



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: 18-007658/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:

A [REDACTED] Ja [REDACTED]

Applicant

and

Security National Insurance Company

Respondent

CASE CONFERENCE REPORT

ADJUDICATOR:

Bradley Wallace

APPEARANCES:

For the Applicant:

[REDACTED] Applicant
Imtiaz Hosein, Counsel

For the Respondent:

Melissa Melala, Claims Representative
Cody Muscovitz, Counsel

Held by Teleconference:

February 20, 2020

OVERVIEW

- [1] The applicant was involved in an automobile accident on May 27, 2016, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").
- [2] The parties participated in a case conference but were unable to resolve the issues in dispute. This matter will proceed to a hearing.

ISSUES IN DISPUTE

- [3] The issues in dispute were identified and agreed to as follows:
 - i. Is the applicant entitled to interest on any overdue payment of benefits?
 - ii. Is the applicant entitled to an award under *Ontario Regulation 664* because the respondent unreasonably withheld or delayed the payment of benefits?

CASE MANAGEMENT

- [4] This application was directed to a case conference by Motion Order of Adjudicator Maedel on February 7, 2020. In short, the Tribunal's file had been ordered closed when all issues had not yet been resolved. The issues with respect to disputed benefits had been resolved by that point but the applicant still intended to pursue a claim for interest owing on any overdue payment of benefits and an award under Regulation 664. The Report of the previous Case Conference Adjudicator was therefore quashed, the Tribunal's file was re-opened and the case was directed to a fresh case conference before this Member.
- [5] The respondent advised at the commencement of the case conference that there had been a stoppage of Non-Earner Benefits since this matter first came before the Tribunal but the applicant was content to address any issues in that regard through separate proceedings.
- [6] The parties consented to all procedural matters including the production of the complete Accident Benefits file, except for the following:
 - a. Whether a claim for an award can proceed on a stand-alone basis where no substantive benefit claims are in dispute;
 - b. Whether there should be a written or in-person hearing in this matter;

- c. Whether the Adjuster's Log Notes should be produced to June 21, 2019 subject to redaction for privilege, information about reserves and relevance;
- d. Whether internal memos sent or received by the handling adjuster regarding the issues in the case subject to redaction for privilege ought to be produced to the applicant;
- e. Whether the respondent ought to produce all OCF-21s on file with respect to the NEB claims herein;
- f. Whether the invoices issued by the respondent's section 44 assessors should be produced to the applicant;
- g. Whether written communications between the respondent or its counsel and its section 44 assessors ought to be produced to the applicant subject to redaction for privilege;
- h. Whether all records evidencing that the respondent arranged for section 44 assessments up to June 21, 2019 should be produced to the applicant;
- i. Whether adjuster training materials, if any, should be produced to the applicant;
- j. Whether the invoices issued to the applicant by section 25 assessors ought to be produced to the respondent;
- k. Whether written communications between applicant's counsel and the applicant's section 25 assessors ought to be produced to the respondent;

[7] Having heard the submissions of the parties, my orders and reasons are as follows:

[8] No substantive arguments were advanced on why an award claim and a claim for interest on any overdue payment of benefits could not proceed to a hearing without there being any claims for benefits presently in dispute. The respondent submitted that the claim for an award and interest could not proceed on their own, where the applicant argued that such an interpretation would effectively permit respondents to remedy whatever circumstances gave rise to the award claim at the eleventh hour (as he submits happened here) and completely avoid the statutory consequences of such unreasonable conduct. The respondent denied having engaged in any unreasonable conduct. Nothing in the Schedule prevents a claim for an award and interest allegedly owed from being adjudicated in the absence of any substantive claims being in dispute and Tribunal decisions endorse that perspective. The application may proceed to hearing on the issues

of an award and interest allegedly owed independently of any claims for benefits being in dispute.

