

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Tribunal File Number: 18-000467/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:

Marcia MacDonald

Applicant

and

Aviva Insurance Canada

Respondent

MOTION DECISION AND ORDER

Order made by: Maureen Helt, Vice Chair

Date of Order: October 3, 2018

NATURE OF THE MOTION

- [1] The applicant filed an application with the Licence Appeal Tribunal – Auto Accident Benefits Service (“Tribunal”) on August January 16, 2018.
- [2] On or about August 15, 2018, the Applicant filed a Notice of Motion with the Tribunal seeking an order, in part, that the respondent produce adjuster log notes for the period May 6, 2015 to December 13, 2016 subject to those log notes directly related to the issues in dispute before the Financial Services Commission of Ontario (FSCO) .
- [3] The respondent produced those log notes and claimed litigation privilege as they directly relate to the cost of an attendant care assessment and interest and a special award which were in issue before FSCO.
- [4] On September 11, 2018, the Applicant filed submissions, modifying the original request set out in its August 15, 2018 Notice of Motion and sought as follows:
 - (a) An Order requiring the respondent to produce the adjuster log notes for the period of May 6, 2015 to December 12, 2016 subject to solicitor-client privilege.
 - (b) In the alternative, the applicant requests an order that a separate hearing be arranged with respect to determining whether there is a prima facie case of actionable misconduct.

RESULT

- [5] I find the following:
 - i. The adjuster log notes relating to the specific issues in dispute before FSCO, namely attendant care and a special award claim during the period May 6, 2015 through to December 12, 2016, do not need to be produced as they are subject to litigation privilege.
 - ii. Any adjuster log notes created during the period May 6, 2015 to December 12, 2016 that are not covered by litigation privilege must be produced.
 - iii. The Tribunal has no jurisdiction to make a determination of actionable misconduct.

BACKGROUND

- [6] The applicant was injured in an automobile accident on January 15, 2015 and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 ("Schedule").
- [7] On or about May 6, 2015 the applicant submitted an Application for Mediation to FSCO with respect to a treatment and assessment plan for an attendant care assessment. On or about December 12, 2016 the parties settled the matters in dispute.
- [8] As noted by both the applicant and respondent, no other matters were formally disputed until the current application (the Application) was filed with the Tribunal on or about January 16, 2018.
- [9] The Application is for the cost of two examinations; one for an orthopedic assessment submitted to the respondent in July 2017 and the other, the cost of examination for a psychological assessment recommended by Dr. Waxer, submitted to the respondent on September 7, 2017. The respondent denied both claims.
- [10] A case conference took place on May 3, 2018 at which time the applicant requested the adjuster log notes for the period of May 6, 2015 to December 12, 2016. The respondent refused production on the basis of litigation privilege.
- [11] By way of letter dated June 6, 2018 counsel for the applicant wrote to the respondent and asked for production of several documents including "the adjusting notes of Aviva from January 15, 2015 to January 23, 2018, subject to litigation privilege (i.e. redaction of notes pertaining to FSCO arbitration)¹"; The January 23, 2018 date is the date the applicant filed her Application with the Tribunal.
- [12] On July 26, 2018, the adjuster log notes were provided to counsel for the applicant, for the period from January 15, 2015 to January 23, 2018, subject to redactions made on the basis of litigation privilege. The redactions encompassed the whole of the period of the FSCO dispute from the filing of the Application for Mediation to its settlement in December 2016.
- [13] The respondent sent further correspondence dated August 3, 2018 to applicant's counsel setting out very brief reasons for each redaction and confirmation as to the time periods of each page of the redacted entries. Of note is that all of the

¹ Tab 9 Appellant's Book of Documents

redactions were during the arbitration at FSCO but for one entry in July 2017 which the respondent explained was covered by solicitor-client privilege.

- [14] The respondent also argued that the records within the redacted periods are not relevant to the current issues before the Tribunal as the treatment plans in dispute were submitted to the respondent well after the FSCO matter settled.
- [15] Counsel for the applicant argued that redacted documents are relevant as they reveal how the respondent adjusted the file and will give an indication if the clinical notes and records were properly reviewed. The applicant states this directly relates to why the treatment plans in dispute in the Application were denied.

