

**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**

Tribunal File Number: 18-005019/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

D [REDACTED] T [REDACTED]

Applicant

and

Wawanesa Mutual Insurance Company

Respondent

MOTION ORDER

Order made by: Samia Makhamra, Adjudicator

Date of Order: July 15, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident on January 22, 2018 and sought benefits pursuant to the Statutory Accident Benefits Schedule – Effective September 1, 2010.
- [2] The applicant was denied certain benefits and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [3] A case conference took place on Friday, November 9, 2018. A Tribunal order set out an in-person hearing scheduled for January 2019.
- [4] In dispute is the sole issue of attendant care benefits, and interest.
- [5] The in-person hearing has not yet taken place.
- [6] The following is a summary of the recent, lengthy, but straight forward procedural history of this matter:
 - i. The applicant filed a notice of motion on January 3, 2019.
 - ii. The respondent provided reply submissions and filed a cross-motion on March 1, 2019.
 - iii. The Tribunal scheduled a teleconference motion hearing for May 15, 2019.
 - iv. Just before the motion hearing, on May 14, 2019, the applicant provided response submissions to the cross-motion.
 - v. The Tribunal adjourned the May 15th motion hearing to allow the respondent reply submissions to the applicant’s response. The Tribunal also converted the teleconference motion hearing to an in-person proceeding.
 - vi. The respondent provided its reply submissions on June 14, 2019.
 - vii. The applicant filed a notice of motion on July 5, 2019.
 - viii. On July 8, 2019, the respondent provided response submissions to the applicant’s July 5th notice of motion.
- [7] This order is the result of a motion hearing conducted in person. The motion hearing addressed two notices of motion brought by the applicant, which includes a Notice dated July 5th, and a cross-motion by the respondent. As tasked, the scheduling of an in-person hearing was also completed.

Procedural issue of the applicant’s Notice of Motion of July 5th

- [8] This Notice of Motion was filed just a few days before this motion hearing was to begin.
- [9] At the time of this motion hearing, the Tribunal had not yet acted on the Notice.

[10] I decided to address this Notice of Motion during today's in-person motion hearing. Doing so would prevent another adjournment, or the scheduling of another motion hearing, which would further delay the application. In addition, the applicant's requests in his Notice deal with issues that directly relate to the issues before me. Hence, pursuant to Tribunal Rule 3.1, I determined that it would be efficient and appropriate to hear this Notice today.

[11] To be fair to the parties, I allowed them the opportunity to take time away from the hearing to caucus privately, as they saw fit.

MOTIONS

[12] **The applicant's Notice of Motion of January 3, 2019**, wherein he requested:

- a) An order adding Alex Amigud as a witness at the hearing; and
- b) An order for productions of several documents.

[13] The list of documents requested includes 11 items. Paragraph 23 below lists the items being ordered. Paragraph 54 provides a brief description of items no longer requested.

[14] **The respondent's cross-motion dated March 1, 2019**, wherein it requested:

- a) That the Tribunal declare that the applicant is not entitled to rely on any documents obtained through a request under PIPEDA where those documents have not also been obtained through the proper procedures put in place by the LAT;
- b) That the Tribunal order the applicant to cease to contact the respondent directly or its witnesses seeking documentation relating to this dispute or that such communication explicitly exclude all documents relevant to this ongoing dispute when there are already existing LAT production orders and additional LAT motions and reconsiderations brought by the applicant, on which the LAT is currently adjudicating or has adjudicated;
- c) That the Tribunal make a declaration that all opposing party and witnesses' records relating to this dispute or sought to be used in this dispute must be obtained through the proper procedures put in place by the LAT and Insurance Act in order to be relied on at the LAT hearing; and
- d) That the applicant be ordered to attend the occupational therapy assessment requested by the insurer or be precluded from disputing entitlement to attendant care benefits or in the further alternative, a stay of the proceeding be ordered until attendance at an occupational therapy assessment occurs.

[15] **The applicant's Notice of Motion of July 5, 2019**, wherein he requested:

- a) An Order to add an award claim made under section 10 of *Ontario Regulation 664*.

