inHEALTH's LAT Compendium Service

User Submitted Case Conference Report

1 Yonge Street, Suite 1801 Toronto M5E 1W7 **Tel** 416.364.6688 **Fax 647.776.3118** **www.inhealth.ca**

LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

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

Ontario

Tribunal File Number: 18-004783/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:

Richard Tipping

Applicant

and

Coseco Insurance

Respondent

CASE CONFERENCE REPORT

ADJUDICATOR:	**Deborah Neilson**
APPEARANCES:	
For the Applicant:	Richard Tipping, Applicant
	Imtiaz Hosein, Counsel
	Peter Murray, Counsel
For the Respondent:	Alaina Walker, Claims Representative
	Shirline Apiou, Counsel
Held by Teleconference:	**June 4, 2019**

OVERVIEW

[1] The applicant was involved in an automobile accident on November 24, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the *"Schedule"*). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The parties participated in a case conference on October 22, 2018, at which time a preliminary issue hearing was scheduled to commence on December 19, 2018. The parties resolved the preliminary issue and attended at a case conference on February 11, 2019, at which time a five day hearing was scheduled to commence on June 17, 2019. A further case conference was scheduled for March 1, 2019 to address production orders and witnesses. The parties were to file written submissions and oral reply submissions were to be heard at the resumption of the case conference. I was seized with the case conference but was unable to attend. The Adjudicator who attended at the case conference sought to adjourn it to a new date, but the respondent objected, and no new case conference date was obtained. The respondent filed a motion that was scheduled for April 2, 2019. The respondent submitted that my determination of the production issues was required before its motion could proceed. I was unable to hear the parties' reply submissions on their production requests on April 2, 2019 because the parties' submissions on productions had not been uploaded into the Tribunal's electronic filing system. Accordingly, the motion was adjourned until I could hear their oral reply submissions on their production requests. The Tribunal scheduled the resumption of the case conference for June 4, 2019.

[3] The respondent since filed a motion for an order that the applicant is barred from proceeding to a hearing because he failed to submit to an insurer's examination. I find the respondent's motion cannot be determined before June 17, 2019. Therefore, the hearing on the substantive issues is adjourned to **October 8, 9, 10, 11 and 30, 2019.**

ISSUES IN DISPUTE

Preliminary Issues

[4] The parties previously agreed that the preliminary issues to be decided at the hearing with the substantive issues are as follows:

i. Whether the applicant is barred from proceeding with his claim for non-earner benefits as he failed to notify the respondent of the circumstances giving rise to a claim for the non-earner benefit.

ii. Whether the applicant is barred from proceeding with his claim for non-earner benefits as he failed to submit an application for the benefit within the times prescribed by the *Schedule*.

[5] The respondent has identified the following preliminary issue motion that will be determined by a preliminary issue hearing:

i. Is the applicant barred from proceeding with his claim for non-earner benefits and catastrophic impairment because the respondent provided the applicant with notice that it requires an examination under section 44 of the *Schedule* (an "IE"), but the applicant has not complied with that section?

Substantive Issues

[6] The substantive issues in dispute were identified and agreed to as follows:

i. Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?

ii. Is the applicant entitled to receive a non-earner benefit ("NEB") in the amount of $185.00 per week for the period from January 3, 2018 and ongoing, which was denied on March 9, 2018?

iii. Is the applicant entitled to attendant care benefits:

a. In the amount of $6,000.00 per month for the period from November 24, 2015 to date?

b. What was the amount of attendant care incurred by the applicant or was the attendant deemed incurred?

iv. Is the applicant entitled to an award under s.10 of *Ontario Regulation 664* because the respondent unreasonably withheld or delayed payments to the applicant?

v. Is the applicant entitled to interest on any overdue payment of benefits?

vi. Is the applicant entitled to his costs because the respondent's conduct or course of conduct has been unreasonable, frivolous or vexatious or the respondent has acted in bad faith?

