2.iii. of the *Schedule*.

REASONS

Duty to Attend IEs

- [8] Section 44(1) of the *Schedule* governs IEs and it prescribes as follows:

¹ O.Reg. 34/10

- i. S. 44(1) permits an insurer to require an insured person to be examined by one or more regulated health professionals to determine whether the insured continues to be entitled to a specific benefit, as in this case.
- ii. S.44(9)2.ii. requires the insurer to make reasonable efforts to schedule the IE for a day, time and location that are convenient for the insured person.
- iii. S.44(9)2.iii. requires the insured person to attend the examination and to submit to all reasonable examinations requested by the examiner(s).

Consequences of Non-Compliance with s.44

- [9] Section 37(7) of the *Schedule* prescribes the consequences to the insured person if she fails to attend an IE: the insurer may determine that the insured person is no longer entitled to the specified benefit and it may refuse to pay the specified benefit relating to the period during which the insured person failed to comply with s.44(9).
- [10] Section 37(8)(b)(ii) requires the insurer to pay all amounts withheld during a period of non-compliance if the insured person is determined to be still entitled to the claimed benefit and provides a reasonable explanation for not complying with s.44(9).
- [11] The onus is on the insured person, in this case OG, to establish a reasonable explanation for failing to attend an IE.²
- [12] Section 55(1)2. of the *Schedule* provides that an insured person shall not apply to the Tribunal if the insurer has notified him that it requires an examination under s.44, but the insured person has not complied with that section.

Security National’s Position

- [13] Security National acknowledges that OG did attend a psychological assessment with Dr. Nikkhou, neuropsychologist, on July 25, 2017 and a Functional Capacity Evaluation (FAE) with Ms. Dawn Ryberk, a kinesiologist, on October 2, 2017.
- [14] The parties agree that OG failed to attend five IEs scheduled to assess his claim for IRBs

date	IE type	assessor
July 18, 2017	vocational psychological	Dr. Sandra Cauchard, psychologist
August 15, 2017	physiatry	Dr. Florin Feloiu, physiatrist
August 17, 2017	vocational assessments	Ms. Ruth Billet,

² *Stranges v. Allstate*, 2010 ONCA 457, 103 O.R. (3) 73 led by Aviva

September 26, 2017		vocational assessor
October 10, 2017	physiatry	Dr. Michael Ko, physiatrist

- [15] Security National discontinued paying IRBs to OG by letter dated October 25, 2017, stating as its reason OG's failure to either attend or reschedule the missed IE of October 10, 2017. SNIC's letter warned OG that it could not reinstate his IRBs until he attended a rescheduled IE or provided a reasonable explanation for not doing so. It also warned him that he might not be able to continue an appeal with the Tribunal until he met one of these conditions. Finally, the letter confirmed SNIC's willingness to reschedule the missed IE and to reassess his IRB eligibility once the results were in.
- [16] Security National asserts that OG never made any effort to reschedule the IE or provide an explanation for doing so.
- [17] Security National submits that because of the time elapsed between the accident, the scheduled IEs and today, it is prejudiced by the inability to assess OG closer to the date of the accident.

OG's Position

- [18] OG does not deny missing the scheduled IEs noted in the chart above.
- [19] The sole reason given by OG for failing to attend the missed IEs is that the driver sent to transport him to two IE appointments went to the wrong address. OG claims that the driver was sent to the wrong address on July 18, 2017 (appointment with Dr. Cauchard) and August 17, 2017 (appointment with Ms. Billet). He includes invoices from the transport service provider which have on them an address that is not his residence.
- [20] OG asserts that Security National is to blame for the error, and that he should not be prejudiced by it. He cites his attendance at the psychological assessment by Dr. Nikkhou and the FAE by Ms. Ryberk as proof of his *bona fides* in complying with s.44.
- [21] I find that OG has not established a credible reasonable explanation for his failure to comply with s.44 for the following reasons:
- i. OG's "wrong address" excuse is weak and undermined by the following:
 - a. He cites it for only two of five missed IEs. He offers no explanation for his apparent failure (and that of his former legal counsel) to mention these missed pick-ups to Security National. I do not find this credible.
 - b. The "wrong address" cited was listed on some of OG's benefit application documents, including a Disability Certificate (OCF-3) dated September 3, 2015, submitted by Aviva.

