

**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: 17-005570/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:

**Rebar Hussein**

**Applicant**

and

**Wawanesa Mutual Insurance Company**

**Respondent**

**MOTION DECISION**

**ADJUDICATOR:**

**Ian Maedel**

**APPEARANCES:**

For the Applicant:

Zeitoun Vaezzadeh, Counsel

For the Respondent:

Kathleen O'Hara, Counsel

**Motion Heard via Teleconference:**

**June 19, 2018**

**Date of Decision:**

**August 20, 2018**

## OVERVIEW

- [1] The applicant was injured in an automobile accident on August 23, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("Schedule").
- [2] The applicant filed an application before the Licence Appeal Tribunal – Auto Accident Benefits Service ("Tribunal") on August 25, 2017.
- [3] The applicant was the front seat passenger of a vehicle involved in a single-vehicle collision, where it is alleged the vehicle left the roadway and struck a tree. Aside from the applicant, there were two other occupants of the vehicle: B.N., the driver and Z.R., the rear passenger. The collision took place at an approximate speed of 60 km per hour and the vehicle air bags deployed on impact.
- [4] The applicant submitted an Application for Accident Benefits (OCF-1) and later attended an Examination Under Oath ("EUO") on March 29, 2017. In correspondence dated May 4, 2017, the respondent stated that it was refusing to provide benefits, as it had determined the applicant had not been involved in an accident as defined in s. 3 and had wilfully misrepresented material facts per s. 53 of the *Schedule*. The respondent did not provide any further basis or explanation for the denial of benefits.
- [5] A number of case conferences have been held since December 2017. On April 5, 2018, Adjudicator Sharma ordered that the matter proceed to an in-person hearing in April 2018 to address the preliminary issues in dispute. In addition to the issues of whether an accident occurred and material misrepresentation, the respondent is seeking a repayment of benefits paid and costs.
- [6] Adjudicator Sharma ordered the respondent provide the adjustor's log notes, redacted for privilege and reserves, from the date of the accident to the date of filing of the Application. Reasons for each redaction were also ordered.
- [7] On April 5, 2018, the applicant brought a motion seeking to add witnesses to the hearing. The applicant's motion was granted by Adjudicator Makhamra on April 10, 2018 without input from the respondent. On April 11, 2018, the respondent filed a Request for Reconsideration of Adjudicator Makhamra's Order. A reconsideration decision has not been rendered by the Tribunal and the parties are awaiting the outcome before scheduling a new date for hearing.
- [8] On April 6, 2018, the applicant filed a Notice of Motion seeking the following remedy:
  - a) An Order compelling the respondent to produce unredacted log notes from the date of the accident to the date of the hearing;

- b) Alternatively, an Order stating that references to the property damage claim relating to B.N. and or accident benefit files of B.N. and Z. R. be inadmissible at the hearing.

[9] The matter was set for a Motion Hearing via teleconference on June 19, 2018. Both parties provided written motion submissions.

## RESULT

[10]

- i. The applicant's motion for production of unredacted log notes from the date of the accident to the date of the hearing is dismissed.
- ii. The applicant's motion that the property damage and/or accident benefit files of B.N. and Z.R. be inadmissible at the hearing is dismissed.
- iii. The respondent shall provide redacted adjuster's log notes that pertain to the accident investigation and the decision for the denial of benefits, ongoing and up to the date of the hearing.
- iv. The respondent shall provide the redacted adjusters log notes regarding the property damage matters for B.N. and the bodily injury (tort) for B.N and Z. R. ongoing and up to the date of hearing. Signed authorizations from these third parties have already been received.
- v. The respondent shall provide an explanation and summary for each redaction, including those for reserves.
- vi. Any other issues regarding privilege of these log notes shall be left to the hearing adjudicator.
- vii. Any application for costs pursuant to Rule 19.1 shall be left to the hearing adjudicator.
- viii. A case conference shall resume on **September 12, 2018 at 1:00 pm via teleconference**. The parties shall be prepared to discuss outstanding productions, the receipt of the reconsideration decision and be prepared to set a date for the preliminary issue in dispute.
- ix. The Tribunal shall provide the parties with the teleconference information as soon as practicable.