ANALYSIS

- [16] The Tribunal must consider each of the following issues
- (a) Are the adjuster log notes relevant to the issues in dispute in the current application?
 - (b) Are the adjuster log notes for the period May 6, 2015 to December 12, 2016 covered by litigation privilege?
 - (c) If the answer to the above is yes, does litigation privilege continue to exist after the matter settled at FSCO?
 - (d) Can the Tribunal order a separate hearing to be arranged with respect to determining if there is a prima facie case of actionable misconduct is dismissed?

(A) Relevance

- [17] The Tribunal has consistently held that log notes are presumptively relevant as an insurer owes an insured a duty to continue to adjust their file following an accident. However, once an application is filed, these log notes presumptively become privileged and are generally not produced.
- [18] In support of its argument that the log notes are not relevant, the respondent refers to a FSCO appeal decision in *Al-Obaidi v. Allstate Insurance Co. of Canada* (FSCO Appeal P99-00009) in which relevance is framed by reference to the issues being arbitrated. There must be a reasonable relationship between the records sought and the dispute being arbitrated.

[19] The respondent submits as a result of the almost two year period of inactivity on this file, the relevance of the redacted notes to the issue of entitlement to the benefits claimed or to the applicant's understanding of the basis for the denial or termination of benefits in dispute before the Tribunal is highly questionable. The respondent argues that without a reasonable basis for the production of the log notes between the period of May 6, 2015 and December 12, 2016, the motion seeking production amounts to a "fishing expedition".

[20] While I agree with the well-established principle that adjuster log notes are presumptively relevant, there must be a reasonable relationship between the records sought and the issues in dispute. The Application relates to the cost of examination of two assessments while the matter before FSCO related to attendant care.

[21] In this case the respondent has redacted a specific number of documents during the period of May 6, 2015 and December 12, 2016, for which he claims litigation privilege. While the respondent has provided a list of the documents to the applicant he has failed to provide a sufficient explanations for the redactions to adequately inform the applicant of the nature of the redactions (ie relevance, litigation privilege and the reason for such privilege). As such I order that for any notes that are redacted, the respondent shall provide an explanation and summary for each redaction.

(B) Are the Adjusters Log Notes covered by Litigation Privilege?

[22] For the reasons set out below I am satisfied that any of the adjuster log notes made the period May 5, 2015 and December 12, 2016 that are redacted on the basis that they relate to the cost of an attendant care assessment and special award are subject to litigation privilege.

[23] Litigation privilege gives rise to a presumption of inadmissibility for documents and communications whose dominant purpose is preparation for litigation. The purpose is to ensure an effective adversarial process.

[24] Both parties made submissions on the appropriate test to be applied for litigation privilege. There was general agreement that the test consists of two parts:

- (1) The document must have been created for the dominant purpose of litigation; and
- (2) The litigation or related litigation is either pending or may reasonably be apprehended.

[25] The above two criteria are articulated in the Supreme Court of Canada decision of *Lizotte v. Aviva Insurance Company of Canada* 2016 SCC 52 .

[26] Both parties also refer to the Supreme Court of Canada's decision in *Blank v. Canada* 2006 2 SCR 319. The appellant referred to the following passage:

While the solicitor client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hall mark of the judicial process.

[27] The respondent referred to the following passage in *Blank*:

At minimum... this enlarged definition of "litigation" include separate proceedings that involve the same or related parties and arise from the same or related cause of action or "judicial source"). Proceedings that raise issues common to the initial action and share its essential purpose would...qualify as well.

[28] The appellant refers to the FSCO decision in *Ghaedsharagy v. Kingsway General Insurance* which deals specifically with adjuster log notes:

It seems clear that any litigation privilege attaching to a document or record must be established in connection with a specific dispute. In a multiple dispute file, the dominant purpose for creating the document or record must be anticipated litigation of one or more specific disputes. Log notes that are otherwise producible on an issue are not afforded the protection of litigation privilege simply because prior entries on unrelated issues were created for the dominant purpose of litigation (emphasis added).

[29] The appellant argues that the only issues that were previously the subject of litigation were an attendant care assessment and interest and a special award. During this time the respondent was continuously adjusting the applicant's accident benefits claims. The applicant argues that it follows not all adjuster log not entries were created for the dominant purpose of litigation.

[30] Litigation privilege is intended to allow a party to freely investigate the facts at issue and determine how to prepare for litigation.

