

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: 19-011457/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:

Gloria Galit

Applicant

and

Technology Insurance Company Inc.

Respondent

MOTION ORDER

Order made by: Ian Maedel, Adjudicator

Date of Order: September 22, 2020

Appearances

For the Applicant: Syliva Guirguis, Counsel

For the Respondent: Kadey Schultz, Counsel

Martin Lidums, Counsel

Motion Hearing conducted via teleconference August 19, 2020

OVERVIEW

- [1] The applicant was injured in an automobile accident on February 11, 2016, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule")*.
- [2] The applicant was denied certain benefits and submitted an Application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") on September 30, 2019.
- [3] A case conference took place on February 12, 2020 before Adjudicator Kaur. An in-person preliminary hearing was set for April 20, 2020 and a substantive in-person hearing set for January 25-February 2, 2021.
- [4] The preliminary issues in dispute are whether the applicant is entitled to any accident benefits beyond August 2, 2019 as a result of a material misrepresentation pursuant to s. 53 of the *Schedule* and is the applicant precluded from proceeding with her application pursuant to s. 55 of the schedule for failing to notify the respondent of the circumstances giving rise to the claim for income replacement benefits.
- [5] The substantive issues include a catastrophic impairment designation, income replacement benefits, attendant care benefits, three medical treatment plans, the cost of an examination, interest, and an award.
- [6] The preliminary issue hearing was vacated pending a determination regarding the production issues that remained outstanding.
- [7] In my Motion Order dated June 1, 2020, the applicant was permitted to file sur-reply motion submissions and the respondent's motion for costs was adjourned to be heard a written Motion Hearing.
- [8] In my subsequent Motion Order dated June 16, 2020, the respondent's production requests were granted, and costs were denied. An in-person preliminary hearing was scheduled for November 30, 2020.

MOTION

- [9] On July 29, 2020, the applicant filed a Notice of Motion requesting the following relief:
 - i. An order for production of the complete accident benefits file, redacted for reserves and privilege including the following;
 - a) A copy of all statements prepared by the respondent under s. 50 of the *Schedule* with respect to the applicant's benefits claim;
 - b) A copy of all correspondence and other information sent to and

- received from third parties in relation to the applicant's accident benefits claim;
- c) A copy of all OCF-21's (Auto Insurance Standard Invoices) submitted with respect to the applicant's accident benefits claim;
 - d) A copy of all other invoices submitted with respect to the applicant's accident benefits claim;
 - e) A copy of all documentation, recordings, electronic documents etc., that the respondent has with the applicant's name, image, and/or accident benefits claim number.
- ii. The complete adjuster's log notes from the date of loss to present, redacted only for reserves and privilege with specificity as to the reason for the redaction so that the applicant has sufficient information to challenge any claim for privilege;
 - iii. A copy of all surveillance evidence (documents, video recordings, audio records, photographs, investigation notes, reports etc.) relating to the applicant, including but not limited to:
 - a) Details of any and all surveillance, whether or not such information will be used at the hearing;
 - b) The qualifications of the investigators;
 - c) A copy of all notes and records of all activities and phone conversations with anyone by the investigators and/or surveillance companies;
 - d) A copy of the instruction letters provided to the investigators and/or the surveillance companies by or on behalf of the respondent;
 - e) A copy of all complete and unedited video surveillance;
 - f) A copy of all complete and unedited photograph surveillance;
 - g) The complete details of all investigations involving the applicant, other than investigation by surveillance.
 - iv. A summons directing Sherlock Investigations Inc. to produce all documents and information gathered pertaining to the applicant, including, but not limited to, all records, notes, emails, and summaries on files provided to Sherlock Investigations Inc. by the respondent or its agents; the names and contact information of all persons involved in the applicant file(s); any instruction letter(s) provided to Sherlock Investigations Inc., by the respondent or its agents; and all intraoffice records, notes, reports,

emails, correspondence, photographs, videos, and information gathered, generated, and/or prepared pertaining to the applicant by August 28, 2020.

