Reasonably Necessary Test (S.44)

Prepared For: You
Service Level: Pay As You Go OAR
Date Requested: November 13, 2024
Issues Raised: What is a reasonable time period to re-request assessments for IRBs?
EOB Reason for denial (if applicable) N/A

For/Against Analysis – Reasonably Necessary Test (S.44)

Results as of November 14, 2024 including any Reconsideration/Divisional Court outcomes
Sorted by the most relevant/recent decisions returned
Date of most recent decision: October 7, 2020

Overview

S. 37(1) allows the insurer to determine if an insured person is still entitled to a specified benefit by requesting the Applicant undergo an IE, but not more often than is reasonably necessary. There are two cases that are often quoted when determining when an IE is "reasonably necessary" under s.44. One is *16-003144 v CUMIS,* which assessed:

a. There must be a reasonable nexus between the type of examination requested and the claimed impairments.

b. The purpose and timing of the request should be considered.

c. IEs should be for the purpose of adjusting the claim, not solely to bolster the case for litigation.

d. 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 examination.

e. In the case of numerous assessments, the insurer should proceed cautiously, as they may not all be necessary. There must also be reasonable reasons for non-compliance, such as medical reasons for non-attendance.

The other is *Al-Shimasawi v. Wawanesa Mutual Insurance Company* which assessed:

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i. The timing of the insurer's request;

ii. The possible prejudice to both parties;

iii. The number and nature of previous examinations;

iv. The nature of examinations being requested;

v. Whether there are any new issues being raised that require evaluation; and

vi. Whether there is a reasonable nexus between the examination being requested and the applicant's injuries.

In *16-002861 v Aviva,* the Tribunal found that it was not reasonable for the Applicant to undergo another IE when one had been done the previous year for the same type of Treatment Plan. In *21-005342 v Intact,* the Applicant was not required to attend a second CAT psychological assessment after two years because it would be too intrusive. *19-009160 v MVACF* found that a subsequent IE was not reasonable when there was no new medical information prompting it, or new issues raised.

However, *18-012427 v Unifund* dealt with the particular case of a subsequent assessment involving IRBs under s. 37 and found that the Applicant had not submitted "any case law that supports a finding that an IE assessment is unreasonable if it is scheduled eight months following a first set of IE assessments for the same benefit."

We note that ss..42(7) and (8) have a similar provision to s.37(1) related to continuing entitlement to ACBs. We also note that S.42(12) holds that, post-104 weeks, an insurer cannot require such an assessment less than one year after the prior assessment. The question is raised if this suggests that the SABS recognizes one year between IEs to be a reasonable time period to evaluate continuing entitlement to other benefits post 104 weeks. However, we did not find a decision stating this.

Regarding the issue of whether an insurer is required to use the same assessor for subsequent Post-104 assessments, we were not able to find specific decisions on this matter. However, the Tribunal has held (*18-008443 v Economical*) that under s.44, the insurer "has unfettered discretion to choose its assessor as long as it does not require an IE more often than is reasonably necessary." In *18-006102 v Certas* it found that "an insured cannot dictate the identity of those performing an insurer examination."

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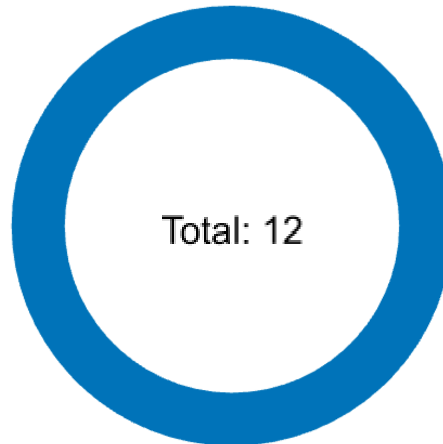
Results - Compendium Search Parameters

Option 1: Benefit/Issue Search: Reasonably Necessary Test (S.44)
Filtered Results By: For Applicant



For Applicant

1. **16-002861 v Aviva**
Release Date: September 8, 2017
Outcome: Considering that the Applicant had seen Ms. Park one year prior, Adjudicator Treksler did not find that it was "reasonably necessary for the Respondent to require the Applicant to undergo another IE…As such, I find the Applicant's absence from the IE was justified."

