



Licence Appeal Tribunal File Number: 21-004152/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:

Maryan Osman

Applicant

and

BelairDirect

Respondent

MOTION ORDER

VICE-CHAIR:

Terry Hunter

APPEARANCES:

For the Applicant:

Sam Elbassiouni, Paralegal

For the Respondent:

Branson Wong, Counsel

**Motion heard by
Teleconference:**

October 21, 2022

BACKGROUND

- [1] The applicant was injured in an automobile accident on **November 8, 2018**, and sought benefits pursuant to the Statutory Accident Benefits Schedule – *Effective September 1, 2010 (including amendments effective June 1, 2016)*.
- [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 **February 3, 2022** and an order was issued scheduling a five-day videoconference hearing to commence November 28, 2022.
- [4] On September 29, 2022, the respondent served two new reports. The reports were a surveillance report of Investigative Solutions Network, dated September 26, 2022 and a biomechanical engineering report of Kodsí Engineering dated September 29, 2022.

MOTION

- [5] On **October 7, 2022**, the applicant filed a Notice of Motion requesting that the Tribunal;
 - i. Order the respondent to provide the applicant the complete file of Investigative Solutions Network, including the instruction letters and communications pertaining to the applicant, a copy of all documents provided to the investigator and a copy of the invoice for the surveillance conducted.
 - ii. Order the production of the adjuster’s log notes unredacted, pertaining to the verbal communication with the investigator on September 19 and 26, 2022, and any other communication with the investigator from the date of the assignment to the date of the report.
 - iii. Order the production of the complete file of Kodsí Engineering, including the instructions letter and communications pertaining to the applicant, a copy of all documents provided to the engineer and a copy of the invoice.

RESULT

- [6] The applicant’s motion is denied.

ANALYSIS

Position of the applicant

- [7] On **September 29, 2022**, the respondent served two reports on the applicant's representative. The two reports were a surveillance report of Investigative Solutions Network dated September 26, 2022, and a biomechanical engineering report of Kodsi Engineering dated September 29, 2022. The purpose of the reports was to address the applicant's activity and level of functioning in the surveillance report and to assess 1. The physical damage to determine the severity of the collision and 2. To comment on the accelerations experienced by the driver and compare the accelerations to the risk of sustaining a concussion.
- [8] The reports address the core issue of the hearing which is whether the applicant has sustained a concussion in the accident and her level of functioning.
- [9] The applicant submits it is settled law that the applicant is entitled to obtain a copy of referral letters, instruction letters and a list of documents shared with the investigator and engineer. I note that the applicant has been provided by correspondence dated October 13, 2022, a list of the documents that the investigators and engineer experts were provided. The respondent has offered to provide the instruction letters to the experts.
- [10] The applicant relies on the decision of the British Columbia Supreme Court decision in *Vancouver Community College v. Phillips, Barratt*¹. The decision, the applicant submits stands for the proposition that once reports are served or the authors are called to testify, a party waives any privilege which previously shielded the expert's papers from production. The applicant further submits the decision holds that once privilege has been waived it is waived for the entire communication.

Respondent's Position

- [11] Communications and instructions between the respondent and their surveillance and engineering experts as well as log notes pertaining to these reports are subject to litigation privilege and not disclosable.
- [12] The Tribunal, the respondent submits does not have the power to compel production of information, documents or records litigation privilege has been established over. The *Statutory Powers Procedure Act* R.S.O. 1990, CHAPTER S. 22 (SPPA) and Tribunal precedents both acknowledge this.

¹1987 CanLII 2532 (BC SC)

[13] Litigation privilege protects any document or communication between a lawyer or paralegal, their client or a third party, created for the dominant purpose of preparing for existing or anticipated litigation.

Decision

[14] Litigation privilege provides a zone of privacy to a party to facilitate investigation and preparation of a case in an adversarial process. The Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, 2006 SCC set the test for the application of litigation privilege. The two-part test requires:

- a) There must be a reasonable prospect of litigation at the time the document was created, and
- b) The dominant purpose for the creation of the document or record was to assist in the contemplated litigation.

[15] I find that litigation had commenced prior to the surveillance taking place. It was undertaken for the dominant purpose of assisting with litigation. This meets the two-prong test set in *Blank*.

[16] There have been a number of Tribunal cases which support this approach.²

[17] The test for litigation privilege with respect to the engineering report is similar to that of surveillance evidence. The engineering report was requested and produced after the application had been commenced. Engineering reports the applicant submits are generated to investigate and form opinions on technical material issues. I agree the engineering reports are obtained solely to assist with litigation.

[18] Similarly, any adjuster log notes pertaining to communications and instruction letters between the respondent and their experts are subject to litigation privilege and are redacted on that basis. I find the dominant purpose was to facilitate communication between the respondent and their experts as they gathered evidence and prepared their opinions.

[19] The applicant also seeks the invoices of both experts. The rationale behind the request is the invoices will confirm time spent on surveillance or preparation of the engineering report. The invoices are not probative of any material issues. I find they are not relevant to the issues in dispute as they do not address what are the injuries and impairments flowing from the accident nor do they address

² 17-008769 *v Unifund Assurance Company*, 2018 CanLII 11092 (ON LAT) and *R.D. v Wawanesa Insurance*, 2019 CanLII 22203 (ON LAT)

whether treatments are reasonable and necessary.

The litigation privilege applies only to providing a protected zone allowing hearing preparation. When an expert witness is called to testify or when their report is placed in evidence, they will be required to produce to the opposing party all documents relevant to the substantive issues in their evidence or to their credibility.

[20] **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

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

Released: November 2, 2022



**Terry Hunter
Adjudicator**