- [9] On the form of hearing, I found that fairness in this case called for an in-person hearing. The question before me at this point is not whether the applicant's claim for an award has merit on the evidence, but what are the nature of the allegations giving rise to the claim. Among other things, the applicant alleges – albeit in somewhat broad strokes – that the respondent has acted not only unreasonably, but also in bad faith. That being so, I cannot see how this issue can be adjudicated fairly and fulsomely in writing. I am also advised that, based on the facts presently known, the handling adjuster would be the only witness (although the applicant stressed a review of the respondent's productions could conceivably reveal the relevance of evidence from others). Therefore, based on submissions at the Case Conference, the hearing in this matter will be scheduled for half a day.
- [10] The applicant sought production of the complete Accident Benefits file to which the respondent did not object.
- [11] Regarding the Adjuster's Log Notes, the respondent agrees to produce them to the date of the application but subject to redaction for privilege, reserves and relevance. The respondent did not consent to production of the Notes after the date of the application on grounds of relevance and privilege. Applicant's counsel submits that it is not for the respondent to determine what is relevant in a case where the respondent is alleged to have engaged in conduct meriting an award under Regulation 664. The respondent submits that a number of logs will not be relevant to the issues in the case and reserves the right to redact such entries. When asked what prejudice might result from producing records that the respondent considered irrelevant to the proceeding, counsel submitted that the prejudice lay in having to produce irrelevant evidence. I do not agree. As much as with admissibility, the relevance of any piece of evidence falls to be decided by the hearing Adjudicator, not by either of the parties. The respondent shall, therefore, produce the Adjusters' Log Notes to June 21, 2019 subject to redaction for privilege and reserves. There is no general prohibition against the production of such records beyond the date of an application in the Schedule or anywhere in the Rules of Practice. Such orders have also been made by this Tribunal in the past on grounds that any interests the respondent may have in confidentiality of certain information contained in the Logs is protected by privilege and the right to redact for information about reserves. On those grounds, I allow the applicant's request for production of the Log Notes to June 21, 2019, subject to redaction for privilege and information about reserves, with a written explanation for each such redaction.
- [12] The applicant sought production of any internal memoranda sent or received by the handling adjuster with respect to the issues in the case. The respondent

refused that production but only as part of a general refusal in lieu of an undertaking to produce the AB file. In the absence of a specific submission as to why such records should not be produced, provided that they are not already part of the AB file, I find the request appropriate. So, to the extent that such memoranda are not already part of the Accident Benefits file to be produced hereunder, they shall be produced to the date of the application subject to redaction for privilege and reserves.

- [13] The applicant's request for production of OCF-21s with respect to the Non-Earner Benefit claim is also reasonable. The applicant sought their production as part of the allegation that the insurer spent more than the \$2,000.00 maximum on assessments in this case, based on which the Tribunal should draw an adverse inference against the respondent. The respondent refused the request on grounds that the OCF-21s were irrelevant to the issues in the case. I disagree. Again, I do not wish to be taken in any way as finding for the applicant on this or any other substantive issue, but there is a legitimate issue to be argued here, whichever party's perspective on it ultimately prevails. The issue to which these documents may be relevant is the award claim. The OCF-21s in this case shall therefore be produced to the applicant.
- [14] For the same reasons as production of the OCF-21s was ordered, I order the respondent to produce any invoices submitted by the respondent's section 44 assessors.
- [15] Likewise, I find the applicant entitled to production of any written communications between the respondent or its counsel and its section 44 assessors ought to be produced to the applicant subject to redaction for privilege. This is information generated with respect to the applicant's claims which, subject to privilege and information about reserves, is part of the respondent's ongoing duties of transparency to the applicant.
- [16] The applicant sought production of records evidencing that the respondent had actually arranged for section 44 assessments, as one of the contentions is that the applicant failed to attend such assessments. The respondent refused such production in favour of a proposal to produce the complete AB file with the Adjusters' Log Notes subject to redactions for privilege, reserves and relevance. As I explained at the Case Conference, however, the question at this stage is not whether such evidence establishes any part of the applicant's claim for an award but whether it might be accepted as evidence of that assertion. In my view, the bar of relevance for the purposes of production orders is a low one and, based on the submissions made at the Case Conference, I find this an appropriate production request. The question is not whether the allegation informing the request will likely prevail but whether there is an argument to be made. In this case, I find that there is. I allow the applicant's request for production of these

records to June 21, 2019, subject to redaction for privilege and information about reserves, with a written explanation for each such redaction.