- b) An Order to strike the respondent's written reply submissions of June 14, 2019; or
 - In the alternative to strike paragraphs 30-43, and all tabs containing evidence; or
 - In the alternative, striking paragraphs and evidence from the respondent's written reply submissions this Tribunal deems just.
- c) A caution be issued to Respondent's counsel for abusing the process of the Tribunal and especially so, given that Respondent's counsel was put on proper notice that such abuse was occurring; and
- d) An Order for costs for the applicant's time and expense in preparing and arguing the Motion to Strike.

RESULT

- [16] The issue of an award under *Ontario Regulation 664* is added to the issues in dispute.
- [17] The applicant may call the adjuster, Alex Amigud, as a witness.
- [18] The applicant's request for a caution to the respondent is dismissed.
- [19] The applicant's request for costs is dismissed.
- [20] The respondent's requests in its cross-motion are dismissed.

The Hearing

- [21] The parties agreed to re-schedule the in-person hearing to November 5, 6 and 7, 2019.
- [22] For the purposes of this Order, the location of the hearing is Toronto. The hearing is to start at 9:30 each day.
- [23] By no later than August 4, 2019, the parties shall produce the following:

The respondent:

- i. The updated accident benefits file, subject to redactions for privilege and reserves, and settlement discussions (on consent);
- ii. The adjusting records of the respondent, including records of all telephone conversations that pertain to the applicant's file, subject to redactions for privilege, reserves, and settlement discussions (on consent);
- iii. All communications, phone notes, and e-mails related to the file, including communications with other staff of the respondent, or third parties such as assessors, that are not noted on, or part of its adjusting records. This is subject to redactions for privilege, reserves and settlement discussions (not on consent).

- iv. Updated OCF-21s submitted with respect to the applicant's accident benefits claim (on consent);
- v. Updated copy of all s.50 statements by the respondent (on consent);
- vi. Payment summary of all amounts paid to or on behalf of the applicant, listing dates, amount, and type of expenses or no-fault benefits paid to or on behalf of the applicant (not on consent); and
- vii. Copies of all surveillance summaries and videos that the insurer intends to rely on at the hearing (not on consent);

The applicant

- i. Any instructions provided to the occupational therapist, Sasha Stewart, who conducted the in-home assessment of attendant care needs (of February 26, 2018) that are not already included in form(s), or request(s) submitted to the respondent for funding. This is subject to redactions for privilege or settlement discussions.

[24] Where there are redactions made to the documents ordered above, the parties must provide a summary explanation for each redaction.

[25] By no later than September 5, 2019, the parties shall exchange all evidence they intend to use at the hearing.

[26] October 4, 2019 is the deadline for the parties to provide a joint brief, if they so wish.

[27] October 11, 2019 is the deadline for the parties to confirm their list of witnesses.

[28] Lastly, while not an Order, the Tribunal asks that the applicant advise of his accommodation needs for the in-person hearing as soon as possible, so that the Tribunal can make the necessary arrangements.

REASONS

[29] I have considered all the materials submitted by the parties in their notice(s) of motion, response(s), and reply.

Applicant's Relief: Adding an award and adding Ms. Amigud as a witness

[30] Section 10 of Ontario Regulation 664 of the *Insurance Act* states that if the Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Tribunal may award a lump sum up to 50 per cent of the amount to which the person was entitled to at the time of the award, together with interest.

[31] I am allowing this request. An adjudicator has the inherent jurisdiction to add an award at any part of the hearing process, even if not raised by the parties.

