

Tribunals Ontario  
**Licence Appeal Tribunal**

Tribunaux décisionnels Ontario  
**Tribunal d'appel en matière de permis**



**Tribunal File Number: 19-011457/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:

**Gloria Galit**

**Applicant**

and

**Technology Insurance Company Inc.**

**Respondent**

**MOTION ORDER**

**Order made by: Ian Maedel, Vice Chair**

**Date of Order: February 1, 2021**

**Motion Hearing conducted via teleconference February 1, 2021**

## OVERVIEW

- [1] The applicant was injured in an automobile accident on February 11, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*").
- [2] The applicant was denied certain benefits and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") on September 30, 2019.
- [3] A case conference took place on February 12, 2020 before Adjudicator Kaur. An in-person preliminary hearing was set for April 20, 2020 and a substantive in-person hearing set for January 25-February 2, 2021.
- [4] The preliminary issues in dispute are whether the applicant is entitled to any accident benefits beyond August 2, 2019 as a result of a material misrepresentation pursuant to s. 53 of the *Schedule* and is the applicant precluded from proceeding with her application pursuant to s. 55 of the *Schedule* for failing to notify the respondent of the circumstances giving rise to the claim for income replacement benefits.
- [5] The substantive issues include a catastrophic impairment designation, income replacement benefits, attendant care benefits, three medical treatment plans, the cost of an examination, interest, and an award.
- [6] The preliminary issue hearing was vacated pending a determination regarding the production issues that remained outstanding.
- [7] In my Motion Order dated June 16, 2020, the respondent's production requests were granted, and costs were denied. An in-person preliminary hearing was scheduled for November 30, 2020.
- [8] In my subsequent Motion Order dated September 22, 2020, the applicant's production requests were granted, and I addressed issues regarding a key witness. Costs were held in the cause and a case conference was scheduled for November 16, 2020 for case management purposes.
- [9] At the case conference on November 16, 2020, Adjudicator Driesel set this matter for a written Motion Hearing on January 11, 2021 regarding the applicant's alleged non-compliance with my Motion Order dated June 16, 2020.

## MOTION

- [10] On December 7, 2020, the respondent filed a Notice of Motion requesting the following relief:

- i. An order for:
  - a. The applicant to disclose and produce all outstanding documentation ordered to be disclosed by Adjudicator Maedel on June 16, 2020 by January 2, 2021;
  - b. An order the applicant disclose to the respondent all documents listed as outstanding in the attached chart within thirty days of the order;
  - c. An order for a summons to issue for Joan or Joanne Bennett to disclose the applicant's complete employment file and an order for the witness to attend for cross-examination within twenty days of the date of the summons;
  - d. An order for a summons to issue for Jessica Sinclair-McCallum or another representative or other representative of the Manufacturer's Life Insurance Company ("Manulife") to disclose or produce the applicant's complete insurance plan and benefits received from one-year pre-accident to date and ongoing;
  - e. In the alternative, an order that an adverse inference be drawn with respect to all presently outstanding productions owed by the applicant;
  - f. In the further alternative, an order the within application be dismissed for the applicant's failure to comply with Adjudicator Maedel's Order of June 16, 2020;
  - g. An order for costs for unreasonable and/or bad faith conduct of the applicant in failing to comply with the Order of Adjudicator Maedel of June 16, 2020.

## **PARTIES' POSITIONS**

- [11] Pursuant to the chart outlined in my Order of June 16, 2020, the respondent is seeking various productions it submits remain unsatisfied or only partially satisfied. The respondent maintains these productions remain relevant and spoliation of evidence with the passage of time remains a concern. The respondent submits the previous Order is not contingent upon any pre-payment for the production of records. The respondent seeks a dismissal of the application pursuant to Rule 3.4 given the applicant's alleged bad faith conduct in failing to comply with the previous Order, and costs.
- [12] The applicant submits it has satisfied the majority of the respondent's production requests. Some records like he names of previous attendant care or housekeeping providers remain unknown and records cannot be located. The applicant submits that pre-payment for records remains a real issue, as the

respondent has not provided payment for pre-payment requests from providers and the applicant is unwilling to provide payment out-of-pocket. The applicant is also seeking costs, as she submits the respondent's motion was unnecessary given the majority of the productions have been satisfied.