- v. The applicant further seeks a summons directing Intrepid Investigations to produce all documents and information gathered pertaining to the applicant, including but not limited to, all records, notes, and summaries on files provided to Intrepid Investigations by the respondent or its agents; the names and contact information of all persons involved in the applicant's file(s); any instruction letter(s) provided to Intrepid Investigations by the respondent or its agents, and all intraoffice records, notes, reports, emails, correspondence, photographs, videos, and information gathered, generated, and/or prepared pertaining to the applicant by August 28, 2020.

- [10] The applicant has privacy concerns regarding how information was obtained by the respondent's investigators. Until this motion, the applicant was unaware the respondent had relied on a whistleblower or informant during its investigation. The applicant does not seek to obtain the informant's identity unless they are a material witness and their evidence should be tested as part of the hearing. The applicant further submits the complete accident benefits file and adjuster's log notes should be provided and explanations for all redactions provided. These explanations should clearly indicate what redactions pertain to evidence obtained from the informant.
- [11] The respondent submits the Tribunal has a moral, ethical, and public duty to protect the identity of the informant pursuant to the wider goal of preventing insurance fraud. The respondent submits it has provided the complete accident benefits file, unredacted log notes that are not protected by litigation privilege, and the surveillance reports that have been redacted to protect the informant. The respondent further submits that if the investigators are summonsed, the whistleblower's identity may be revealed. The respondent submits the informant is not a material witness, as the surveillance itself will reveal the material misrepresentation pursuant to the s. 53 denial.

RESULT

- [12] The applicant's motion for a copy of the complete accident benefits ("AB") file is granted. However, it appears the AB file has already been provided to the applicant. The applicant objected to the organization of the file, submitting it clearly did not come from directly from the insurer, but was instead prepared by respondent counsel. I am not persuaded by the implicit inference that respondent counsel has altered or tailored the information in the file in some manner.
- [13] Further to the specific relief laid out in the Notice of Motion, I am prepared to order the specific production of the following by **October 30, 2020**:

- a) A copy of all statements prepared by the respondent under s. 50 of the *Schedule* with respect to the applicant's benefits claim;
- b) A copy of all correspondence and other information sent to and received from third parties in relation to the applicant's accident benefits claim, subject to redactions for privilege and reserves;
- c) A copy of all OCF-21's (Auto Insurance Standard Invoices) submitted with respect to the applicant's accident benefits claim;
- d) A copy of all other invoices submitted with respect to the applicant's accident benefits claim;
- e) A copy of all documentation, recordings, electronic documents etc., that the respondent has with the applicant's name, image, and/or accident benefits claim number, subject to redactions for privilege, reserves or information that may otherwise reveal the identity of the informant in this matter.

- [14] Relevance must be broadly construed. The AB file should contain the complete record of the adjusting of this claim. I am satisfied the documents outlined above are relevant pursuant to Rules 9.3(e), 9.1 of the *Common Rules of Practice & Procedure* ("*Rules*") and to the Tribunal's wide power to order disclosure pursuant to s. 5.1(1) of the *Statutory Powers Procedure Act*¹ ("*SPPA*").
- [15] The applicant's motion for log notes is granted. The respondent shall provide complete adjuster's log notes to the date of this Notice of Motion, July 29, 2020. Although litigation may have been anticipated at an early stage, in October of 2018, the applicant has a right to know the decision-making processes undertaken on her file throughout this claim, including the post-Application period to the Tribunal. I am not persuaded by the respondent's submissions that log notes after September 26, 2019 are not producible pursuant to litigation privilege.
- [16] I specifically reject the respondent's submissions that redactions of the log notes should be made for relevance to the issues in dispute. The applicant shall be entitled to a copy of these complete log notes, subject to claims of privilege, reserves, or information that may otherwise reveal the identity of the informant in this matter. The respondent shall provide the complete redacted log notes to the applicant by **October 30, 2020**.
- [17] Although the complete surveillance reports and investigator files have already been produced to the applicant, I am prepared to order the following, if they have otherwise not previously been produced:

