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13-0546JC

Safety, Licensing Appeals and Standards Tribunals Ontario
Licence Appeal Tribunal

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario
Tribunal d'appel en matière de permis



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Tribunal File Number: 16-003309/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c 1.8., in relation to statutory accident benefits.

And in the matter of two motions brought by the respondent and the applicant to exclude documents from the hearing

Between:

A.FC.

Applicant

and

TD General Insurance Company

Respondent

DECISION

ADJUDICATOR: Chloe Lester

APPEARANCES:

For the Applicant: Sylvia Guirguis, counsel for the Applicant

For the Respondent: Ilya Kirtsman, counsel for the Respondent

HEARD: May 15, 2017

OVERVIEW

[1] This decision deals with two motions. A hearing in this matter is scheduled to take place on June 5, 2017.

Motion #1

[2] On April 28, 2017, the respondent filed a motion with the Tribunal requesting an order barring the applicant from relying on materials at the hearing. Specifically, the respondent requested that the applicant be precluded from relying on the affidavits sworn by the applicant and the applicant's step-son, Steven Chase, ("the affidavits"), along with the clinical notes and records of Greenway Retirement Village. The respondent based this request on the fact that the applicant did not serve these materials by the deadlines ordered in the Tribunal's January 24, 2017 case conference order.

Motion #2

[3] On the same day, the applicant filed a motion to exclude documents she received from the respondent on April 26 and 27, 2017, which were also not served by the deadline included in the same January 24, 2017 order. Specifically, the applicant requested that, given their late service, the following documents be excluded from admission at the hearing: the alternative housing report #2 (dated April 25, 2017), the existing and proposed floor plan for the applicant's current residence, the occupational therapy file review of Starr Robinson (dated April 25, 2017), Starr Robinson's acknowledgement of expert duty and cover letter, the affidavits sworn by Wayne Parson and Starr Robinson, and Wayne Parson's acknowledgement of expert duty and *curriculum vitae*.

[4] The applicant is also requesting a declaration that the alternative housing report and occupational therapy report are in contravention of the *Statutory Accident Benefits Schedule* ("SABS"), along with an order for costs. However, the parties have agreed that both of these issues should be held over and heard at the hearing.

[5] Upon hearing the submissions of the parties, the motions are denied and the hearing is adjourned until August 24, 2017.

BACKGROUND

[6] A case conference was held on January 12, 2017. At that time, the Tribunal granted the applicant an adjournment of the case conference as the applicant was unavailable to participate. The case conference resumed on January 19, 2017. The parties were unable to settle the issues in dispute.

[7] To prepare for the hearing, the parties agreed to numerous deadlines to exchange their respective hearing materials, including affidavits and other documents. The applicant agreed to provide her hearing materials to the respondent by March 3, 2017.

This enabled the respondent to complete addendum reports in a timely manner before the hearing. The respondent agreed to provide the reports and other productions, to the applicant on or before March 31, 2017. These agreements were outlined in the January 24, 2017 order.

[8] The March 3, 2017 deadline passed and several documents from the agreed production list remained outstanding.

[9] The parties agree that they spoke on March 17, 2017 and that, at that time, the applicant advised that she was still waiting for the clinical notes and records from Greenway Retirement Village, a facility where the applicant resides. The applicant also admitted during that conversation, she had not provided the affidavits as per the deadline listed on the order. The applicant admitted she had misread it.

[10] The applicant believes that during the March 17, 2017 conversation, the respondent consented to the affidavits being filed with the applicant's initial submissions that were due on April 28, 2017. The respondent denies this assertion.

[11] The clinical notes and records from Greenway Retirement Village came in two separate lots on March 21, 2017 and March 24, 2017, and were subsequently sent to the respondent. Greenway Retirement Village did not offer any reason for the delay in forwarding these documents.

[12] The affidavits were later sent to the respondent on April 24, 2017.

SUBMISSIONS ON MOTION #1

[13] The respondent submits the applicant should be barred from relying on the affidavits and clinical notes and records as they were not filed within the ordered timelines. The respondent submits that the Tribunal process is supposed to be expeditious and that the applicant is expected to be prepared to proceed to a hearing at the time of the filing of the application. At the time the reports were authored, the assessors only had half of the clinical notes and records to factor into their decision. The respondent alleges if the affidavits and clinical notes and records are allowed into evidence, it would be prejudiced since their assessors issued reports based on "incomplete information". That being said, the respondent submits that the affidavits contained allegedly new information that would change the standard by which it would have approved or denied the applicant's claim. Had the respondent known about the deficient level of care being delivered to the applicant by the nursing home at the time the treatment plan had been submitted, its adjuster would have reviewed it from a different perspective. Therefore, the respondent claims that it is unaware of the case to which it has to respond. In addition, if the hearing is delayed, the respondent may be faced with increased interest costs.