## RESULT

- [13] There is already an existing order for the majority of these productions. I have attached the production chart below to address all thirty-two requests.
- [14] The test for ordering productions is relevance pursuant to Rule 9.3(e) of the *Common Rules of Practice & Procedure*. The Tribunal may order that any document or thing be disclosed that is relevant to the issues in dispute. Similarly, Rule 9.1 empowers the Tribunal to order any party to provide such disclosure as the Tribunal considers necessary for a full and satisfactory understanding of the issues in the proceeding. Relevance is also echoed in s.15(1)(b) of the *Statutory Powers Procedure Act*,<sup>1</sup> which indicates the Tribunal may admit any document or thing relevant to the subject matter of the proceeding.
- [15]

Number	Production	Satisfied or Unsatisfied	Order for Production
1.	Complete copy of the Ontario Disability Support file from one-year pre-accident to date and ongoing.	Outstanding.	Yes. Summons to issue. See Order below.
2.	The complete employment file from Joan Bennett.	Outstanding.	Yes. Summons to issue. See Order below.
3.	The clinical notes and records of Dr. Portugal from the time he completed the ODSP Application to date and ongoing.	Partially satisfied.	Yes. Applicant shall produce the records from May 17, 2016 to February 14, 2017 or demonstrate best efforts to provide these documents.

<sup>1</sup> R.S.O. 1990 CHAPTER S.22.

4.	The completed Application for Accident Benefits (OCF-1)	Satisfied.	No. See Order below.
5.	The clinical notes and records of Dr. Katrina Hui from one-year pre-accident to date and ongoing.	Outstanding.	Yes. Confirmation directly from Dr. Hui required to indicate there are no further clinical notes and records for this period.
6.	The applicant's complete prescription records from Kesel Pharmacy, Howard Pharmacy, and Shoppers Pharmacy at Queensway, from one-year pre-accident to date and ongoing.	Partially satisfied. Updated records required.	Yes. Records from Howard Pharmacy required for December 3, 2018 to August 21, 2019.  Updated records required for all three pharmacies.
7.	Copy of the Manulife file from one-year pre-accident to date and ongoing.	Outstanding.	Yes. Summons to issue. See Order below.
8.	Written confirmation that the applicant received no WSIB benefits from one-year pre-accident to date.	Satisfied.	No.
9.	The applicant's decoded OHIP Summary from February 11, 2015 to date and ongoing.	Partially satisfied. Updated records required.	Yes. Applicant to provide updated summary from July 17, 2020.
10.	The complete Scarborough Physiotherapy and Rehabilitation Centre file from one-year pre-	Satisfied.	No.

	accident to date and ongoing.		
11.	The clinical notes and records of Dr. John Arthur Gorfinkle from one-year pre-accident to date.	Satisfied.	No
12.	The clinical notes and records of Dr. Kodsir from one-year pre-accident to date and ongoing.	Outstanding.	Yes. Applicant shall make best efforts to obtain these records. Specifically, the records from March 2019 as listed on the OHIP summary.
13.	The clinical notes and records of Phy Action Physiotherapy Clinic including but not limited to sign-in sheets and accounting documentation.	Satisfied.	No.
14.	The clinical notes and records of Toronto Western Hospital from one-year pre-accident to date and ongoing.	Partially satisfied. Updated records required.	Yes. Applicant to provide updated records covering any gaps between the previous records provided, as outlined in the OHIP summary.
15.	A copy of the complete Motor Vehicle Accident Report.	Satisfied.	No.
16.	A copy of the investigating officer's notes.	Satisfied.	No.

17.	A declaration of post-accident income to date and ongoing.	Outstanding.	Yes. Applicant to provide a sworn statement or declaration of post-accident income.
18.	Complete employment files and self-employment sources relating to the applicant (including any and all attendance/time sheets, performance reviews, and paystubs, including the complete employment file from Joan Bennett from February 11, 2015 to date and ongoing.	Outstanding.	Yes. Productions to be provided via summons as per Order below.
19.	The details of any work performed by the applicant in Detroit, Michigan since February 11, 2015 to date and ongoing, including pay stubs, deposit records, and correspondence relating to said work.	Outstanding.	Yes. The Order made previously stands. The applicant shall provide any details of work in Detroit during this period. If no details available, a sworn declaration or statement is required.
20.	Name and contact information of any facility/person providing an attendant care and/or housekeeping and home maintenance services to/for the applicant.	Partially satisfied.	Yes. The applicant shall provide this information or proof of best efforts to for this request.
21.	Proof of any economic loss sustained by any person providing attendant care and housekeeping and home maintenance services,	Outstanding.	Yes. The applicant shall provide this information or proof of best efforts to demonstrate there are no records outstanding.