[31] I agree with the principle that a blanket statement cannot be made to claim that adjusters log notes as a whole are or are not protected by litigation privilege. Each document in the file will have to be subject to the dominant purpose test and it is not enough for the respondent to claim litigation privilege as a blanket statement.

[32] That is not what the respondent did in this case. Rather, by way of letter dated August 3, 2018 counsel for the respondent objected to the applicant's claim that the respondent used "heavy handed redactions".

[33] It is my opinion that litigation privilege does apply any adjuster log notes prepared during the period May 6, 2015 to December 12, 2016 that relate to the issues in dispute before FSCO.

(C) Does litigation privilege continue to exist after the matter settled at FSCO?

[34] For those documents that were created for the dominant purpose of litigation the question that still needs to be determined is whether or not the litigation privilege continues to exist after the settlement in December 2016.

[35] The applicant submits that litigation privilege ends once the litigation is completed. As explained by the Supreme Court of Canada in Blank "[o]nce the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose -- and therefore its justification."

[36] However, the Court has also said that litigation privilege can continue "where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended" and that "litigation" includes, at minimum, separate proceedings that include the same or related causes of action or proceedings that raise issues common to the initial action and share its essential purpose.

[37] The Respondent submits that the above notion of continuing litigation privilege is particularly relevant in the context of accident benefits claims, where an applicant has an ongoing right to dispute an insurer's claim for benefits before the Tribunal.

[38] As such, the respondent submits, litigation may be reasonably apprehended as long as the claim is open, given the potential for the denial of future benefits.

[39] In addition, the respondent points out that regardless of the issue(s) in dispute any future claims will always involve the same accident and the same parties.

- [40] As noted in the submissions the purpose of litigation privilege is to “create a zone of privacy” in relation to pending or apprehended litigation. When that litigation ends but further litigation involving the same parties and the same cause of action (the accident) continues, a continuation of that zone of privacy over the documents that were covered by litigation privilege previously remains.
- [41] I agree with the respondent that the litigation privilege that existed for those adjuster log notes created for the dominant purpose of addressing the issues which were in dispute before FSCO during the period May 6, 2015 and December 12, 2016 continues to apply to those notes today and does not cease to exist because the FSCO proceeding settled.
- [42] The reason for this is that the matter before the Tribunal in this application relates to the same motor vehicle accident and the same parties. In essence, to ensure an effective adversarial process, it is necessary to maintain that privilege even after one aspect of the dispute settled.

(D) Actionable Misconduct

- [43] The applicant submits that even if there is privilege, the respondent has unreasonably withheld or delayed payments of benefits and has committed “actionable misconduct”. The applicant asks the Tribunal to order the disclosure of the documents despite the privilege.
- [44] The respondent, and in my view, quite correctly, states that the Tribunal does not have the any statutory authority to award this type of order (with the exception of the special award), and has no jurisdiction to order a separate hearing to determine whether there is a prima facie case of actionable misconduct.
- [45] I agree with the respondent. When a party acts in bad faith by unreasonably denying or withholding payment of benefits the Tribunal can grant the remedy of an award pursuant to Ontario Regulation 664. If a party acts in a frivolous or vexatious manner then a claim for costs can be made under the Tribunal rules of practice and procedure. A claim for an award and/or for costs is best dealt with by the hearing adjudicator, if the applicant chooses to make any of these claims.

ORDER

[46] Further to the Motion Hearing on September 20, 2018, I order that:

- i. The applicant's motion for production of adjuster log notes from the May 6, 2015 to December 12, 2017 subject to solicitor-client privilege is dismissed. I find that the litigation privilege applies to the redacted adjuster log notes provided that relate to the specific issues in dispute before FSCO, namely attendant care and a special award claim.
- ii. The respondent shall produce any adjuster log notes from May 16, 2015 to December 12, 2016 that are not subject to litigation privilege but are relevant to the current issues in dispute.
- iii. For any notes that are redacted, the respondent shall provide an explanation and summary for each redaction.
- iv. The applicant's motion for a separate hearing to be arranged with respect to determining if there is a prima facie case of actionable misconduct is dismissed.
- v. Any other issues regarding privilege of these log notes shall be left to the hearing adjudicator.
- vi. All remaining terms of the previous Orders remain in full force and effect.

Date of Issue: November 27, 2018



**Maureen Helt
Vice Chair**