- [32] The bar to add an award as an issue in dispute is very low, and I am of the view that the applicant has met his threshold for the award to be added. Briefly put, the applicant is concerned that the respondent has not paid any attendant care, despite the available evidence, and despite the precarious circumstances he is now facing as a result.
- [33] The respondent argued prejudice because it was unable to adequately prepare oral submissions on the award request, given that the notice of motion was filed on the business day before this motion hearing.
- [34] I offered respondent's counsel the opportunity to take some time to discuss this issue with her client in private.
- [35] I see no prejudice to the respondent. The hearing in this matter will not take place until a few weeks from today. With time between today and the date of the hearing, and with a revised deadline for the exchange of documents, I am satisfied that the respondent is afforded time to prepare for this issue at the hearing.
- [36] Ms. Amigud is the adjuster on the applicant's file. With the issue of an award now in dispute, the request for Ms. Amigud's testimony is allowed.
- [37] The bar to add a witness is relatively low. Rule 8 of the Tribunal provides the Tribunal may issue a summons at the request of a party. My reading of the rule is that there is no requirement that consent from the other party is required.
- [38] Nonetheless, as the hearing is not until a few weeks from today, I fail to see any prejudice to the respondent.

Applicant's Relief: The requests for a caution, costs, and part of reply submissions to be struck.

- [39] I am not persuaded that the respondent's conduct is such that it would warrant a caution, or any adverse comment by the Tribunal. Neither am I convinced that, at this time, a caution, or similar, would add any value to this matter, procedurally or otherwise.
- [40] The Tribunal's authority to award costs is derived from the Rules. More specifically, Rule 19, which requires a party to have acted "unreasonably, frivolously, vexatiously, or in bad faith". I am not persuaded that the respondent's conduct warrants an order for costs, as contemplated in the Tribunal Rule.
- [41] Here the applicant is referring to the respondent's reply submissions of June 14. More specifically, paragraphs 30 to 43 in which, according to the applicant, the respondent introduces new evidence, and argument that was not submitted at first instance.
- [42] In paragraphs 30 to 43 the respondent provides its chronology of attendant care assessment(s) and proceeds to argue that the applicant has failed to attend a s.44 examination, as well as other scheduled assessments thereafter, on the premise of being unable to provide meaningful consent pursuant to PIPEDA. The respondent

asks the Tribunal to require the applicant to attend a s. 44 examination with an OT.

- [43] To the applicant, in these paragraphs the respondent is case splitting to its advantage. In so doing, it effectively sought to prevent the applicant from proceeding (due to non-attendance at an Insurer's examination). It also brought unnecessary costs to the applicant, who had to prepare submissions.
- [44] In addition, the applicant raised a procedural fairness argument because he was not allowed to submit a sur-reply, which would have addressed the respondent's reply submissions of June 14. This is part of his submissions with the Notice of July 5th. As I have considered his submissions on the Notice, I am of the view that this issue is now moot.
- [45] I do not need to strike paragraphs 30 to 43. However, I have assigned these paragraphs no weight. At this time, I am not prepared to hear arguments on the issue of whether the applicant should be required to attend a s. 44 examination with an OT. This is premature. In my view, this is clearly a dispute that deserves full airing before a hearing adjudicator.

Applicant's Relief: Productions

- [46] Under paragraph 23 above, I am ordering the respondent to produce three documents that were discussed but the parties could not agree on the terms. These are item iii, item vi, and item vii.
- [47] I find these documents relevant to the issues in dispute. They not only inform the applicant how his claim for attendant care benefits was handled and eventually determined, but also how his accident benefits file as a whole was managed. In my view, this ensures the duty of good faith that is owed to the applicant. Significantly, this is in line with the Tribunal's mandate to facilitate a fair process that allows the effective participation of the parties, and for the resolution of a matter on its merits.
- [48] Item iii was not on consent. I am ordering it based on relevance. The piece that generated some discussion was the respondent's communications with other staff and third parties. This needed clarification, which the respondent provided.
- [49] Item vi, not on consent, raised some practical questions. The applicant wants a summary of all payments made on his behalf with details such as the type of service, or payment, the date of the service or payment, and the amounts. The respondent advised that an itemized payment summary is produced every so often, and a copy of it is provided to the applicant in the regular course of its management of the file. As it was unclear to me exactly what format this type of document has, or whether it would satisfy the request, we discussed whether it could be practically, or easily, obtained from the respondent's records. I am ordering it based on relevance.
- [50] The respondent requested that the applicant be ordered to produce his own payment summary as well, as I understand it, on the basis that it would level the playing field, and fully inform the respondent of the applicant's actions. I respectfully decline to make the order, as I see no basis for it. Simply put, the funding for the in-home assessment of attendant care needs conducted by Sasha Stewart, OT, on February

26, 2018, was sought from the respondent, in accordance with the *Schedule*. I have no information indicating otherwise.