[7] On consent, the following issues are added:

i. Is the applicant entitled to receive a rehabilitation benefit in the amount of $1,013.34 for assistive devices recommended by Moira Hunter -Kenyon in a treatment plan dated January 29, 2018, denied by the respondent on February 23, 2018?

ii. Is the applicant entitled to receive a medical benefit in the amount of $1,906.95 for occupational therapy services recommended by Moira Hunter-Kenyon in a treatment plan dated June 15, 2018, denied by the respondent on June 27, 2018?

iii. Is the applicant entitled to receive a rehabilitation benefit in the amount of $1,022.02 for assistive devices recommended by Moira Hunter-Kenyon in a treatment plan dated July 19, 2018, denied by the respondent on August 2, 2018?

[8] At the request of the respondent, the following issue is added:

i. Is the respondent entitled to its costs because the applicant's conduct or course of conduct has been unreasonable, frivolous or vexatious or the applicant has acted in bad faith?

CASE MANAGEMENT

[9] In addition to the production and witness issues listed below, the parties were unable to agree to the following procedural matters:

(i) Whether I should hear the preliminary issue motion filed by the respondent on May 23, 2019;

(ii) Whether the hearing scheduled to commence June 17, 2019 should be adjourned;

(i) Preliminary Issue Motion

[10] The respondent filed a preliminary issue motion on May 23, 2019 seeking a determination that the applicant was barred from proceeding with his claims pursuant to s.55 of the *Schedule* for failure to comply with the respondent's

request under s.44 of the *Schedule* to undergo an insurer's examination (an "IE"). Under *LAT Rule* 14.2,[1] the scope of a case conference is essentially settlement and procedural matters. A motion for more than just a procedural matter may be heard at a case conference provided the parties have complied with *LAT Rule 15*. *Under LAT Rule 15*, the party bringing the motion must serve and file it 10 days before the case conference. The responding party must file his materials 5 days before the case conference. In this case, the respondent filed its motion materials within the time requirement, but the applicant filed his materials on June 4, 2019, the day of the case conference. Under *LAT Rule* 14.3[2], a member who presides at a case conference shall not participate as a member of a panel at a subsequent hearing of the appeal except with the consent of the parties. The issue raised by the respondent of the applicant's failure to attend an IE is a preliminary issue that requires a hearing in accordance with the definition in *LAT Rule* 2.10. The applicant consented to me determining the preliminary issue. The respondent did not consent. The applicant submitted that the respondent implied consent for me to hear the issue by filing its motion materials. I find that in cases where both parties have not complied with *LAT Rule 15*, the consent for the case conference adjudicator to preside at a hearing requires verbal or written consent, not just implied consent. Otherwise, the Tribunal would not be adhering to the principle of transparency and fairness. For these reasons, I find I am unable to hear the preliminary issue of the applicant's failure to comply with the IE.

[11] The issue of whether the applicant is barred from proceeding with his claims for NEBs and catastrophic impairment for failing to comply with the respondent's request for an IE will proceed to a written preliminary issue motion. The other preliminary issue will be heard together at the hearing of the substantive issues, which is adjourned to the agreed upon dates of October 8, 9, 11 and 30, 2019.

PRELIMINARY ISSUE MOTION

[12] After issuing my oral decision that I could not hear the preliminary issue motion, the parties agreed that the preliminary issue hearing on whether the applicant is barred from proceeding with his claims for NEB and catastrophic impairment for failure to comply with the insurer's request for an IE is to proceed in writing on **June 14, 2019**. The remaining preliminary issue will be determined at the hearing of the substantive issues.

---

[1] *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017).*{"*LAT Rules*")

[2] *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017).*{the "*LAT Rules*")

SUBSTANTIVE ISSUE HEARING

[13] On consent, a combination hearing, consisting of a portion in-person, and an electronic portion with some of the witnesses testifying by teleconference, is scheduled for **October 8, 9, 11 and 30, 2019, commencing each day at 9:30 a.m. in Toronto and October 10, 2019 commencing at 9:30 a.m. in Grand Bend, Ontario.**

[14] The electronic portion of the hearing consists of the experts providing their testimony over the telephone.

[15] In preparation of the in-person hearing, the parties request that the hearing adjudicator review the reports and records of the witnesses listed below, which shall be located in the parties' document briefs.

EXCHANGE OF DOCUMENTS BETWEEN THE PARTIES (PRODUCTIONS)

A. Document Production Sought by the Applicant

[16] The applicant sought the following documents from the respondent:

(1) The report completed by Maria Roth for the purposes of assessing Mr. Tipping's catastrophic status in which Mr. Tipping was assessed on July 9, 2018.

