



Licence Appeal Tribunal File Number: 21-001035/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:

Amritpal Kaur

Applicant

and

Northbridge General Insurance Company

Respondent

MOTION ORDER

Order made by: Craig Mazerolle, Adjudicator

Date of Order: June 17, 2022

BACKGROUND

- [1] The applicant was injured in an automobile accident on **January 28, 2018**, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*.
- [2] Due to an adjournment order (dated April 19, 2022), a hearing is now set for October 3–7 and 11–13, 2022.
- [3] The issues in dispute include, in part, catastrophic impairment determination, as well as requests for an attendant care benefit, medical benefits, and an award.

NOTICE OF MOTION

- [4] The applicant filed a Notice of Motion (submitted **April 27, 2022**) seeking the following relief:
 - a. An order for productions.
- [5] The respondent opposed the relief. In its motion materials, it also sought costs. However, it withdrew this request at the motion hearing held on May 11, 2022.
- [6] The applicant added a costs request during the motion hearing, as well as a request for a summons to be issued against the respondent's assessment company, SOMA Medical Assessments ("SOMA").

PARTIES' POSITIONS

- [7] The applicant argued that there are significant differences in the parties' expert opinions, such that further disclosure is needed to ensure a procedurally fair proceeding. For instance, psychological test data created as part of the respondent's assessment process is needed to understand the difference between the parties' reports (especially since the applicant has provided her own data to the respondent). The applicant then highlighted references to surveillance in the respondent's document brief (from the original hearing dates) as proof that further disclosure of surveillance is needed. The applicant's representative also alleged that surveillance videos produced with this brief do not appear to be unedited. For her request of draft expert reports, the applicant claimed the titles of SOMA's PDFs strongly suggest that there are multiple versions of the reports, e.g., the words "REVISED" and "final". Finally, the applicant supported her costs request by noting that the respondent has not been forthcoming with productions, and it has ignored an order for productions from the Tribunal.

- [8] The respondent opposed the requested productions for several reasons. First, the respondent submitted that there is no psychological test data to provide. Similarly, there is no evidence that draft reports exist, and, even if they do, the applicant can cross-examine its experts. The respondent also cited the Court of Appeal for Ontario's decision in *Moore v. Getahun* ("*Moore*")¹ as further support for its position on draft reports. Then, for the SOMA file, the respondent claimed this request should have been raised earlier, but it has asked for the complete file from SOMA nonetheless. Finally, for the log notes and surveillance evidence, the respondent asserted that it has satisfied these requests.
- [9] In reply, the applicant noted that she takes issue with some of the redactions in the log notes produced to date, i.e., redactions based on priority and surveillance.

ANALYSIS

- [10] Rule 3.1 of the *Common Rules of Practice and Procedure* (the "LAT Rules") requires the Tribunal to conduct its proceedings in a fair, proportional, and efficient manner that allows disputes to be decided on the merits of the case.
- [11] Rule 9.3(e) of the LAT Rules states that the Tribunal may make an order to: "Disclose any document or thing the Tribunal considers relevant to the issues in dispute." Relevance is the key consideration when ordering productions.
- [12] In light of these provisions, I will make the following production orders.

Psychological Test Data

- [13] I am satisfied that the respondent has made best efforts to try and obtain psychological test data from its psychiatric assessor. I am also satisfied that there is nothing for the respondent to produce, so no further effort is needed.
- [14] The applicant submitted that the respondent's evidence of no test data is based solely on an e-mail from SOMA that copied—but did not attach—correspondence from the assessor himself. I do not place much weight on this submission. I am satisfied that this e-mail from SOMA provides a sufficient basis to conclude that no test data exists. The correspondence sent by the respondent to the assessment company also demonstrates that it followed up about a reference in the assessor's report to several scales—further evidence that it made best efforts to meet this request.

¹ 2015 ONCA 55.

[15] I am also satisfied that any concerns the applicant may have about a lack of psychological test data can be addressed through cross-examination of the expert.

SOMA File and Draft Reports

[16] I am satisfied that the respondent has committed to requesting the complete file from SOMA, and that the different parts of this file identified in the applicant's Notice of Motion are relevant to the disputed issues (though I will speak more about the requested draft reports later on in this order).

[17] The applicant may take issue with what she believes are missing parts of the file (e.g., request letters), she will have a chance to review the disclosure received in response to this request. If she is still unsatisfied by this exchange, there are further steps she can take (e.g., cross-examine the adjuster about the process used to set up the assessments).

