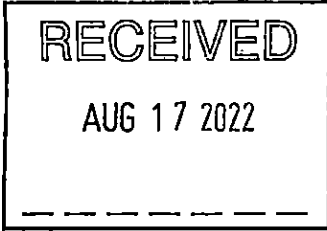


Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis



Licence Appeal Tribunal File Number: 21-010608/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c l.8., in relation to statutory accident benefits.

Between:

Erwin Giles

Applicant

and

Intact Insurance

Respondent

MOTION ORDER

Order made by: Craig Mazerolle, Adjudicator

Date of Order: August 17, 2022

BACKGROUND

- [1] The applicant was injured in an automobile accident on **June 12, 2016**, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*.
- [2] A hearing is set for September 16 and 19 – 23, 2022.
- [3] The issues in dispute include catastrophic impairment determination, as well as requests for an attendant care benefit, medical benefits, and an award.

REQUESTED RELIEF AND MOTION HEARING SUBMISSIONS

- [4] On August 11, 2022, the respondent sent correspondence to the Tribunal asking for an order allowing it to rely on a surveillance report (dated July 28, 2022) and related video at the upcoming hearing. This request was first spoken to at the August 12, 2022 motion hearing, which had been set up to address the respondent's Notice of Motion (submitted July 27, 2022).
- [5] The applicant was not prepared to argue the respondent's request, due to the timing of its correspondence and his inability to play the surveillance video. A brief adjournment was granted, and the applicant was allowed by the Tribunal to provide written submissions
- [6] The respondent's request to admit the surveillance report and video was heard on August 16, 2022. Both parties provided motion materials in advance of the motion hearing.
- [7] The applicant opposed the inclusion of the respondent's materials, because only the applicant was granted the right to file motion materials for this motion hearing. The respondent submitted there was no basis to strike its submissions, and it would be of assistance to the Tribunal to have written arguments.
- [8] Despite the lack of formal allowance for these submissions, I admitted the respondent's written submissions and materials into the record. The applicant had an opportunity to address these submissions (as evidenced by his written request to have them struck), and I accepted the respondent's position that the motion would be run in a more efficient manner with its submissions provided in a written form.

PARTIES' POSITIONS

- [9] The respondent contended that it is commonplace for new evidence to be admitted at all stages of a proceeding. For instance, Rule 18.2(d) of the *Common Rules of Practice and Procedure* ("LAT Rules") allows adjudicators to consider new evidence on reconsideration. Considering the high relevance of this surveillance (e.g., the applicant is seen participating in a form of employment that was previously undisclosed) and the time remaining before the hearing, there is

no reason to strike this evidence. Further, procedural fairness requires the respondent to be able to present its case in a fulsome manner, and it would be a serious breach of natural justice to interpret the LAT Rules in a manner that excludes relevant evidence.

- [10] The applicant opposed the inclusion of the surveillance evidence as untimely. The deadline for exchange of all evidence (aside from addendums) was May 31, 2022. Despite several changes to other document exchange deadlines (e.g., addendums are now due on August 26, 2022), the May 31, 2022 deadline has never been altered. The respondent did not serve this surveillance evidence until August 10 and 11, 2022, so it missed the May 31, 2022 deadline. In fact, it did not commission this surveillance until July 22, 2022. Procedural fairness is a two-way street, and it would be prejudicial to the applicant to have to alter his hearing preparation so close to the hearing. The applicant also submitted that it is too late to obtain addendums for the surveillance, especially during the summer.
- [11] In reply, the respondent challenged the relevance of when it commissioned the surveillance. According to the respondent, the only consideration is when it obtained this new evidence. The surveillance report was not complete until late July 2022, so that was when it was due. The respondent also challenged the notion that the May 31, 2022 deadline applies to this evidence, though, regardless, the disclosure due dates have been amended several times. Finally, the respondent added that this evidence will assist the hearing adjudicator to reach a fulsome determination of the case on its merits.

ANALYSIS

- [12] Rule 3.1 of the LAT Rules requires the Tribunal to conduct its proceedings in a manner that balances fairness and efficiency, all the while ensuring cases are decided on their merits.
- [13] Rule 9:3 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."
- [14] Relevance is the key consideration for production orders. Yet, there must always be an assurance that any order from the Tribunal will promote a fair and efficient process. A central component of procedural fairness is knowing the case you have to meet. Last-minute changes to the parameters of a hearing (be it the evidence, issues, etc.) are all potentially detrimental to this assurance of procedural fairness. For these reasons, I will not allow the respondent to rely on its surveillance evidence at the hearing.
- [15] To start, I find the respondent's surveillance evidence was due to be exchanged by May 31, 2022. According to the case conference report and order (released December 16, 2021): "The parties agreed they shall exchange the documents including any expert reports by May 31, 2022." The only other disclosure

deadline was for addendums and response letters—originally set for July 26, 2022, now set for August 26, 2022.