	to/for the applicant.		
22.	All ambulance call reports pertaining to the subject motor vehicle accident.	Satisfied.	No.
23.	A complete copy of the clinical notes and records of Princess Margaret Hospital from February 11, 2015 to date and ongoing.	Partially satisfied. Updated records required.	Yes. Applicant to provide updated records or best efforts to demonstrate there are no records outstanding.
24.	A complete copy of the clinical notes and records of Mount Sinai Hospital, including but not limited to the notes of Dr. Katrina Hui, Physician, Department of Psychiatry from February 11, 2015 to date and ongoing.	Satisfied.	No. I am satisfied the records from Mount Sinai have been provided. However, confirmation directly from Dr. Hui is required, see my Order above.
25.	A copy of clinical notes and records of any specialists, not listed above, consulted as a result of the impairment sustained as a result of the motor vehicle accident.	Satisfied.	No.
26.	The clinical notes and records of all hospitals from February 11, 2015 to date and ongoing.	Partially satisfied. Updated records required.	Yes. The applicant shall provide these records or proof of best efforts to obtain these records, including any gaps in the records already provided.
27.	The clinical notes and records from any Walk-In	Satisfied.	No.



	Clinic(s) attended from February 11, 2015 to date and ongoing.		
28.	The complete file contents from Omega Medical Associates relating to the applicant.	Partially satisfied.	Yes. Applicant to provide the records of Dr. Harold Becker including any invoices or documentation relied upon to draft his report(s). I am not prepared to order the production of draft reports, as I am not persuaded they are relevant to the issues in dispute, given the provision of the completed report(s). If documents are otherwise unavailable, proof of best efforts to be provided.
29.	All reports prepared by treatment providers.	Satisfied.	No.
30.	Curricula vitae for all section 25 assessors whose assessment is relevant to the issues in dispute.	Satisfied.	No.
31.	Copy of the Accident Benefits file from any other motor vehicle accident that occurred from one-year pre-accident or any subsequent motor vehicle accidents, including pleadings and/or settlement documents	Satisfied.	No.

	relating to same.		
32.	To provide Gemma's address.	Outstanding.	Yes. The applicant to provide proof of best efforts to obtain this information.

- [16] Unless otherwise noted, the productions listed in the chart above, or proof of best efforts shall be provided to the respondent by **March 26, 2021**. Any production issues that remain outstanding after this date shall be addressed by the preliminary hearing adjudicator.
- [17] I am not otherwise persuaded by the applicant's submissions regarding the respondent's pre-payment for records. My previous Order does not specify that the productions shall be produced subject to pre-payment by the respondent. The respondent has pledged to repay the applicant for production costs. I have not been provided any evidence the quantum of costs for these productions is oppressive or unwarranted. The applicant shall make best efforts to obtain the records, despite the potential out-of-pocket expense that may be incurred.
- [18] The summons request for the applicant's ODSP file, one-year pre-accident to date and ongoing is granted pursuant to Rule 8. These records may be relevant to the issues in dispute. The applicant does not object to the issuance of a summons for these records. These records shall be provided to the respondent by **March 26, 2021**.
- [19] The summons request for Joan Bennett is granted. This witness may provide information regarding the applicant's previous employment. She shall produce the applicant's complete employment file by **March 26, 2021**. I find this information is relevant to the income replacement benefit in dispute. The applicant does not take a position with regard to this request.
- [20] The summons request for Jessica Sinclair-McCallum or another representative of Manulife is granted. Manulife shall disclose the applicant's complete insurance file from February 11, 2015 to date and ongoing is granted. I am satisfied this file will contain information relevant to a number of the issues in dispute, including income replacement benefits, catastrophic impairment, quantum and entitlement of attendant care benefits and medical/rehabilitation treatment plans. The applicant does not take any issue with this request. This file shall be produced to the respondent by **March 26, 2021**.
- [21] A summons may only be issued to a named individual. The respondent shall complete the Summons to a Witness Form and direct the summons to a named party. Once the request is received by the Tribunal, a summons shall be issued directing these parties to produce the documents at issue.