- [17] The adjuster advised at the Case Conference that there were, in fact, no training manuals or other resources of the kind for the training of adjusters. The question of whether such documents should be produced to the application was, therefore, moot.
- [18] Regarding the production requests made by the respondent, specifically for:
- a. The invoices issued to the applicant by section 25 assessors ought to be produced to the respondent; and
 - b. Any written communications between applicant's counsel and the applicant's section 25 assessors ought to be produced to the respondent;

I find as follows:

- [19] The respondent made no specific argument in support of the request for production of the invoices except that, if the respondent is required to produce the invoices issued to it by section 44 assessors then the applicant should have to do likewise with respect to its section 25 assessments. The applicant refused that request on grounds that such records would be irrelevant. The invoices submitted to the applicant by section 25 assessors has no relevance to the issues in dispute here as the Schedule sets no cap on such assessments. Therefore, the amounts spent on the applicant's behalf in that regard are not relevant.
- [20] On the other hand, I find the applicant must produce its written communications with its section 25 assessors subject to redaction for privilege, as such records will confirm the instructions given on the parameters of the assessment(s) being requested.
- [21] The above productions are ordered below.

HEARING

- [22] **On consent, a hearing, in-person is scheduled to commence on October 8, 2020 at 9:30 AM, at Toronto.**

EXCHANGE OF DOCUMENTS BETWEEN THE PARTIES (PRODUCTIONS)

- [23] It is ordered that:
- (i) the applicant shall provide the respondent with the following by **May 31, 2020**;

- (a) any written communications with its section 25 assessors subject to redaction for privilege
- (ii) the respondent shall provide the applicant with the following by **May 31, 2020**.
 - i. the Adjuster's Log Notes to June 21, 2019 subject to redaction for privilege and information about reserves, with a written explanation for each such redaction;
 - ii. any internal memos sent or received by the handling adjuster regarding the issues in the case subject to redaction for privilege and information about reserves, with a written explanation of the reason for each such redaction;
 - iii. all OCF-21s on file with respect to the NEB claims herein;
 - iv. Any the invoices issued by the respondent's section 44 assessors;
 - v. Any written communications between the respondent or its counsel and its section 44 assessors subject to redaction for privilege, with a written explanation of the reason for each such redaction; and
 - vi. all records evidencing that the respondent arranged for section 44 assessments up to June 21, 2019 subject to redaction for privilege and information about reserves, with a written explanation for the reason for each such redaction.

[24] The applicant shall provide the respondent with particulars of its claim for an award under Regulation 664 on or before **July 31, 2020**.

DOCUMENTS FOR THE HEARING

[25] The parties must exchange and file with the Tribunal indexed copies of evidence that they plan to use at the hearing: **by September 4, 2020**.

The evidence shall be limited to documents previously exchanged between the parties on or before **July 31, 2020**.

- (i) No additional or new evidence may be submitted for use at the hearing beyond the date in this paragraph.
- (ii) The documents shall be limited to those relevant to the issues in dispute and that the parties will refer to in the hearing.
- (iii) Documents must be indexed, bookmarked/tabbed and page numbered.

- (iv) The parties are encouraged, but not required, to produce a joint document brief and/or an agreed statement of facts.
- (v) The documents filed by the parties with their application, response or for the case conference will not be part of the evidence at the hearing. Documents that the parties wish to rely on must be resubmitted to be used for the hearing.
- (vi) For an oral hearing, the parties shall bring a hard copy of the documents to the hearing for the aid of the hearing adjudicator.
- (vii) The hearing adjudicator will have the discretion to vary the above.