- [16] The May 31, 2022 document exchange deadline has never been amended since the case conference. Motion orders have amended the addendums deadline, and they have set dates for the exchange of particular records. However, the May 31, 2022 deadline has remained unchanged. As such, I find the exchange of the respondent's surveillance evidence missed this deadline.
- [17] I accept the respondent's position that evidence may be allowed into a hearing, despite missed deadlines. This case has involved several such allowances. I also find there is relevant information in this surveillance, namely, there is new information about the applicant's employment history. Yet, even in light of these findings, I still conclude the request to add this surveillance report and video would be unduly prejudicial to the applicant's right to a procedurally fair hearing.
- [18] First, I disagree that the date the respondent first commissioned this surveillance evidence is irrelevant. The respondent was put on notice at the case conference that all documents (aside from addendums) were to be exchanged by May 31, 2022. This timeline meant the respondent had about five months to seek out this new form of evidence. However, it did not take the first steps to obtain this new form of evidence until several weeks after the exchange deadline.
- [19] This is a significant breach of the hearing timetable, because it placed the applicant in a position where his ability to test this evidence with an addendum report has been seriously curtailed. As noted by the applicant, the original gap between the May 31, 2022 deadline and the addendum deadline set at the case conference was almost two months. At present, the parties only have about two weeks before the current addendum deadline on August 26, 2022.
- [20] I also note that the respondent's reliance on Rule 18.2(d) is not helpful in this context. This provision allows for new evidence to be entered during the reconsideration process, but only if this new evidence "could not have been obtained previously by the party now seeking to introduce it". In the present case, I have not been provided with any explanation for why the surveillance could not have been requested and obtained prior to May 31, 2022.
- [21] Second, the respondent's present request differs greatly from the production orders that were recently issued.
- [22] In the first productions order following the case conference (dated July 14, 2022), the respondent was ordered to produce the adjuster's log notes and a copy of the applicant's insurance policy. Both of these documents are internal records within the possession of the respondent. As such, it was not the case of a new category of evidence (previously unknown to one of the parties) being entered into the dispute by the party who commissioned it. Rather, the applicant was being given the opportunity to review records that the respondent had control over. Also, at

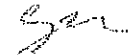
the time this order was issued in mid-July 2022, there was still sufficient time before the hearing to allow for a later addendum deadline.

- [23] Then, for the second productions order (dated August 12, 2022), I note that the applicant consented to providing almost all of the records sought by the respondent. There was only a dispute over the request for a copy of his collateral insurance policy. As noted in this productions order, the applicant disputed whether this policy applied to the present dispute, but the Tribunal found "fairness requires the respondent to have the opportunity to test this position with documentary evidence."
- [24] I find ordering the production of this single document (within the applicant's possession) was significantly different from the current request to admit new evidence. The respondent sought this policy for a limited purpose, i.e., confirming whether the coverage applied to this dispute. There was, therefore, no need for the addendums that the applicant now wants in response to the surveillance—reports that are unlikely to be completed before this hearing.
- [25] Finally, though the respondent contended that its surveillance is needed to test the veracity of the applicant's claims about his employment history, I find a fulsome assessment of this history can be accomplished through cross-examination. In this way, a merits-based adjudication of the case will be preserved.
- [26] Taken together, I find allowing the inclusion of the respondent's surveillance evidence at this late stage would seriously imperil the applicant's right to procedural fairness. Therefore, despite the relevant information contained in this evidence, I will not allow it to form a part of the hearing record.

ORDER

- [27] The respondent's request to add the surveillance report (dated July 28, 2022) and related video to the hearing record is denied.

Released: August 17, 2022



**Craig Mazerolle
Adjudicator**

Dear Parties:

RE: Tribunal File No.: 21-010608/AABS Erwin Giles vs. Intact Insurance

Please see the attached Motion Order related to your Automobile Accident Benefits Service dispute.

If you have questions regarding the scheduling of a future event, contact AABSScheduling@ontario.ca.

For any other concerns, please contact *Vishal Lall, Case Management Officer, Case Management Officer*, or the Tribunal via phone 416-326-1356 or via email LATregistrar@ontario.ca.

Sincerely,

Jana Indran

Case Management Officer

Licence Appeal Tribunal

Tribunals Ontario

General Inquiries: 416-326-1356 | Toll Free: 1-888-444-0240

Email: LATregistrar@Ontario.ca

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