[14] The applicant submits that the information contained in the affidavits was not new to the respondent. She alleges that the respondent has been aware the retirement village

was inadequate not from a functional perspective but from a cognitive and customer service standpoint. The applicant submits that the respondent's assessors did review some of the clinical notes and records from the retirement village and has tendered a report. Therefore, the respondent has everything they need to proceed.

SUBMISSIONS ON MOTION #2

[15] The applicant is seeking to exclude documents from the respondent that she received between April 26-28, 2017. The applicant claims that she received two reports from the respondent that she did not know the respondent would rely on at the hearing. One report was authored by an Occupational Therapist, and the other was an alternative housing report. The applicant alleges that these reports were conducted by the respondent via paper review but without the required section 44 notice to the applicant. The applicant alleges that she has not had an opportunity to respond to these new reports. The applicant argues that, if these reports are allowed into evidence, she will need to seek alternative reports to respond. This will then result in prejudice caused by an increase in her costs to prepare for the hearing. The applicant asserts that these reports contravene the SABS as she had no knowledge of these assessments and did not consent to them being done.

[16] The respondent claims the applicant had knowledge that these reports were going to be authored as the case conference summary stated they were. Further, it argues that the reports were dependant on the documents from the applicant and, since those documents were received late, there was a delay in authoring the reports. For these reasons, the respondent submits that the reports should be allowed in.

ANALYSIS AND DECISION

[17] Upon hearing the submissions of the parties, the motions to exclude the documents in question and proceed with the hearing are both denied. The hearing will be adjourned until August 24, 2017 at 9:30 a.m. in Toronto (the date was agreed to by the parties if the hearing was adjourned).

[18] The rule and principle governing my authority to exclude documents are Rule 9.4 of the Licence Appeal Tribunal Rules of Practice and Procedure and the principle of relevance. Rule 9.4 states that failure to comply with disclosure obligations as ordered may result in the late evidence not being relied upon as evidence without the Tribunal's consent.¹ Thus, I have the authority to grant consent and allow documents in as evidence for a hearing. The two questions that need to be answered are: Are the documents relevant to the issue in dispute? Should the Tribunal grant consent?

[19] The issue in dispute in this case is a request for a home modification benefit, more specifically a purchase of a home the applicant claims fits her accommodation needs. The applicant currently resides in a retirement home. The applicant alleges that the

¹ Rule 9.4 was paraphrased as it applies to this application.

retirement facility does not meet her cognitive impairments and that there are deficiencies in the level of customer service.

[20] The parties agree they do not want to adjourn the hearing. However, both parties allege they are prejudiced by the late submission of documents. Both parties argue that, if the documents are allowed into evidence, they would need an adjournment of the hearing in order to provide responding/rebuttal evidence.

[21] Upon reviewing the submissions, I find that all of the documents in question for these motions are relevant to the issues before the Tribunal. The affidavits and clinical notes and records speak to the very heart of the issue in this case. Even the respondent in its submissions deem them as "highly relevant" information. I find that the alternative housing report and occupational therapy report provided by the respondent are also relevant. The reports highlight alternative housing options based on the injuries sustained from the accident.

[22] Given their relevance to the issues in dispute, should I consent to the admission of these documents into evidence?

[23] The parties have not raised any specific argument or have highlighted any prejudice that would prevent me from granting the consent. Any prejudice flowing from my consent to allow the disputed documents into evidence have been dealt with in the below paragraphs. As such, under Rule 9.4, I grant the consent of the Tribunal to allow the documents into the hearing.

[24] Both parties have submitted that, if the documents in question are allowed into the hearing as evidence, they would require an adjournment of the hearing dates. Therefore, I am adjourning the hearing.

[25] The applicant claims the alternative housing report and the occupational therapy report were conducted in contravention of the SABS. The parties at the hearing may make submissions on whether the reports were in contravention of the SABS and the weight the hearing adjudicator should give the evidence.

[26] In order to remedy any potential prejudice to the respondent, the parties should be prepared to argue at the hearing, if and when the interest costs should cease.

ORDER:

1. The motions of the applicant and the respondent are denied. The following documents will be admitted into evidence:

a. The clinical notes and records from Greenway Retirement Village;

- b. The affidavits from the applicant and Steven Chasé sent on April 24, 2017 to the respondent;
 - c. The occupational therapy report by Starr Robinson, the alternative housing report #2 (dated April 25, 2017), the existing and proposed floor plan for the applicant's current residence, the occupational therapy file review of Starr Robinson (dated April 25, 2017), Starr Robinson's acknowledgement of expert duty and cover letter, the affidavits sworn by Wayne Parson and Starr Robinson, and Wayne Parson's acknowledgement of expert duty and *curriculum vitae*.
2. The hearing scheduled for June 5, 2017 is adjourned until August 24, 2017.

Released: July 7, 2017



Chloe Lester, Adjudicator