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**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Tribunal File Number: 18-003979/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Hussin Majeed

Applicant

and

Intact Insurance Company

Respondent

MOTION DECISION

Order made by: Ian Maedel, Adjudicator

Date of Order: July 3, 2019

APPEARANCES:

For the Applicant: Arash Goneh-Farahani, Paralegal

For the Respondent: Joseph Lin, Counsel
Tracy Brooks, Counsel

Motion Hearing Heard via Teleconference: May 29, 2019

OVERVIEW:

- [1] The applicant was injured in an automobile accident on **November 13, 2016** and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 ("Schedule").
- [2] The applicant filed an application before the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal") on **May 2, 2018**.
- [3] A case conference was held on **October 26, 2019** before Adjudicator Corapi. A written hearing was scheduled for **April 8, 2019**.
- [4] The issues in dispute are a medical benefit, and the cost of two examinations.
- [5] Respondent counsel, Ms. Tracy Brooks, was retained after the case conference. A Declaration of Representative was served and filed on **January 14, 2019**. The parties conducted settlement discussions in the eight-week period between counsel being retained and the filing of this motion.

MOTION:

- [6] The applicant filed a Notice of Motion dated **March 13, 2019** and sought the following relief:
 - i. An order adding an award pursuant to s. 10 of Ontario Regulation 664;
 - ii. An order for costs pursuant to Rule 19 of the Common Rules of Practice and Procedure;
 - iii. An order removing respondent counsel from the accident benefits file.
- [7] The respondent filed submissions in reply and sought a dismissal of the motion and costs pursuant to Rule 19.

RELIEF:

- [8] The applicant's motion to add an award pursuant to s.10 of Ontario Regulation 664 is granted. An adjudicator has the inherent jurisdiction to add an award at any part of the hearing process, even if not raised by the parties. The bar to add the award as an issue in dispute is very low. The applicant has established that there may be a basis for the claim, flowing from the denial of these benefits. I find that the applicant has met this threshold and I will add this as an issue in dispute to the hearing.

- [9] The applicant's motion to add costs pursuant to Rule 19 of the Common Rules of Practice and Procedure is granted. I am satisfied this may be added as an issue in dispute, the onus remains on the applicant to establish the respondent acted unreasonably, frivolously, vexatiously, or in bad faith.
- [10] The applicant's motion to remove respondent counsel from the record is denied. Only in the rarest circumstances will a court grant a motion for removal of counsel. Quoting Cronk J.A. in *Kaiser (Re)* in *Best v. Cox*, "A litigant should not be deprived of counsel of its choice without good cause..." For this reason, Canadian courts exercise the highest level of restraint before interfering with a party's choice of counsel... the test is whether a fair-minded and reasonably informed member of the public would conclude that counsel's removal is necessary for the proper administration of justice.¹
- [11] The onus of providing evidence of a conflict of interest is on the applicant. Neither party disputes that an Examination Under Oath ("EUO") was conducted pursuant to the private arbitration in the priority dispute, however this in itself, does not give rise to an automatic claim for conflict of interest. The applicant has failed to explain how Ms. Brook's participation as counsel at the EUO could potentially cause a conflict. Otherwise, bald statements of conflict of interest do not create an apprehension of conflict of interest, especially when the threshold to remove counsel is such a high bar.
- [12] The law is well established following cases like *Dervisholli et al. and Cervenak and State Farm*², where the Ontario Divisional Court affirmed the industry practice of establishing ethical firewalls to insulate tort claims from accident benefits claims brought by the same claimant to avoid conflict of interest. These same protections do not arise in accident benefit matters, due to the fiduciary nature of the relationship between an insured party and the first party insurer.
- [13] At the heart of the matter are the privacy interests of the insured party. Unlike tort claims, the insured party does not have an expectation of privacy in a priority dispute, this is evident in section 6(1) of Ontario Regulation 283/95, Disputes Between Insurers, which states:
- 6. (1)** The insured person shall provide the insurers with all relevant information needed to determine who is required to pay benefits under section 268 of the Act...

This signals a clear legislative intent for insured parties to share personal

¹ 2013 ONCA 695 (CanLII) at paras. 8, 9.

² 2015 ONSC 2286 (CanLII).

information between insurers to determine coverage for accident benefits matters. This legislative intent is echoed in the Auto Insurance Claim Forms (OCF Forms), which explicitly state that information may be shared between insurance companies for “recovering payment from insurers and others liable in law for amounts you pay in connection with my claims”.³ Unlike tort, there is no adversarial relationship created, therefore no expectation of privacy in a priority dispute. To conflate the tort and accident benefit matters is to read protections into the law which simply do not exist.

- [14] This matter is distinguishable from *P.Y.J. and L.J. v. The Personal Insurance Company*,⁴ in which Vice Chair Trojek found the respondent’s reliance on the EUO transcript raised a potential conflict of interest. Each case must be considered upon its own facts. In this matter, the applicant simply relied on counsel’s appearance at the EUO to suggest a conflict of interest. This, in my view, is insufficient to meet the high bar of removing respondent counsel from the record given the test laid out in *Best v. Cox*.
- [15] The respondent’s motion for costs is denied. Costs are a discretionary remedy pursuant to Rule 19.1 and may be awarded when a party has acted unreasonably, frivolously, vexatiously, or in bad faith. Although ultimately unsuccessful, I am not persuaded the applicant filed this motion in bad faith or has otherwise acted unreasonably in the motion proceedings.
- [16] The previous submission deadlines and hearing date have all lapsed. The written hearing set for **April 8, 2019** shall be vacated.
- [17] The parties shall attend a case conference on **July 29, 2019 at 9:00 am** via teleconference for the purposes of case management and setting a new hearing date. The Tribunal shall provide the parties with a Notice of Case Conference that includes the teleconference information.
- [18] Except for the provisions contained in this order, all previous orders made by the Tribunal remain in full force and effect.

³ Application for Accident Benefits (OCF-1) at Part 12.

⁴ 2018 CanLII 132225 (ON LAT).

OTHER PROCEDURAL MATTERS:

[19] If the parties resolve the issues in dispute prior to the hearing, **the applicant** shall immediately advise the Tribunal in writing.

Released: July 3, 2019



**Ian Maedel
Adjudicator**