- [22] The Tribunal does not have the power to compel third party documentary production outside of a summons, pursuant to Rule 8 of the *Common Rules of Practice & Procedure*.<sup>2</sup> As per Rule 8.2, the respondent is entitled to summons a witness once they have provided the Tribunal with a brief description of the anticipated evidence. This is a low bar and witnesses are generally added or productions ordered if they can satisfy this low threshold. The respondent has satisfied Rule 8.2 in establishing how the documents may be relevant in relation to the issues in dispute.
- [23] The Tribunal's Rules are silent with regard to third party disclosure requests. The Tribunal's only authority is found s. 12(1)(b) of the *Statutory Powers Procedure Act*, R.S.O. 1990. CHAPTER S.22., ("*SPPA*") which states:
- A tribunal may require any person, including a party, by summons, (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal, relevant to the subject-matter of the proceeding...<sup>3</sup>
- [24] The Ontario Court of Appeal addressed summons for production in advance of a hearing in *Ontario (Human Rights Commission) v. Dofasco Inc.*<sup>4</sup> Although the Court indicated the point was not argued and they expressed no final opinion the matter provides useful guidance.
- [25] In paragraph 51 of the decision the Court wrote to produce documents at hearing would inevitably lead to adjournments if they are produced for the first time at the hearing. The court made reference to section 2 of the *SPPA*, which provides that the *Act* and rules made under it "shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits."
- [26] Sections 25.1 and 25.0.1 of the *SPPA* enumerate the ability of the Tribunal to make rules governing the practice and procedure before it and to make orders with respect to these procedures and practices that apply in any particular proceeding. This power clearly extends to a determination of admissible evidence and productions in anticipation of hearings scheduled.
- [27] The productions sought are relevant to a determination of the substantive issues in dispute pursuant to Rule 9.3(e). The parties would be prejudiced if forced to proceed to a hearing without the benefit of these documents.
- [28] The timing of the production of these relevant documents is also a procedural fairness consideration. Rules 3.1(a) and 3.1(b) state the Tribunal Rules will be liberally interpreted and applied, waived, varied or applied... to facilitate a fair, open, and accessible process and to allow effective participation by all parties...

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<sup>2</sup> *Common Rules of Practice & Procedure*.

<sup>3</sup> R.S.O. 1990, c. S. 22.

<sup>4</sup> 2001 CanLII 2554 (ON CA).

and these rules will be interpreted to ensure efficient, proportional, and timely resolution of the merits of the proceedings before the Tribunal.

- [29] I am satisfied that I have the power not only to grant a summons for a named individual to provide the documents required, but to produce these documents in advance of the hearing, by **March 26, 2021**. Obtaining these documents in advance of the hearing is a procedural fairness issue. If these documents were produced by the summonsed party on the date of the hearing, this would inevitably lead to an adjournment request and further compromise the efficient, timely and proportional resolution of this matter on the merits.
- [30] In relation to the respondent's motion for a new Application for Accident Benefits (OCF-1), I am not persuaded the applicant shall draft a new OCF-1 solely for the purposes of providing it to the respondent at this stage. The respondent can explore any potential inaccuracies on the previous document during cross-examination of the anticipated witnesses.
- [31] The respondent's motion that an adverse interest be drawn regarding the outstanding productions is denied. Only the hearing adjudicator can make such an inference and only after considering the fully evidentiary record. For me to provide any commentary in this regard may fetter the discretion of the hearing adjudicator.
- [32] The respondent's motion to dismiss this Application pursuant to Rule 3.4 is denied. This is a remedy of last resort, when the bad faith conduct of the parties is so egregious that it offends the administration of justice. This is an extremely high bar, and it has not been met in this case.
- [33] Both parties have sought costs in relation to this motion. As in my previous Motion Order of September 22, 2020, costs shall be held in the cause. Given the extended procedural history of successive motions, the preliminary hearing adjudicator shall determine if costs are warranted to either of the parties.
- [34] However, I would further encourage the parties to act collaboratively to address the productions that remain outstanding. The filing of a Notice of Motion should only be required in circumstances where the parties disagree on the nature of the request or require an order for compliance. Successive production motions compromise hearing efficiency and inevitably lead to delay. I note this matter was originally scheduled for a preliminary hearing in April 2020 and the matter has yet to be heard.
- [35] This Motion Hearing is adjourned to **February 17, 2021 at 3:00 pm via teleconference**. The parties shall be prepared to set a date for the preliminary hearing following the production deadline outlined above. The parties shall coordinate their respective calendars to provide several potential preliminary hearing dates on consent. I remain seized of this matter.

[36] Except for the provisions contained in this Motion Order all previous orders made by the Tribunal remain in full force and effect.

**OTHER PROCEDURAL MATTERS**

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

**Date of Issue: February 3, 2021**



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**Ian Maedel  
Vice Chair**