(2) Any and every contract or agreement that exists between Coseco and Focus Assessments.

(3) Any and every contract or agreement that exists between Coseco and each of the regulated health professionals that have conducted or will conduct assessments of Mr. Tipping including, but not limited to: Dr. Kurnchy, Dr. Chandrasena, Maria Roth, Dr. Mustafa.

(4) The complete AB file from the date of the OCF-1 to February 20, 2019. If there are any redactions for privilege, a description of the information to establish prima facie privilege.

(5) The clinical notes and records, draft reports and all other documentation in the possession of the insurance commissioned medical examiners in Mr. Tipping's claim

(6) All correspondence between each of the regulated health professionals and Focus Assessments, between each of the regulated health

professionals and Coseco, and between Focus Assessments and Coseco.

(7) The complete adjuster's notes (which would include notes regarding communication relevant to Mr. Tipping's claim to any third party)

(8) Copies of all surveillance and investigation documents in the possession of Coseco or third party contracted to do surveillance by Coseco

(9) Coseco's reserve information relating to Mr. Tipping's accident benefits file

(10) A copy of all policy manuals or documentation relating to Coseco's adjustment of catastrophic impairment claims

(11) A copy of all OCF-21s with respect to invoices paid to the above mentioned insurance medical examiners with respect to Mr. Tipping's claim

(12) Any and all telephone log records and recordings in Coseco's possession relating to Mr. Tipping's accident benefits claim, which include, but is not limited to telephone conversations with licensed service providers, conversations with Mr. Tipping, conversations with Mr. Tipping's facilitators and representatives, conversations with regulated health professionals etc.

(13) A copy of all s. 50 statements prepared by Coseco; and

(14) All other materials with Mr. Tipping's name connected to it in the possession of the Insurer and connected to automobile insurance.

(1) Maria Roth's Report

[17] Maria Roth's report is part of a multidisciplinary IE assessment requested by the respondent in 2018. The respondent requested that the applicant attend at an assessment by an occupational therapist, Ms. Roth, in addition to a psychiatrist and a neuropsychologist for the purpose of determining whether the applicant was entitled to non-earner benefits and whether he sustained a catastrophic impairment. The applicant attended at the assessment by Ms. Roth, an occupational therapist, and the psychiatric assessment. The applicant has not yet been assessed by the respondent's neuropsychological assessor. A multidisciplinary IE report is not finalized until all of the assessors have reviewed each others' reports. The respondent has agreed to provide the report once the

multidisciplinary assessments are all completed. According to the letter from Ms. Roth to the applicant's counsel dated November 23, 2018, the applicant has Ms. Roth's draft report. Therefore, until the multidisciplinary assessments are complete, or the preliminary issue hearing adjudicator determines that the applicant is not required to attend the neuropsychological assessment before proceeding with his claims before the Tribunal, the applicant's request for an order for production of Ms. Roth's report is denied.

(2) Contracts between the Respondent and Focus Assessments and (3) the Regulated Health Professionals

[18] Under *LAT Rule* 9.3 (e), the Tribunal may order a party to disclose any document or thing the Tribunal considers relevant to the issues in dispute. The applicant submits the contracts between the respondent and Focus Assessments and the respondent and the IE assessors are relevant to determine the relationship between them. The applicant submits the issues are relevant to the preliminary issues because without the contracts, the applicant is unable to determine the role and function of Focus Assessments in the IEs. I am not persuaded by the applicant's submissions. Focus Assessment is the company who arranges the IE assessments requested by the respondent. The reconsideration decision of *JP v Royal Sun Alliance Insurance* [3] is very clear that the relationship of companies similar to Focus Assessments to insurers such as the respondent is an agency relationship. The focus on the preliminary issue will be whether the assessment sought by the respondent is reasonably necessary to adjust the claim. Accordingly, I do not find that such contracts are relevant to the applicant's claims.