- [51] Item vii is surveillance. The applicant asked for all unedited surveillance materials to be produced, regardless of whether the respondent is relying on it. The applicant's concern is that the respondent could select or edit materials to its advantage.
- [52] Rule 9 governs production of documents and disclosure requirements. Under this Rule, disclosure is required only where a party intends to rely on the evidence. As a result, I am prepared to order the disclosure of all surveillance materials that the respondent intends to rely on at the hearing only. Despite the applicant's concerns, I see no basis to make any orders under Rule 9.3(e) or 9.1. In other words, I am not persuaded at this time that a full understanding of the issue in dispute is hindered by surveillance that may exist but is not being used by the respondent.
- [53] I am also ordering the applicant to produce documents under paragraph 23.i, if these exist at all. My order serves to provide for a better understanding of the context of the assessment of attendant care needs by Sasha Stewart, OT. Given how entrenched the parties appear to be, in my view this disclosure benefits both their positions by adding transparency. I make this order pursuant to Tribunal Rule 3.1.
- [54] The applicant withdrew his request for 4 items originally listed in his Notice. These are: all policy manuals related to his file; information on the amount of reserves set aside for his non-fault claims; property damage information related to all vehicles involved in the accident; and complete details of all investigations other than surveillance.

The respondent's cross-motion is dismissed

- [55] The respondent's requests are dismissed. I am not persuaded by its arguments.
- [56] In short, the respondent argued the following: the only valid procedure to obtain documents for an accident benefits dispute is, or should be, by an Order of the Tribunal; the applicant should be ordered to cease contact with the respondent directly or its witnesses seeking documentation relating to this dispute; the Tribunal should make a declaration that all records relating to this dispute must be obtained through the proper procedures of the Tribunal and the Insurance Act, in part to prevent inconsistent decisions; and that the applicant be ordered to attend the OT assessment or be precluded from disputing entitlement, based on non-attendance.
- [57] The applicant opposed these requests, essentially on the basis that there are no valid grounds.
- [58] Part of the dispute here is the parties' disagreement on the Tribunal's jurisdiction concerning the Personal Information Protection and Electronic Documents Act (PIPEDA).
- [59] I see no need to make a pre-emptive declaration that the applicant is not entitled to rely on any documents obtained through an access request made under PIPEDA. Nor am I convinced of the Tribunal's authority to do so in this case.

- [60] I decline to make any determination regarding the Tribunal's jurisdiction concerning PIPEDA on the basis that it is unnecessary (on the facts of this case so far), and beyond the scope of this motion hearing.
- [61] Again, Tribunal Rule 9 governs disclosure. Nothing in the respondent's arguments persuades me that the adjudicator's authority is diminished as a result of documents obtained through a request made under PIPEDA. Or that the Tribunal's authority is somehow threatened by documents not expressly obtained through a Tribunal order.
- [62] I decline to make any order to restrict the applicant's contact with the respondent. The respondent has an obligation to continue to adjust the applicant's claim(s), in which case the applicant may need to contact the respondent.
- [63] I have no basis to restrict the applicant's contact with any witnesses either. I accept the applicant's submissions and case law; the witnesses do not belong to either parties.
- [64] Lastly, the applicant requested that the amount of attendant care benefits in his application be amended to \$6,000.00 per month, instead of \$3,000.00. The respondent opposed. I declined to make a ruling because this request would entail hearing full submissions on the issue, which, in my view, should be adequately addressed by the hearing adjudicator.
- [65] **Except for the provisions contained in this order all previous orders made by the Tribunal remain in full force and effect.**

OTHER PROCEDURAL MATTERS

- [66] If the parties resolve the issue(s) in dispute prior to the hearing, the applicant shall immediately advise the Tribunal in writing.

Date of Issue: July 17, 2019



**Samia Makhamra
Adjudicator**