[26] The applicant failed to attend an IE for physiotherapy services.

[27] Section 42 of the Schedule states that for the purposes of assisting an insurer to determine if a person is or continues to be entitled to a benefit, the insurer may, as often as is reasonably necessary, require a person to undergo an IE. The applicant had recently undergone an IE in 2014 regarding his entitlement to another physiotherapy treatment plan for the injuries he sustained from the accident.

[28.] **I do not find that it was reasonably necessary for the respondent to require the applicant to undergo another IE when one had been done the previous year for the same type of treatment plan.**

[29.] As such, I find that the applicant's absence from the IE was justified and further find that the expenses for the treatment plan are reasonable and necessary for the same reasons indicated for the treatment plan denied on September 25, 2014.

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2.

21-005342 v Intact
Release Date: August 26, 2016
Outcome: The Tribunal found it would be prejudicial to the Applicant to undergo another psychological IE following the death of the initial assessor Dr. Kiss, and that the complete file and raw psychological test data had been provided to Psychologist Dr. L. Davidson. In Dr. Davidson's opinion, which the Tribunal found reasonable, Dr. Kiss had administered a reasonable battery of tests, and there was sufficient testing for a psychological report.

[26] I will first review the psychology IE. The applicant attended the scheduled psychology IE with Dr. Kiss on March 5, 2020, and the assessment was completed on that date. The evidence shows that the respondent has Dr. Kiss' draft report, which contains a detailed assessment, and is signed by Dr. Kiss while noting that its finalization is awaiting input from the co-assessor.[10] The question to be determined is whether the applicant is required to attend a second psychology IE because Dr. Kiss passed away before he completed his report.

[28] The respondent submits that Dr. Kiss' draft report cannot be tendered into evidence, and that the application to the Tribunal amounts to a trial by ambush, precluding the respondent from making a full answer and response. The respondent further argues that allowing the applicant to proceed would preclude it from having any way to respond to the applicant's evidence, and would amount to a breach of procedural fairness. I note, however, that the purpose of IEs under section 44(1) is to assist the insurer in determining if a person is entitled to a benefit, not for the purposes of litigation. In my view, the important consideration is not whether or not the report is draft, or can be tendered into evidence, but rather is it sufficient for the purposes of assisting in determining entitlement or if a second in-person IE is reasonably necessary.

[29] In G.P. v. Cumis at paragraph 33, the Tribunal discussed the distinction between "optimal" vs. "reasonably necessary" assessments. ***The Tribunal noted that the Schedule provides a right to reasonably necessary, not optimal, assessments****. While Dr. Kiss' draft report may not be optimal from the respondent's perspective, that does not mean it has right to a second psychology IE, unless it is shown to be otherwise reasonably necessary. In this case the only reason provided by the respondent was that they did not have Dr. Kiss' report as he had passed away. It now has his report, albeit in draft form.*

[31] ***I am of the view that a paper review would have been a reasonable approach. I note that the respondent submits it did not have any information about the results of Dr. Kiss' assessment at the time of the Notice of Examination. It does have that information now.*** *The respondent argues the data is dated, but I note it has had the data since the Tribunal ordered its production in November 2021. In my*

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view, a paper review would have allowed the respondent to obtain additional information to assist in its determination of the applicant's entitlement to benefits, while protecting the privacy rights of the applicant. A paper review would have provided for a balancing of the competing interests given the unique circumstances in this case. A paper review is not, however, the IE requested by the respondent in the Notice of Examination.

[32] The respondent requested a second in-person psychology IE in the September 2021 notice. ***Psychological assessments are by their very nature intrusive, and the applicant has already fully participated in one****. In my view, he has met his obligations under section 44 with respect to the psychology IE. Given that the respondent now has the draft report of Dr. Kiss based on the first in-person assessment attended by the applicant,* ***there would be significant prejudice to the applicant if he was now required to undertake a new in-person IE, more than two years after the first.***

[33] For the reasons outlined above, I find the respondent has not demonstrated that the second in-person psychology IE is reasonably necessary pursuant to section 44(1).