## ANALYSIS

### *Privilege*

- [11] I am not satisfied the applicant has been provided with sufficient particulars for the denial of benefits. The respondent cannot use privilege as a shield to prevent disclosing the basis of the denial. As per *Smith and Cooperators*,<sup>1</sup> the *Schedule* is consumer protection legislation and the log notes should reflect an ongoing adjustment of the applicant's file. Procedural fairness pursuant to Rule 3.1(a) of the *Common Rules of Practice and Procedure* ("Rules") demands the applicant be provided fulsome reasons for the denial of benefits.
- [12] The respondent indicates the log notes have been redacted for several reasons: solicitor-client privilege, post LAT-Application notes and for irrelevant information. This irrelevant information includes information pertaining to the property damage claim and bodily injury (tort) claims of B.N. and Z.R.
- [13] I am unsatisfied with the explanations provided for the redactions. Simply noting "solicitor-client" or "non-relevant, bodily injury" is not a sufficient explanation or summary. The respondent shall provide an explanation and summary of each redaction, providing sufficient detail for each, including redactions for reserves.
- [14] Solicitor-client privilege exists to protect the candid communication and advice between a lawyer and client, in order for the client's interests to be fully represented. The courts have held that this privilege is almost absolute and incursions into it must be in rare circumstances. Waivers of privilege must be explicit and it cannot be abrogated by inference.<sup>2</sup>
- [15] The Ontario Court of Appeal in *Chrusz* held the appropriate test for privilege is the "dominant purpose" test, and the onus is on the party asserting the privilege to establish the evidentiary basis for the privilege.<sup>3</sup> The onus then reverts to a party seeking to overcome the privilege to establish that it ought to be compelled.<sup>4</sup>

### *Waiver*

- [16] I am not persuaded that the respondent has waived solicitor-client privilege at any time during the adjustment or adjudication of this matter. None of the exceptions to privilege apply: unlawful conduct, a risk to public safety, genuine risk of a wrongful conviction, or privilege abrogated by statute.<sup>5</sup> Further, I find the early retainer of counsel does not signify that the respondent is attempting to evade their duty

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<sup>1</sup> [2002] 2 S.C.R. 129.

<sup>2</sup> *Canada v. Blood Tribe Department of Health* [2008] 2 S.C.R. at 584-585.

<sup>3</sup> *General Accident Assurance Co. v. Chrusz et al*, [1999] 45 O.R. (3d) 321 (ONCA) as quoted in *Campeau and Liberty Mutual FSCO A00-000522* at pg. 5.

<sup>4</sup> *Guelph (City) v. Super Blue Box Recycling Corp.* [2004] O.J. No. 4468 (ONSCJ) at pg.16.

<sup>5</sup> *Ibid.*

regarding the production of key documents. I see no indication that the respondent relied on the advice of counsel rather than the fruits of its investigation to deny the benefits in question.

### **Relevance**

- [17] If the log notes relate to the investigation regarding whether this is an accident pursuant to s. 3 of the *Schedule*, they are relevant. There is a clear nexus between the productions sought and the issues in dispute. The Tribunal's main consideration regarding any production is relevance. The *Rules* allow the Tribunal to order production of material that is relevant to the issues in dispute, at any stage of the proceeding.<sup>6</sup>
- [18] The jurisprudence has generally held that log notes are presumptively relevant, as the respondent owes the applicant a duty to continue to adjust their file following an accident. The respondent, as first party insurer, has a duty to act in the utmost good faith towards an insured party. However, once an Application for adjudication is filed, these log notes presumptively become privileged and are generally not produced. This privilege is not absolute; the onus remains on the respondent to establish that the log notes after the date of the Application are not reasonably relevant or protected by privilege.
- [19] The applicant submits it is unaware of the basis of the denial, as the respondent has not clarified several key points:
- a) How the accident occurred any differently than the applicant described;
  - b) Who conducted the investigation and what their qualifications are;
  - c) What documents were relied on for its investigation;
  - d) What material facts the respondent alleges were misrepresented and whether the respondent considered the issue of language barriers;
  - e) When were these material facts relayed to the respondent, if at the EUO, what part of the transcript show material misrepresentation; and
  - f) What the respondent has requested a second EUO and not reinstated benefits, if its investigation is ongoing, and is aware there were interpretation issues at the EUO.<sup>7</sup>
- [20] Relevance in relation to these issues must be broadly construed. The dominant purpose of log notes is to record the ongoing adjustment of the file, thus, the notes are presumptively relevant. Without an accurate record of the adjustment of the

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<sup>6</sup> Rules 9.1 and 9.3(e)

<sup>7</sup> Applicant's Motion Submissions page 7.

file, the applicant cannot determine the decision-making process regarding accident benefits. When log notes are withheld or over-redacted, the applicant is left to search for the relevance in the dark, unsure of what is relevant without further clarification. In this matter, the applicant received no clarification other than bald statutory language in the correspondence and Explanation of Benefits denying the benefit on May 4, 2017. The log notes provided did not provide a summary of the redactions or a basis to illustrate the reasons for the denial of benefits.