- c. The “wrong address” was noted on the invoices from the transport provider for the two successful pick-ups for IEs on July 25, and October 2, 2017 respectively, submitted by Security National.
 - d. It is telling, in my view, that OG omits the facts noted in subparagraphs b and c above. I find that these omissions erode the credibility of OG’s claims that the “wrong address” was in fact “wrong”.
 - e. Even if Aviva did mistakenly send the transport provider to a wrong address on the first occasion as alleged, OG offers no explanation for his failure (and that of his former legal counsel) to alert Security National and correct the address for the subsequent four examinations. I find that this further undermines the credibility of the “wrong address” excuse for missed IEs.
- ii. There is no evidence of any attempt on his part to explain his failure to attend or to reschedule the physiatry IE of October 10, 2017, even after being told in writing that failing to attend was the immediate cause of Security National’s decision to discontinue IRBs. I find that he simply ignored this particular IE request.
 - iii. Section 44(9)2.iii of the *Schedule* creates an obligation on the insured to make himself reasonably available for IEs³. I do not agree with OG’s implicit argument that he is absolved of any and all obligation to meet Security National’s requests for an IE, because of alleged transport arrangement errors. I find that a reasonable person would respond to missed pick-ups by demanding that the problem be fixed. I find that by simply ignoring – for a year -- Security National’s October 25, 2017 notice of discontinuing IRBs, OG himself failed to comply with the *Schedule*: he fatally weakened his claim of mistakes by Security National as his explanation for failing to attend the IEs as required.

[22] I think it important to note that OG does not suggest that he failed to understand any part of Security National’s letter of October 17, 2017. He and his counsel were aware of the consequences for failing to attend as outlined in that letter, which included a bar on his appeal, and were advised of Security National’s willingness at that time to reschedule IE. He was unmoved to act.

[23] OG is barred from proceeding with his appeal of Security National’s refusal to pay the IRBs listed in his appeal. I summarize my main reason to be that OG did not make himself reasonably available for the required IE as required by the *Schedule*, and provided no credible, reasonable explanation for his failure to attend.

[24] I note that under s.37(8)(b)(ii) of the *Schedule*, OG is only entitled to be paid IRBs for any period during which he failed to comply with s.44(9) if he provides a reasonable excuse. I have found that he did not; accordingly, even if it were determined at future IEs that he was entitled to IRBs (by reason of medical eligibility), the claimed benefit

³ Based on my own reading of the subsection, shared by other adjudicators, including for example in *Hashi and Security National Insurance Management Inc.*, 2006 FSCO A05-001275, referenced in *D.C. v Aviva Insurance Company*, 17-002921/AABS, 2018 CanLII 76416 (ON LAT), submitted by SNIC.

would not be payable. OG's non-compliance covers the period for which he claims IRBs. This makes his appeal, in my view, effectively a non-starter.

Does OG's current willingness to comply with s.44 defeat Security National's motion to bar his appeal?

- [25] In an affidavit sworn October 16, 2018, OG asserts that he never advised his lawyers that he will not attend IEs and that he "does not object to attending IEs if they are reasonably necessary."
- [26] OG's submissions imply that his current willingness to attend an IE has brought him into compliance with the *Schedule* and defeats Security National's motion. I disagree for the following reasons:
- i. OG points me to no broad principle that a claimant's late offer of availability effectively "cures" non-compliance and lifts the statute bar. I know of no basis for such a finding.
 - ii. I do not agree with OG's argument that his attendance at two IEs somehow overcomes his failure to attend five other IEs simply by demonstrating some level of *bona fides*.
 - iii. OG waited a year after the disputed IEs scheduled and missed before providing any explanation for his non-attendance at required IEs. While the *Schedule* does not prescribe a timeline for "subsequent compliance" under s. 37(8)(b)(ii), the applicant cannot (and in fact does not) reasonably argue that he has an unlimited time within which to comply with his obligations under s.44. He does not deal effectively with Security National's concern about the prejudice to its ability to determine his claims with significantly delayed IEs.
 - iv. As I noted above, OG's failure to provide a reasonable explanation as required by s.37(8)(b)(ii) of the *Schedule*, for payment of IRBs for any period during which he failed to comply with s.44(9) means that the claimed benefit would not be payable whatever the result of a future IE.

CONCLUSIONS

- [27] OG's appeal on the issue of IRBs is barred.
- [28] The case conference resumption scheduled for March 28, 2019 shall proceed to deal with the rest of the issues in dispute between these parties.

Date of Issue: March 5, 2019



Christopher A. Ferguson
Adjudicator