16-003144 v CUMIS

Release Date: April 3, 2017

Outcome: The Applicant is not precluded from adjudicating her catastrophic impairment claim due to her refusal to attend a scheduled IE, which was not reasonable and necessary.

3.

[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*

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

Against Applicant

1.

18-012427 v Unifund

Release Date: July 5, 2017

Outcome: Moreover, the Tribunal did not find the orthopedic IE was a duplicate since there was no evidence that the Respondent required the Applicant to attend an IE with an orthopaedic surgeon prior to this date. Given that IE assessor Dr. Marchuk's July 2018 report deferred to comment regarding the Applicant's annular tear noted in the December 2017 MRI report "to the appropriate medical expert", the Tribunal found the Respondent established a nexus between the type of assessment sought and the Applicant's injuries. As such, the Respondent's request for the Applicant to attend the September 2018 orthopedic IE was found reasonably necessary.

[26] Unifund submitted that the Tribunal should consider the following criteria set out in 17-002973 v Aviva Insurance Company in determining whether an IE assessment is reasonably necessary:

(i) The timing of the insurer's request;

(ii) The possible prejudice to both sides;

(iii) The number and nature of the previous insurer's examinations;

(iv) The nature of the examination(s) being requested;

(v) Whether there are any new issues being raised in the applicant's claim that require evaluation;

(vi) Whether there is a reasonable nexus between the examination requested and the applicant's injuries.[24]

[27] While I am not bound by decisions of other Tribunal adjudicators, I am persuaded by the test outlined in 17-002973 and find the criteria useful in determining the reasonableness of the proposed September 24, 2018 orthopaedic IE assessment.

[28] In his September 20, 2018 correspondence, O.R. failed to provide any explanation or reasons for his position that the proposed orthopaedic IE assessment was unreasonable. ***It was not until December 3, 2019 that O.R. informed Unifund of his position that he, "did not attend the Assessment because it was a duplicate. We found [sic] unreasonable and unnecessary that he attends the same appointment with the same assessor in the same year.****"[25]*

[30] I agree with O.R. that Unifund scheduled the orthopaedic IE assessment within a year of the previously completed set of IE assessments regarding O.R.'s entitlement to IRBs. The timing of the orthopaedic IE assessment, however, is but one consideration in

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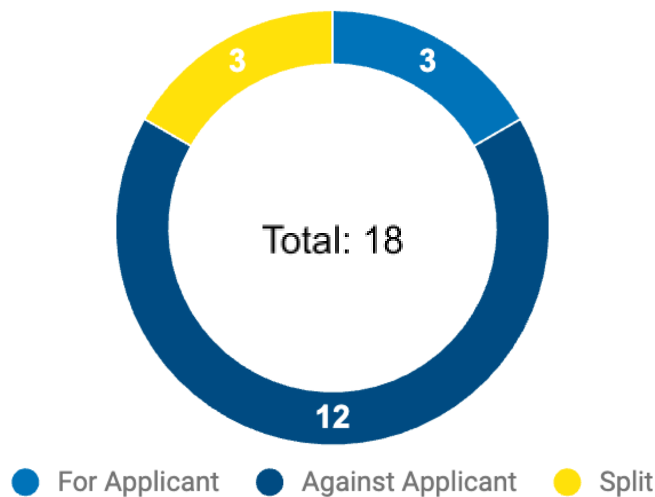
determining the reasonableness of Unifund's request. ***Moreover, O.R. failed to submit any case law that supports a finding that an IE assessment is unreasonable if it is scheduled eight months following a first set of IE assessments for the same benefit.***

Option 2: Advanced Search**:** Primary Criteria: Referenced Cases/Legislation: Al-Shimasawi v. Wawanesa Mutual Insurance Company [2007] O.F.S.C.D. No. 82.



For Applicant

1. **<u>19-009160 v MVACF</u>**
Release Date: Oct. 7, 2020
Outcome: The Tribunal found that the Applicant was not barred from proceeding with his claim for the in-home OT assessment, despite the Respondent's contention that the Applicant had failed to attend a second IE to address same. The Respondent was found to have requested IEs more often than was reasonably necessary. When the Respondent arranged the first OT IE, it ought to have known that the medical opinion regarding causation it stated it required was not within an OT's scope of practice.

