



Tribunal File Number: 19-004635/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:

Addisalem Amare

Applicant

and

Economical Insurance Company

Respondent

MOTION ORDER

Order made by: Ian Maedel, Vice Chair

Date of Order: April 14, 2021

OVERVIEW

- [1] The applicant was injured in an automobile accident on **April 9, 2018** 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").
- [3] A case conference took place on **October 23, 2019** before Adjudicator Braun. On consent, a written preliminary issue hearing was set for May 4, 2020.
- [4] The preliminary issues in dispute was whether the incident was an "accident" as defined in s. 3 of the Schedule and whether the applicant is barred from the proceeding as he failed to comply with a request for information pursuant to s. 33 of the Schedule.
- [5] This matter has a lengthy procedural history. Eventually, Adjudicator Norris heard expert evidence via videoconference on October 15, 2020. Written submission deadlines were imposed for November and December 2020.

MOTION

- [6] On **December 7, 2020**, the respondent filed a Notice of Motion requesting that the Tribunal;
 - i. Strike the applicant's entire reply submissions.

PARTIES' POSITIONS

- [7] The respondent submits the applicant's reply submissions reference photographs and a statement of Ms. Carvalho that are not part of the evidentiary record before the Tribunal. The respondent submits this evidence was proffered by the applicant only after the applicant was challenged on the lack of evidence in his submissions. This is a clear breach of procedural fairness as the applicant is seeking to split his case and the respondent has not had the opportunity to reply.
- [8] The applicant submits these photographs are the same as previously produced in the preliminary issue hearing brief, except for the date stamps on each photograph. The applicant admits Ms. Carvalho's evidence was not previously tendered, but the firsthand evidence may assist the Tribunal in a determination of the preliminary issue. The applicant is also seeking to admit the applicant's phone records relating to the immediate period before and after the incident.
- [9] This matter was scheduled for a motion hearing on January 26, 2021. Applicant counsel was delayed in attending, and upon his attendance indicated he had just filed supplementary written motion submissions in reply, after the 11:00 am start time of the motion hearing. The applicant alleged the issue of a staged accident

was only brought to his attention in the respondent's materials, and that additional evidence was required to rebut this argument. The motion hearing was adjourned for respondent counsel to review these materials.

- [10] The applicant retained new counsel in February 2021, the motion hearing was again adjourned to permit applicant counsel to receive the file from previous counsel.
- [11] In supplementary motion submissions, the respondent reiterated how the applicant's attempt to adduce new evidence is contrary to the fundamental principles of procedural fairness. The only potential remedy to allowing the evidence of Ms. Carvalho, would be an opportunity for the respondent to cross-examine this additional witness. The respondent sought costs in the amount of \$1,000.00 in relation to the applicant's conduct at the previous motion hearing where supplementary submissions were tendered after the commencement of the motion hearing.
- [12] The applicant further submits that the applicant's credibility has now been placed at issue, as the respondent is now claiming the "accident" was staged. Given this key change in circumstances, procedural fairness demands the applicant is given the ability to respond, as a staged "accident" was never previously at issue. If the applicant was aware this was the issue, he would never have consented to a written hearing. The applicant submits this matter should be reopened so that a videoconference hearing can be conducted, and witness evidence can be tested through cross-examination.

RESULT

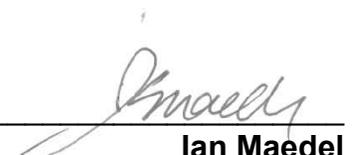
- [13] The respondent's motion is granted in part.
- [14] I am not prepared to strike the totality of the applicant's reply submissions. However, I am prepared to strike any reference to Ms. Carvalho's statement. Both the applicant's previous counsel and current counsel admit it was not previously part of the applicant's evidence. His current counsel admits the statement was not taken until December 2020. This is after the respondent's hearing submissions were already tendered to the Tribunal.
- [15] I am satisfied the evidence of Ms. Carvalho was in existence at the time the applicant's initial written submissions were made. This evidence could have been tendered, but the applicant made a tactical decision not to rely upon this evidence. To now admit evidence related to this statement would essentially be trial by ambush, and contrary to procedural fairness, as the respondent's case is complete, and it does not have the ability to provide evidence in reply.
- [16] It appears the photographs at issue were previously provided to the respondent, minus the date stamps. These photographs shall remain part of the evidentiary record.

- [17] I am similarly not prepared to admit any additional evidence regarding the applicant's cellular phone records in the immediate period before and after this incident. Again, this evidence existed at the time of the applicant's initial submissions and could have previously been produced upon the exercise of reasonable diligence.
- [18] This application was filed with the Tribunal in May 2019, and the parties have been awaiting a determination of these issues for almost two years. The hearing format was set on consent of the parties. The applicant was afforded ample time between the case conference on October 23, 2019 and the commencement of the videoconference portion of the hearing on September 25, 2020 to vary the format of the hearing. Now, only after the written submissions are complete, the applicant is seeking to vary the format of the hearing and start the hearing process from scratch.
- [19] To vary the hearing format at this juncture, when the format was set on consent, after the evidence has already been tendered would offend the Tribunal mandate of ensuring an efficient, proportional, and timely resolution of this matter pursuant to Rule 3.1(b).
- [20] The evidence is now complete. The written submissions, minus any reference to the statement provided by Ms. Carvalho, shall be placed before the hearing adjudicator. The hearing adjudicator will assign the appropriate weight to the evidence tendered. The submissions and evidence tendered shall be forwarded to the hearing adjudicator for a determination on the preliminary issues raised.
- [21] The respondent's motion for costs shall be held in the cause. The hearing adjudicator shall make a determination on costs in relation to the entire procedural history of this matter before the Tribunal.
- [22] **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

- [23] 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: April 20, 2021



Ian Maedel
Vice Chair