[18] Though the respondent has agreed to provide the file from SOMA, the parties were at odds over whether draft reports exist and, if so, did they have to be produced. The respondent's submissions focused on the explanation it received from SOMA, i.e., words like "REVISED" and "final" in the titles of the PDFs do not mean drafts exist. Rather, the respondent had an issue opening the original versions of the reports, so it asked for new versions to be sent.

[19] Though this explanation has an air of reality, I find that fairness requires the applicant to be able to test the veracity of this claim. I find the respondent must produce copies of the correspondence it sent to and received from SOMA about the issue it had opening the PDF reports. This information is relevant to the dispute, as it will allow the applicant to determine whether additional efforts are needed to try and obtain draft reports before the hearing.

[20] In a similar vein, I do not find the respondent's reliance on *Moore* is persuasive. The Court of Appeal's reasoning involved the use of expert reports during a civil suit, while the present proceeding involves s. 44 examinations conducted as part of an accident benefits claim. Section 44 examinations are obtained for the purpose of adjusting an insured person's claim—not to forward the goals of litigation. With this purpose in mind, it is appropriate for insured persons to have a fulsome understanding of the process the insurer's assessors used to reach conclusions about their entitlement to benefits. Draft reports are, therefore, relevant documents for assisting insured persons to better comprehend these important assessments.

[21] Related to this request, I will not grant the applicant's request for a summons to be issued against SOMA. Rather, if the applicant want to pursue this form of relief, she can file a separate Notice of Motion requesting a summons.

Adjuster's Log Notes

[22] I find that the adjuster's log notes are all relevant and, therefore, producible. An award request is at issue, so the respondent's adjusting process is in question. The adjudicator will be asked to compare and contrast the respondent's handling of the applicant's entire claim. A comprehensive disclosure of the adjusting process will allow the adjudicator to better understand whether payments were unreasonably withheld or delayed—the key determination for an award request.

[23] To reduce the prejudice the respondent may face by the release of these notes, I will allow for redactions based on priority, reserves, and privilege (with particulars for each individual redaction). Though the applicant took issue with redactions based on priority, I am satisfied that these notes will have little, if any, relevant information to add to the dispute over accident benefits. I also accept the respondent's position that these notes are likely subject to solicitor-client privilege. As such, I further find requiring the respondent to parse apart this category of notes could jeopardize this important privilege.

[24] However, I agree with the applicant that redactions based on surveillance are inappropriate. Surveillance is a common form of evidence at the Tribunal, and—as is apparent from the motion hearing—it is likely to be serious point of contention at the hearing. Procedural fairness requires the applicant to understand how this key form of evidence was used to adjust her claim. Therefore, unless the respondent is able to demonstrate that one of the now redacted notes for surveillance can be withheld under a different, allowable ground, these log notes must be provided without redactions.

[25] Finally, the respondent argued that the applicant should only be entitled to the log notes up to the previous document disclosure deadline set during the case conference. According to the respondent, it would be unfair for the applicant to access additional records on account of an adjournment.

[26] I will not limit the adjuster's log notes to the previous document disclosure deadline of February 18, 2022. Rather, I will order the production of these log notes up to the date of the motion hearing, i.e., May 11, 2022. In addition to the relatively minor difference between these two dates, I find the applicant is entitled to a fulsome understanding of the adjusting process. Once again, the award request will require a review of the complete handling of the claim. Further, I see

no undue prejudice that would face the respondent from a slightly broader release of these highly relevant records.