[52] This Tribunal has followed the approach adopted in Al-Shimasawi to determining whether an insurer's request conforms to s. 44. In line with this jurisprudence, an adjudicator is to consider the following factors in deciding whether an insurer's request for an IE was proper:

i. The timing of the insurer's request;

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ii. The possible prejudice to both parties;

iii. The number and nature of previous examinations;

iv. The nature of examinations being requested;

v. Whether there are any new issues being raised that require evaluation; and

vi. Whether there is a reasonable nexus between the examination being requested and the applicant's injuries.

[53] The insurer bears the onus of establishing that its requests conform with s. 44 of the Schedule.

[54] I have considered the six factors outlined above in relation to the facts of this case. The facts before me differ from the cases upon which MVACF relies. In Al-Shimasawi, where there was no evidence of prejudice to the applicant, the insurer's request was found to be reasonable. In Subramaniam, the insurer's request was found to be reasonably necessary due to a change in the applicant's medical condition that introduced a new issue into the dispute.

[56] ***Here, there was no new medical information to prompt the need for subsequent IEs. There were no new issues raised.*** *The prejudice MVACF asserts it suffered as a result of M.P.'s non-attendance was primarily a consequence of its own errors and missteps in adjusting the claim. It had already had an opportunity to schedule an IE in relation to the disputed assessment. It could have sought a medical assessment concurrent to the occupational therapy IE or paper review of the available medical documentation as less-intrusive alternatives to an additional in-person assessment.*

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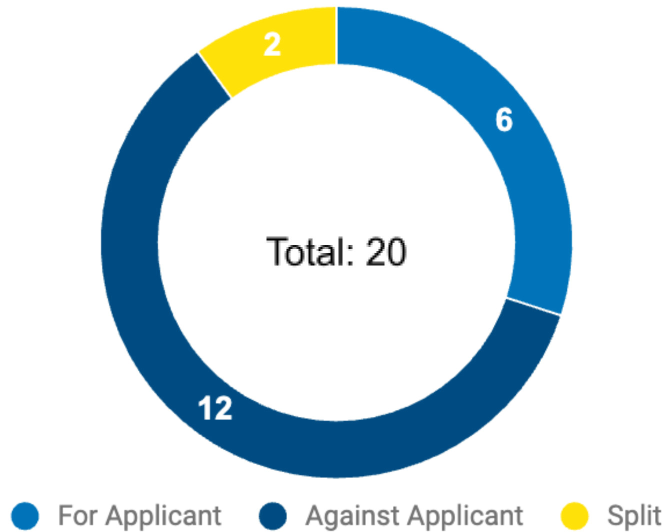
Option 3: Advanced Search**:** Primary Criteria: Referenced Cases/Legislation: SABS: S.37(7)



Split

1. **18-012427 v Unifund**
   Release Date: July 5, 2017
   Outcome: Moreover, the Tribunal did not find the orthopedic IE was a duplicate since there was no evidence that the Respondent required the Applicant to attend an IE with an orthopaedic surgeon prior to this date. Given that IE assessor Dr. Marchuk's July 2018 report deferred to comment regarding the Applicant's annular tear noted in the December 2017 MRI report "to the appropriate medical expert", the Tribunal found the Respondent established a nexus between the type of assessment sought and the Applicant's injuries. As such, the Respondent's request for the Applicant to attend the September 2018 orthopedic IE was found reasonably necessary.

   [26] Unifund submitted that the Tribunal should consider the following criteria set out in 17-002973 v Aviva Insurance Company in determining whether an IE assessment is reasonably necessary:

   (i) The timing of the insurer's request;

   (ii) The possible prejudice to both sides;

   (iii) The number and nature of the previous insurer's examinations;

   (iv) The nature of the examination(s) being requested;

   (v) Whether there are any new issues being raised in the applicant's claim that require evaluation;