- a) Details of any and all surveillance conducted which may be relied upon at

¹ R.S.O. 1990, CHAPTER S.22

the hearing;

- b) The curriculum vitae of the investigators;
- c) A copy of all notes and records of all activities and phone conversations with anyone by the investigators and/or surveillance companies;
- e) A copy of all complete and unedited video surveillance;
- f) A copy of all complete and unedited photograph surveillance;

- [18] I find these materials may be relevant pursuant to Rules 9.3(e) and 9.1 of the *Rules*. These materials will assist the applicant in knowing the case it has to meet with regard to the surveillance relied upon by the respondent. The surveillance file shall be redacted to protect the privacy and identity of the informant. The respondent shall provide these surveillance materials to the applicant by **October 30, 2020**.
- [19] I am not prepared to order:
- d) A copy of the instruction letters provided to the investigators and/or the surveillance companies by or on behalf of the respondent;
 - g) The complete details of all investigations involving the applicant, other than investigation by surveillance.
- [20] These materials sought are too broad. I have not been provided specific submissions regarding why these materials are relevant or how they may relate specifically to the issues in dispute.
- [21] The applicant's motion for a summons directing both Sherlock Investigations Inc. and Intrepid Investigations to produce further information regarding the investigation is denied. The applicant has already received the surveillance reports and the investigator files. In addition, I have ordered the surveillance materials provided above. Should there be any specific surveillance materials that are otherwise conspicuously absent from the file or reports, the applicant may file an additional Notice of Motion pursuant to Rule 15 for these materials.
- [22] The Tribunal has a common-law duty to ensure the privacy and the anonymity of the informant that provided information to the respondent in this matter. I am not prepared to make *any* order that may otherwise jeopardize the identity of the informant in this matter. To do so will result in a chilling-effect that may impact other informants from providing assistance in cases of alleged insurance fraud.
- [23] I am not satisfied from the evidence provided that the informant is a material witness and their evidence is required to be tested through cross-examination at the hearing for procedural fairness purposes. The respondent is relying on the information obtained through surveillance to make its case, it is not otherwise

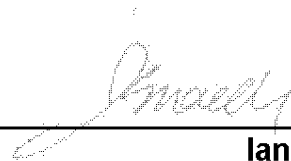
reliant on eyewitness evidence directly flowing from the informant to establish a material misrepresentation.

- [24] However, the applicant should have been made aware the respondent was relying on information from an informant during the course of its investigation. I am somewhat troubled that it was only revealed as a result of this Notice of Motion. This information should have been provided when the surveillance reports were provided to the applicant. The applicant was otherwise unaware how specific information was obtained in relation to the surveillance conducted.
- [25] Both parties made submissions regarding costs pursuant to Rule 19.1 during the Motion Hearing. Any issues of costs shall be held in the cause and shall be addressed by the Hearing Adjudicator at the preliminary hearing.
- [26] The in-person preliminary hearing was previously scheduled for November 30, 2020. The Tribunal is not conducting any in-person matters for the foreseeable future given the public health concerns raised by the Covid-19 pandemic. Given the additional productions ordered above, I want to ensure the parties are provided adequate time to receive and review these productions.
- [27] The November 30, 2020 preliminary hearing shall be vacated, as shall the in-person hearing set for January 25 to February 2, 2021.
- [28] **A case conference** shall be scheduled on **November 16, 2020 at 11:00 am** for case management purposes. The parties shall be prepared to set hearing dates at this time.
- [29] The Tribunal shall provide the parties with a new Notice of Case Conference that includes the teleconference information.
- [30] Except for the provisions contained in this Motion Order all previous orders made by the Tribunal remain in full force and effect.

OTHER PROCEDURAL MATTERS

- [31] 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: September 23, 2020



**Ian Maedel
Adjudicator**