



**Tribunal File Number: 21-004990/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:

**Praba Sivapalauntharam**

**Applicant**

and

**Unifund Assurance Company**

**Respondent**

**AMENDED MOTION ORDER**

Order made by: Ian Maedel, Vice Chair

Date of Order: August 25, 2021

For the Applicant: Courtney Madison, Counsel

For the Respondent: Sarina Sud, Counsel

## OVERVIEW

- [1] The applicant was injured in an automobile accident on **October 25, 2015** 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 **July 7, 2021** before Adjudicator John. A videoconference hearing was scheduled for July 4, 5, 6, 7, 8, 2022.

## MOTION

- [4] On July 27, 2021, the respondent filed a Notice of Motion requesting that the Tribunal;
  - i. An order for the following productions to be provided within 45 days of the Motion Order:
    - a) A decoded OHIP summary, October 23, 2007 to October 22, 2014;
    - b) The clinical notes and records of Dr. Sriharan, November 19, 2007 to December 17, 2014;
    - c) The complete accident benefits file related to the motor vehicle accident dated November 19, 2008, held by TD General Insurance, including the Settlement Disclosure Notice and the Release;
    - d) The complete accident benefits file from the motor vehicle accident dated January 22, 2010, including Settlement Disclosure Notice and Release;
    - e) The contents of the all the applicant's social media accounts, including the LinkedIn file.
- [5] On August 19, 2021, the applicant filed a Notice of Motion requesting that the Tribunal;
  - i. An order for production of the adjuster's log notes to the date of the current motion, redacted for privilege and reserves;
  - ii. An order for the insurer to advise of the basis for non-payment of the income replacement benefit prior to termination; and
  - iii. For this motion to be heard alongside the insurer's Notice of Motion for productions.
  - iv. An order for costs pursuant to Rule 19.

## **PARTIES' POSITIONS**

### **The Respondent's Notice of Motion**

- [6] The respondent's production requests are largely based on an Autoplus Report which allegedly indicates the applicant received accident benefits for two previous motor vehicle accidents on November 19, 2008 and January 22, 2010. The accident benefit files for these previous matters will include amounts paid in settlement of these matters is relevant to the current dispute, preventing potential over-compensation and double recovery. The previous clinical notes and records will also indicate the applicant's level of functionality in the pre-accident and post-accident periods for each date of loss. These medical records are particularly relevant to pre-existing impairments and causation. Surveillance further indicates the applicant was employed at a car dealership, and a commercial cleaning business. The social media accounts will provide relevant information regarding the applicant's potential employment and the test pursuant to criterion 8, related to a class 4 marked impairment.
- [7] The applicant submits these productions were not requested until February 2021 and date back to 2007, or more than seven years prior to the current accident in dispute. The records relating to the 2008 accident are not relevant and there were no accident benefits claimed for the 2010 motor vehicle accident. The Autoplus Report is an unreliable document and does not list the applicant's legal name, nor does it correctly list the amounts paid to the applicant for the previous 2008 date of loss. This request for additional productions is no more than a fishing expedition designed to bully the applicant, particularly when none of these documents were sought by the respondent's own assessors. Any additional questions regarding the previous accident, accident benefits previously paid, or her social media can be put to the applicant at the EUO scheduled on December 4, 2021.
- [8] In response, the respondent submits their experts reserved the right to review additional records. These clinical notes and records may speak to the physical/psychological prognosis and etiology of the impairments. Similarly, the applicant's own family physician noted she complained of neck and lower back pain at this time.

### **The Applicant's Notice of Motion**

- [9] The applicant submits the adjuster's log notes are relevant to the continuing adjustment of the applicant's file and the blanket of litigation privilege cited in *Blank v. Canada (Department of Justice)*<sup>1</sup> is not absolute. This extends to log notes created for previous, related applications before the Tribunal. Relying on the Tribunal's decision in *Sheriffe v Aviva Insurance Company of Canada*<sup>2</sup>, the applicant submits that the log notes are relevant and presumptively producible

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<sup>1</sup> 2006 SCC 39, Respondent's Notice of Motion at Tab 10.

<sup>2</sup> 2021 ONLAT 19-009684/AABS, Applicant's Notice of Motion at Tab 3.

pursuant to Rules 9.3(e) and 9.1 of the Tribunal rules. The respondent may redact any portion of the notes that contain privileged materials or reserve information. Similarly, the applicant has not received any basis for the termination of the income replacement benefit between November 2018 and March 2019. The log notes will illustrate the decisions related to the denial of the benefit in this period.

- [10] The respondent submits that additional litigation was reasonably apprehended following the previous application, therefore litigation privilege extends to the log notes from the previous application. Additionally, the Supreme Court's ruling in *Blank v. Canada* was not relied upon in any of the case law submitted by the applicant and remains binding. The respondent submits the applicant was provided two previous Explanation of Benefits in 2016 and 2019, both clearly stating the applicant did not meet the test for income replacement benefits. As a result, the applicant's Notice of Motion should be dismissed.