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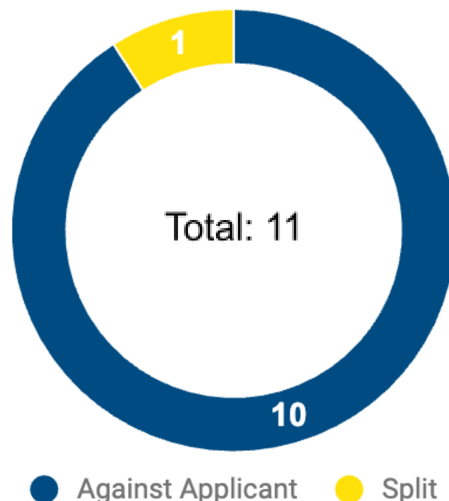
(vi) Whether there is a reasonable nexus between the examination requested and the applicant's injuries.[24]

[27] While I am not bound by decisions of other Tribunal adjudicators, I am persuaded by the test outlined in 17-002973 and find the criteria useful in determining the reasonableness of the proposed September 24, 2018 orthopaedic IE assessment.

[28] In his September 20, 2018 correspondence, O.R. failed to provide any explanation or reasons for his position that the proposed orthopaedic IE assessment was unreasonable. ***It was not until December 3, 2019 that O.R. informed Unifund of his position that he, "did not attend the Assessment because it was a duplicate. We found [sic] unreasonable and unnecessary that he attends the same appointment with the same assessor in the same year."****[25]*

[30] I agree with O.R. that Unifund scheduled the orthopaedic IE assessment within a year of the previously completed set of IE assessments regarding O.R.'s entitlement to IRBs. The timing of the orthopaedic IE assessment, however, is but one consideration in determining the reasonableness of Unifund's request. ***Moreover, O.R. failed to submit any case law that supports a finding that an IE assessment is unreasonable if it is scheduled eight months following a first set of IE assessments for the same benefit.***

Option 4: Keyword: choose
Filtered Results By: Issues: Non-compliance S.44



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Against Applicant

1. **18-006102 v Certas**
Release Date: May 15, 2019
Outcome: The Tribunal found that the Applicant is barred from proceeding with their application as a result of the Applicant's failure to attend a properly scheduled IE. While the Applicant claimed that the IE assessor was not appropriate since the assessor was not an occupational therapist like the person who recommended the medical benefits sought by the Applicant, the Tribunal found that the Respondent had the right to choose the assessor to conduct the IE under s.44 of the Schedule.

[19] Section 44(1) expressly provides the respondent with a statutory right to have ***one or more persons chosen by the insurer*** *who are regulated health professionals to conduct the examination.* ***This was affirmed by the Tribunal in the reconsideration decision NH and Aviva. There the Tribunal found that an insured cannot dictate the identity of those performing an insurer examination.*** *In this case, the person chosen to conduct the examination is a regulated health professional and I find this interpretation applies to the applicant's case.*

2. **18-008443 v Economical**
Release Date: February 6, 2020
Outcome: Boyce noted that an insurer has the discretion to choose its assessors in the same way that the Applicants do in selecting their assessors and that the Applicant's preference to not share personal information with a new assessor is not a compelling reason for non-attendance.

[15] I find on the facts and evidence that Economical's proposed IEs are reasonably necessary, that it complied with all of the requirements under the Schedule, and is permitted to choose its own IE assessors. Accordingly, I find that [the applicant] is statute-barred under s. 55 from proceeding with her application.

[25] I disagree. While it is a fundamental consideration to balance the privacy concerns of an applicant against an insurer's need to secure medical opinions, given [the applicant]'s claims and Dr. Khaled's determination that IEs are required, I consider the IEs proposed to be reasonably necessary to achieve Economical's goal of securing CAT and IRB opinions. ***First, as an insurer, Economical has unfettered discretion to choose its assessor as long as it does not require an IE more often than is reasonably necessary. The same discretion is extended to applicants in selecting their assessors, as [the applicant] did in securing opinions from Omega.*** *Second, while privacy concerns and the well-being of an insured are factors to consider in determining whether IEs are reasonably necessary, they are not the only factors, and to assign more weight to this one factor would unfairly allow an insured to dictate the identity of those performing an IE, which is the purview of the insurer. Third, [the*

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applicant]'s preference not to share her personal information with a new assessor, while understandable, is not, in my view, a compelling reason for non-attendance at an IE where she has not demonstrated that Economical collected more personal information than was necessary for the purposes of assessing her injuries previously in order to warrant prospective concern that a breach could occur.

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