- [21] It would present a procedural unfairness if the applicant was forced to proceed to a preliminary issue hearing without prior knowledge of the reasons for the denial of benefits. The benefits were denied in May 2017 and the Application was not filed until August 2017, thus the reasons for the denial would have been apparent in the log notes prior to the Application being filed. Similarly, any log notes relating to the investigation of the accident or the reasons for the denial of the benefits are relevant, even post-Application. The presumption of privilege over log notes post-Application date is not absolute.

### **Scope**

- [22] The applicant is justified in requesting a wider scope of productions beyond the date of filing, August 25, 2017. The respondent has indicated it has provided log notes to September 12, 2017, but has not provided log notes beyond this date. If there are notes regarding the investigation of the accident and the denial of benefits past the Application date, they are relevant to the preliminary issues in dispute and shall be produced, subject to any claim of privilege.
- [23] This decision is based wholly on potential relevance. I am not persuaded that the respondent's request to conduct a second EUO indicates that new relevant evidence was relied upon to maintain the denial of benefits. Nor am I convinced that the employer's mistake in preparing the OCF-2 and referencing an accident at home instead of the index accident is determinative in relation to the preliminary issues raised.
- [24] I am also alive to the wording of s. 5.4(2) of the *Statutory Powers Procedure Act* which states the Tribunal's power to make orders for disclosure does not extend to the production of privileged information. In my view, the respondent can still redact privileged portions of the log notes, both pre-Application and post-Application, but clearly provide details of the accident investigation and the decision-making process leading to the denial of benefits.

### ***The Bodily Injury and Property Damage Log Notes***

- [25] Given the central issue is whether an accident occurred pursuant to s. 3 of the *Schedule*, the bodily injury and property damage log notes are producible beyond the date of the Application. Both sets of files may contain relevant details that may

assist the applicant in determining the reasons for the denial of the benefit. Conclusions may be reached from the nature of the injuries and the property damage caused, or lack thereof, as a result of the accident.

- [26] The respondent shall provide the log notes pertaining to the applicant and the notes pertaining to the bodily injury files and property damage notes of B.N. and Z.R. both pre-Application and post-Application. These log notes shall be redacted for privilege and an explanation and summary provided for each redaction. The privacy of the related parties are not in dispute, as signed Authorizations from both B.N. and Z.R. have been served upon the respondent.
- [27] The applicant's objection to the respondent's reliance on the bodily injury and property damage log notes of B.N. and Z.R. are now moot. Both parties shall be able to rely on the redacted portions of these notes in relation to the issues in dispute.
- [28] It would be procedurally unfair pursuant to Rule 3.1(a) to deny the applicant access to the respondent's decision-making process outlined in the adjusters' log notes. There is a nexus between the particulars sought and the issues in dispute before the Tribunal. The applicant must be provided some explanation why the respondent is disputing that an accident occurred pursuant to s.3 of the *Schedule* and some information regarding the alleged material misrepresentations made. Without this key basis for the denial, the applicant would be forced into a hearing without knowing the case to meet.

## ORDER

- [29] Further to the Motion Hearing on June 19, 2018, I order that:
- i. The applicant's motion for production of unredacted log notes from the date of the accident to the date of the hearing is dismissed.
  - ii. The applicant's motion that the property damage and/or accident benefit files of B.N. and Z.R. be inadmissible at the hearing is dismissed.
  - iii. The respondent shall provide redacted adjuster's log notes that pertain to the accident investigation and the decision for the denial of benefits, ongoing and up to the date of the hearing.
  - iv. The respondent shall provide the redacted adjusters log notes regarding the property damage matters for B.N. and the bodily injury (tort) for B.N and Z. R. ongoing and up to the date of hearing. Signed authorizations from these third parties have already been received.
  - v. The respondent shall provide an explanation and summary for each redaction, including those for reserves.

- vi. Any other issues regarding privilege of these log notes shall be left to the hearing adjudicator.
- vii. Any application for costs pursuant to Rule 19.1 shall be left to the hearing adjudicator.
- viii. **A case conference shall resume on September 12, 2018 at 1:00 pm via teleconference.** The parties shall be prepared to discuss outstanding productions, the receipt of the reconsideration decision and be prepared to set a date for the preliminary issue in dispute.
- ix. The Tribunal shall provide the parties with the teleconference information as soon as practicable.

[30] All remaining terms of the previous Orders remain in full force and effect.

**Released: August 20, 2018**



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**Ian Maedel, Adjudicator**