## RESULT

### *PRODUCTIONS*

- [11] The respondent's motion for productions is granted in part.
- [12] Rule 9.1 of the Tribunal's Common Rules of Practice & Procedure states the Tribunal may order a party to provide disclosure considered necessary for a full and satisfactory understanding of the issues in the proceeding. Similarly, Rule 9.3(e) states a party may be required to disclose any document the Tribunal considers relevant to the issues in dispute. Generally, relevance is a low bar, and productions will be ordered if they may be relevant to the issues in dispute.
- [13] The applicant shall produce the following productions to the respondent by **November 30, 2021**:
- i. A decoded OHIP summary, October 23, 2007 to October 22, 2014. I find these records may be relevant to the issues in dispute pursuant to Rule 9.3(e), particularly the catastrophic impairment determination. These records will illustrate the treatment sought in the year prior and immediately following the accident in November 2008. However, I am aware that these records are generally only retained for a period of seven years. If these records are otherwise unobtainable, the applicant shall provide the respondent with written proof of best efforts.
  - ii. The clinical notes and records of Dr. Sriharan, November 19, 2007 to December 17, 2014. I find these records may be relevant to the issues in dispute pursuant to Rule 9.3(e), specifically to the issues of potential pre-existing injuries and causation. Again, these records may illustrate the relevant treatment received in the year prior to and following the November 2008 accident.

- iii. The complete accident benefits file related to the motor vehicle accident dated November 19, 2008, held by TD General Insurance, including the Settlement Disclosure Notice and the Release. This file will include the previous s. 25 and s. 44 expert reports which will speak to previous diagnoses and treatment undertaken. Similarly, treatment plans and explanations of benefits will speak to the applicant's needs following the previous accident. Finally, benefits statements and the Settlement Disclosure Notice will illustrate the benefits paid and attributed to future care. I am aware of the inherent private nature of the settlement documents, however, in this case, they shall be provided to prevent potential double-recovery or over-compensation pursuant to s.47 of the Schedule.
- iv. The respondent's request for the complete accident benefits file from the motor vehicle accident dated January 22, 2010 was withdrawn at the motion hearing.
- v. The public content of the applicant's LinkedIn account since 2014, or one-year pre-accident to present. This account may provide key employment information. Her employment is relevant to the income replacement issue and her functionality related to the catastrophic impairment designation in dispute. However, I am not persuaded the applicant's other social media accounts will provide any additional employment information. Thus, the respondent's motion for production of additional social media accounts is denied.

[14] Otherwise, it is not necessary for me to comment on the reliability of the Autoplus Report at this juncture. The applicant admits she was in an accident in November 2008 and that application for benefits was settled. In my opinion, this is sufficient to raise questions regarding the relevance of the previous settlement, and benefits paid.

#### *ADJUSTER'S LOG NOTES*

[15] The applicant's motion for the production of adjuster's log notes is granted. The respondent shall provide the complete log adjuster's notes relating to this application and the previous application before the Tribunal up to the date of this Order. The log notes shall be redacted to protect privileged and private reserve information. The redactions shall be accompanied by the privilege claimed and a brief explanation of the information withheld, capable of being challenged, if necessary. These log notes shall be produced to the applicant by **November 30, 2021**.

[16] I am acutely aware of the Supreme Court's ruling in *Blank v. Canada (Department of Justice)*<sup>3</sup>. However, litigation privilege is not absolute. Citing a

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<sup>3</sup> 2006 SCC 39, Respondent's Notice of Motion at Tab 10.

blanket litigation privilege over log notes following the date of the application, or for the previous application in 2018 contravenes the very purpose of the log notes as a record of adjustment decisions made on the file. The dominant purpose of log notes is not litigation, but adjustment. Although litigation may have been anticipated during the previous 2018 application, the 'zone of privacy' argument has little application in these types of cases when related directly to the adjustment of the file. However, log notes that contain legal advice, legal strategy, settlement discussions, or reserve information may be redacted, but to deny the applicant access to the record of adjustment of her own file would be contrary to the consumer protection nature of the Schedule.

- [17] Otherwise, I adopt my comments at paragraphs 11-14 in *Sheriffe v Aviva Insurance Company of Canada*<sup>4</sup>, as cited by the applicant.

### **OTHER PROCEDURAL MATTERS**

- [18] The applicant's motion for an order for the basis of non-payment of the income replacement benefit prior to termination is denied. The adjuster's log notes should provide a record of the adjustment decisions on the file. Similarly, the applicant is in receipt of the two Explanations of Benefits from 2016 and 2019.
- [19] Following the receipt of the adjuster's log notes, should the applicant have any further questions regarding the adjustment decisions on the file, and is seeking specific productions related to these questions, she is encouraged to file an additional Notice of Motion.
- [20] The applicant's motion for costs is denied. Pursuant to Rule 19.1, costs may be awarded in cases where a party has acted unreasonably, frivolously, vexatiously, or in bad faith. This is a high threshold, and costs are rarely awarded.
- [21] Rule 19 of the LAT Rules outlines the powers that the Tribunal has to order costs. Briefly, Rule 19.1 states that costs may be awarded in cases where a party has "acted unreasonably, frivolously, vexatiously, or in bad faith". I am not persuaded the respondent's opposition to the production of the log notes nor the request for additional productions otherwise rises to the threshold required to impose costs.
- [22] The videoconference hearing for this matter remains scheduled for **July 4-8, 2022, commencing at 9:30 am on each date.**
- [23] **Except for the provisions contained in this Motion Order all previous orders made by the Tribunal remain in full force and effect.**

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<sup>4</sup> 2021 ONLAT 19-009684/AABS, Applicant's Notice of Motion at Tab 3.

## **OTHER PROCEDURAL MATTERS**

- [24] 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: September 22, 2021**

A handwritten signature in cursive script, appearing to read "I Maedel", is written over a horizontal line.

**Ian Maedel  
Vice Chair**