Surveillance

- [27] The final contested production involved surveillance. While the respondent contended it has provided all of the relevant records that could be captured under this request, the applicant claimed that there are still missing records. Briefly, while the respondent relies on its release of information from a company called Intrepid, the applicant asserted that there are two other surveillance companies whose records are missing, i.e., DGI and Scope. The applicant also questioned whether all of Intrepid's records have, in fact, been produced. After reviewing the evidence presented by the parties (including the two affidavits from the applicant), I find that further disclosure of surveillance is merited at this time.
- [28] Surveillance, regardless of whether the respondent intends to rely on it or not, is a highly relevant form of evidence for adjudicating the issues in dispute, especially catastrophic impairment. This category of evidence can provide adjudicators with helpful glimpses into an insured person's functional capacities and activities of daily living.
- [29] On the other hand, surveillance evidence is often highly contested (e.g., the applicant's claim of edited videos), so it is important for parties to have access to all the unedited videos and notes that form the basis of surveillance reports. This need is especially pressing in this case, as surveillance appears likely to be a significant point of disagreement at the hearing. As such, fulsome disclosure of this highly relevant category of evidence is necessary to ensure a procedurally fair proceeding.
- [30] Following on these observations, I am then satisfied that the applicant does not have access to all of the respondent's surveillance evidence.
- [31] First, in reviewing the log notes appended to the applicant's motion submissions, I am satisfied that there are references to the surveillance companies aside from Intrepid, i.e., Scope and DGI. It is clear from the log notes that Scope was involved in surveillance, and, while the reference to DGI in the log notes is not as clear, I accept the parties' submissions that it is also a surveillance company.
- [32] Then, in regard to Intrepid, I can conclude that there appears to be missing records from the respondent's exchange to date. For instance, in a March 16, 2022 e-mail from Intrepid, a representative informed the respondent that "the complete file" had been sent to the respondent "via two separate emails". The

applicant cited this e-mail during the motion hearing as evidence of missing records, because the two e-mails mentioned by Intrepid have never been produced.

- [33] When asked about these missing e-mails, the respondent claimed they could not be provided for security reasons. In response, the applicant asked for the contents of the e-mails, and the respondent claimed that everything has been provided from the e-mails. Much like the draft reports, it is possible that the respondent is correct in its assertion that all of the documents listed in the two e-mails have been provided. However, without a fulsome evidentiary basis to test this assertion, the applicant is being unfairly left to question whether she has access to all of this relevant surveillance.
- [34] On the other hand, I do accept that there could be very limited circumstances where security concerns outweigh the relevance of a document, such that it should not be ordered producible. Put another way, despite relevance being the key consideration for productions, the Tribunal must also be alive to whether prejudice arising from a record's release will unduly imperil a party's interests.
- [35] Taken together, I am satisfied that further release of surveillance evidence is needed from Intrepid, Scope, and DGI, but I will allow the respondent to withhold aspects of these files if there are security concerns directly related to their release. However, there must be a basis for the applicant to understand and question whether this withholding is proper. Therefore, if any part of these surveillance files are withheld for security reasons, the respondent must identify the withheld parts of the file to the applicant (with individualized explanations for why each part is being withheld on the basis of security reasons). This information will be provided to the applicant in writing.

Costs Request


- [36] I will not grant costs to the applicant.
- [37] Rule 19.1 of the LAT Rules allows the Tribunal to order costs where a party has exhibited behaviour that is unreasonable, frivolous, vexatious, or bad faith. Though I recognize the applicant's concerns about its conduct in relation to productions, I do not find any of the respondent's behaviour reaches the high threshold needed to order costs. Production disputes are common sources of conflict, and I am satisfied that the respondent has made sufficient efforts to try and meet some, if not most, of the requests raised by the applicant. I am also satisfied that any prejudice to the applicant caused by the respondent's actions (e.g., redacting log notes based on surveillance) has been addressed by this

order. Taken together, there is no need for to order costs.

ORDER

- [38] The respondent shall provide the applicant with the following records (or evidence of best efforts to obtain these records) **by July 5, 2022**:
- i. Adjuster's log notes, from the date of loss up and until May 11, 2022 (subject to particularized redactions based on priority, privilege and/or reserves only);
 - ii. Complete SOMA file, including, but not limited to, all notes, e-mails, summaries on files provided to SOMA by the respondent or its agents, as well as the names and contact information of all persons who reviewed, summarized and communicated with assessors hired to complete the applicant's assessments, along with the instruction letter to the assessors;
 - iii. Correspondence to and from the respondent and SOMA regarding the respondent's difficulty opening the original PDF versions of the expert reports (as well as the correspondence between the respondent and SOMA related to SOMA providing the new PDF versions of the reports); and,
 - iv. Surveillance files (including, but not limited to, complete investigator notes and unredacted surveillance footage) from Intrepid, DGI, and Scope.
- [39] If any part of the Intrepid, DGI, and Scope surveillance files cannot be provided to the applicant for security reasons, the respondent shall identify the withheld parts of these files, and it shall provide individual explanations for why each part is being withheld on the basis of security reasons. This written statement will be provided to the applicant **by July 5, 2022**.
- [40] Except for the provisions contained in this order, all previous orders made by the Tribunal remain in full force and effect.

Released: June 17, 2022



Craig Mazerolle
Adjudicator