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Ontario

Date: 2016-10-20
Tribunal File Number: 16-000338/AABS
Case Name: 16-000338 v The Personal Insurance Company

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:

S. G.

Applicant

and

The Personal Insurance Company

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: **Chloe Lester**

APPEARANCES:

For the Applicant: William Lu, Counsel

For the Respondent: Pamela Vlasic, Counsel

HEARD: Teleconference: September 13, 2016

Introduction:

1. The applicant was injured in a motor vehicle accident on July 7, 2014. Disputes arose between the applicant and his insurer, The Personal Insurance Company. ("Insurance Company") concerning his entitlement to accident benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*").[1]

2. A preliminary motion hearing (the "hearing") was held on September 13, 2016, by means of teleconference and written submissions were submitted to the Tribunal in advance of the hearing.

Issues:

3. The issue in dispute before the hearing adjudicator is:

> Can the applicant's tape recording of Dr. Mascarenhas' insurer examination be admitted into evidence for the hearing of the Application?

Results:

4. The tape recording is not admissible into evidence.

Background:

5. A case conference was held via teleconference for the application on July 13, 2016. During the case conference, the applicant advised counsel for the Insurance Company that he had tape-recorded the insurer's examination conducted by Dr. Mascarenhas on January 16, 2015. The tape-recording was made without the knowledge of Dr. Mascarenhas. The Tribunal ordered that the applicant disclose the tape recording to the Insurance Company by July 27, 2016. The case conference concluded and a hearing was scheduled for September 13, 2016. At the request of the Insurance Company, a second case conference was scheduled for August 10, 2016 to consider the recording. At the case conference, the Insurance Company objected to the admission of the tape recording into evidence and this preliminary motion hearing was scheduled.

6. On September 13, 2016, this preliminary motion hearing was held and I reviewed the tape recording with the written submissions in advance of the hearing. The parties made oral arguments in addition to their written submissions. The Insurance Company submitted that the tape recording should not be admitted into evidence. The following is a summary of the

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[1] The *Statutory Accident Benefits Schedule* – Effective September 1, 2010, *Ontario Regulation 34/10, as amended.*

respondent's arguments:

a. There is no relevant statutory power that provides a right to the applicant to tape record an insurer's examination.
b. *Bellamy v. Johnson*[2] and the Bellamy line of cases[3] set out a legal test used to determine when a recording of an insurer's examination is permitted. The applicant does not meet that test.
c. If the test in *Bellamy v. Johnson* has been met, a recording is permitted and parameters are put in place to ensure the accuracy of the recording. No safeguards or parameters were in place at the time of the recording.
d. The medical examiner did not consent to the recording.
e. The prejudicial effect outweighs the probative value, as the recording is unreliable. It is muffled, inaudible, and the Insurance Company is unable to determine when the recording was started or stopped. Therefore, the principles of procedural fairness would not be satisfied.
f. This amounts to a trial by ambush as the applicant did not disclose the existence of the recording in advance of the case conference.

7. The applicant argued that the recording should be allowed into evidence. The following is a summary of the applicant's arguments:

a. The case before the Tribunal is whether the tape recording is admissible into evidence, not whether the applicant would have received permission to tape record the examination.
b. The probative value outweighs the prejudicial effect as the recording reveals serious misconduct of the Insurance Company's assessor.
c. The recording is not illegal or improperly obtained.
d. Excluding the evidence would shield misconduct of the medical expert. Allowing the recording into evidence would increase accountability and transparency of medical examinations and it would be in the interest of public policy.
e. The recording is relevant to the issues before the Tribunal.
f. The recording meets the test set out in *Bellamy v. Johnson*.
g. There are no grounds to exclude the audio recording.

8. At the conclusion of the reply submissions, the applicant requested an opportunity to submit a further response. I heard the submissions of the parties

[2] *Bellamy v. Johnson*, [1992] O.J. 864

[3] The Bellamy lines of cases refer to cases that rely on the Bellamy v. Johnson decision. *Willits v. Johnston*, [2003] O.J. No. 1442; *Adams v. Cook* 2010 ONCA 293; *Otote v. Shenouda* [2005] O.J. No. 650 (S.C.J.); *Jilla v. Ribeiro*, [2009] O.J. No. 1281; *Leo v. Hadzalic*, 2016 ONSC1924;

and denied the request as the applicant had an opportunity to present his case in full and no new issues were brought forward in reply submissions.

9. After reviewing the submissions of the parties and evidence, I find that the evidence is not relevant to the issues I have to decide and therefore the tape is not admitted into evidence.

10. I am not convinced *Bellamy v. Johnson* and the Bellamy line of cases are binding upon me. Those cases refer to a test that needs to be met in order for an applicant to be allowed to record an insurer's examination. The applicant is not seeking permission to tape record an insurer's examination, as the recording has already been made. I find those cases distinguishable, as this proceeding is to address the admissibility of evidence.

11. The applicant has presented insufficient evidence establishing that the recording is relevant to the proceedings. The applicant alleges misconduct and inaccuracies on the part of the Insurance Company's examiner. As I do not have the insurer's examination report before me, I cannot evaluate the relevancy or probative value of the tape-recording to establishing the applicant's submission that but for the misconduct and mistakes of the examiner, the examiner's report would have presented different conclusions favourable to the applicant.

12. An assessment report is not meant to be a transcript of the examination but instead should contain relevant information to support the assessor's conclusion. Many of the allegations, in my opinion, are within the discretion of the assessor to write his report. For example, paragraph 10.c. of the applicant's submissions state "Dr. Mascarenhas did not reference conversations that did occur, including discussion on the applicant's recreational activities where the applicant stated that he was unable to lift weights at the gym or fly aircraft due to his injury". If these statements are not relevant to the doctor's conclusion there is nothing in the SABS or case law that obligates the doctor to include this information in his report. The doctor came to a conclusion and in the report wrote information or arguments to support his position. Simply because a doctor does not put all information that was put in front of him in his report, does not necessarily mean the report is inaccurate or has led to misconduct. Moreover, the applicant can address these allegations at the hearing through testimony of the witnesses.

13. Section 15 of the *Statutory Powers and Procedures Act*[4] gives me the authority to admit or not admit evidence at a hearing relevant to the subject

[4] *Statutory Powers Procedure Act,* RSO 1990, c S.22, s. 15

matter of the proceeding. The applicant has not established the relevance or necessity of admitting the tape-recording. The applicant did not lead any evidence concerning cognitive or memory issues of the witnesses that would result in the necessity of using the recording to establish what happened during the insurer's examination. I am persuaded by the Insurance Company's reply submissions that the purpose of the recording was to assess the credibility of the examiner, which can be accomplished through the evidence of the parties at the hearing.

Background:

14. After considering the evidence, pursuant to the authority vested in the Tribunal under s.280 (2) of the Act, the Tribunal orders that the tape recording is not allowed into evidence and will be excluded from the proceedings.

Released: October 20, 2016

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Chloe Lester, Adjudicator