HEARING DETAILS

- [26] The **in-person hearing** shall be limited to the testimony of the witnesses listed below. The time allotted for each witness is subject to the discretion of the hearing adjudicator.
- (i) For the applicant:
 - (a) The handling adjuster (90 minutes in cross-examination, 30 minutes in redirect, if any)
 - (ii) No witnesses will be called for the respondent:
 - (iii) Opening submissions: Each party shall be provided 15 minutes.
 - (iv) Closing submissions: Each party shall be provided a half hour.
- [27] The respondent has permission to bring a court reporter to the hearing.

OTHER PROCEDURAL MATTERS

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

Released: April 16, 2020



Brad J. Wallace
Adjudicator

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Between:

A [REDACTED] J [REDACTED]

Applicant

and

Security National Insurance Company

Respondent

ORDER

Order made by: Brad J. Wallace, Adjudicator

Date of Order: February 24, 2020

Further to the case conference heard on February 20, 2020, I order that:

HEARING

- [1] **On consent, a hearing, in-person is scheduled to commence on October 8, 2020 at 9:30 AM, at Toronto.**

ISSUES IN DISPUTE

- [2] The issues in dispute were identified and agreed to as follows:
- i. Is the applicant entitled to interest on any overdue payment of benefits?
 - ii. Is the applicant entitled to an award under *Ontario Regulation 664* because the respondent unreasonably withheld or delayed the payment of benefits?

EXCHANGE OF DOCUMENTS BETWEEN THE PARTIES (PRODUCTIONS)

- [3] It is ordered that:
- (i) the applicant shall provide the respondent with the following by **May 31, 2020**;
 - (a) any written communications with its section 25 assessors subject to redaction for privilege
 - (ii) the respondent shall provide the applicant with the following by **May 31, 2020**.
 - i. the Adjuster's Log Notes to June 21, 2019 subject to redaction for privilege and information about reserves, with a written explanation for each such redaction;
 - ii. any internal memos sent or received by the handling adjuster regarding the issues in the case subject to redaction for privilege and information about reserves, with a written explanation of the reason for each such redaction;
 - iii. all OCF-21s on file with respect to the NEB claims herein;
 - iv. Any the invoices issued by the respondent's section 44 assessors;
 - v. Any written communications between the respondent or its counsel and its section 44 assessors subject to redaction for privilege, with a written explanation of the reason for each such redaction; and

- vi. all records evidencing that the respondent arranged for section 44 assessments up to June 21, 2019 subject to redaction for privilege and information about reserves, with a written explanation for the reason for each such redaction.

- [4] The applicant shall provide the respondent with particulars of its claim for an award under Regulation 664 on or before **July 31, 2020**.

DOCUMENTS FOR THE HEARING

- [5] The parties must exchange and file with the Tribunal indexed copies of evidence that they plan to use at the hearing: **by September 4, 2020**.

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- (vi) For an oral hearing, the parties shall bring a hard copy of the documents to the hearing for the aid of the hearing adjudicator.
- (vii) The hearing adjudicator will have the discretion to vary the above.

HEARING DETAILS

- [6] The **in-person hearing** shall be limited to the testimony of the witnesses listed below. The time allotted for each witness is subject to the discretion of the hearing adjudicator.

- (i) For the applicant:
 - (a) The handling adjuster (90 minutes in cross-examination, 30 minutes in redirect, if any)

- (ii) No witnesses will be called for the respondent:
- (iii) Opening submissions: Each party shall be provided 15 minutes.
- (iv) Closing submissions: Each party shall be provided a half hour.

[7] The respondent has permission to bring a court reporter to the hearing.

OTHER PROCEDURAL MATTERS

[8] If the parties resolve the issue(s) in dispute, the applicant shall immediately advise the Tribunal in writing.

Released: April 16, 2020



Brad J. Wallace
Adjudicator