(4) Accident Benefit File

[19] The respondent submits that the applicant already has the documents listed at numbers (4), (11), (12), and (13) as a result of a request made under the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 ("*PIPEDA*"). The respondent relies on two letters dated December 31, 2018 and February 20, 2019 from its lawyers retained to address the PIPEDA request, Sunshine Rosen, who are not the same lawyers as the counsel representing the respondent before the Tribunal. The respondent submitted that the copy of the accident benefit file produced through the PIPEDA request was much more comprehensive than the file produced through the requests made at the Tribunal. However, the December 31, 2018 letter from Sunshine Rosen, states that there are a number of documents that were not produced as they are exempt under

[3] *18-006654 JP v Royal Sun Alliance Insurance* 2019canlii34605 (ON LAT) ("*JP v Royal Sun Alliance Insurance*")

various sections of *PIPEDA.* It is not clear from the remainder of Sunshine Rosen's letter what other documents were not produced. The respondent's counsel did not have a copy of the file that was produced through the PIPEDA request. Accordingly, the respondent agreed to produce the non-privileged portions of the accident benefit file listed as (items # 4, 7, 11, 12 and 13) redacted for reserve information and privilege and to produce the particulars of the redactions.

(5) and (6) records and files of the IE Assessors and Focus Assessments

[20] Subject to the preliminary issue determination, I am satisfied, based on the applicant's submissions, that the clinical notes and records, the draft reports and all other documentation in the possession of the IE assessors, all correspondence between each of the regulated health professionals and Focus Assessments, between each of the regulated health professionals and Coseco, and between Focus Assessments and Coseco are relevant to the applicant's claims. Those documents would indicate what questions the assessors were asked, whether there were any changes made to the assessor's reports and what communications the applicant and the respondent had with the assessors and/or Focus Assessments. The respondent refused to request the documents on the basis they have no control over Focus Assessment's file. The respondent also submitted that it would be disproportionate for it to make the request. I disagree. The respondent agreed that Focus Assessments is an agent of the Respondent in the same manner as determined by Associate Chair Batty in *JP v Royal SunAlliance.* Because Focus Assessments is the respondent's agent and the assessments were requested by the respondent, I find that the request for the documents should be made by the respondent. If the shoe was on the other foot, requests for the applicant's medical records sought by the respondent, the respondent would expect the applicant to make those requests from the applicant's doctors. In the same vein, the requests for the IE assessors' files should come from the respondent.

[21] The respondent submits the documents pertaining to the IE assessments that are incomplete should not be produced until the assessments are complete. I agree. I find that once the multidisciplinary assessments are complete, or if the preliminary issue hearing adjudicator determines that the applicant is not required to attend the neuropsychological assessment before proceeding with his claims before the Tribunal, the respondent shall request the documents sought by the applicant and shall produce the non-privileged portion of the documents, or proof of best efforts within 30 days of the release of a determination by the preliminary issue hearing adjudicator that the applicant is not barred from

proceeding with his claims for NEBs and catastrophic determination or 30 days from the release of the insurer's IE reports on NEBs and catastrophic impairment. If the preliminary issue hearing adjudicator determines that the applicant's claims for NEBs and catastrophic impairment are barred, the respondent is not required to request the files pertaining to those IE assessments. .

(7) The Complete Adjuster's Notes Including (9) Reserve Information

[22] Under the *Statutory Powers Procedure Act* (the "*SPPA*")[4], I may not order documents that are privileged. I find that the request is overly broad as the applicant seeks adjuster's notes recording communications with third parties, which, according to the wording of the request, would include solicitor client communications. Solicitor client communications are privileged. The respondent submits that it has never denied a request for its non-privileged adjusters' log notes and states, in fact, that the non-privileged adjuster's notes were produced pursuant to the *PIPEDA* request.

[23] The applicant submits that the reserve information is relevant. I am not persuaded by the applicant that reserves have any relevance to the issues in dispute. The applicant relies on a couple of decisions from the Financial Services Commission of Ontario ("FSCO") that ordered the production of reserve information. I am not bound by FSCO decisions and the courts and FSCO have consistently resisted motions for production of reserve information. I adopt the reasoning in *Osborne v. Non-Marine Underwriters, Lloyd's of London*,[5] which held that an insurer's internal estimation of its monetary exposure regarding the risk is not pertinent to the insurer's conduct in assessing and responding to the claim of an insured. Blair R.S.J. in *Osborne* stated that a plaintiff would have an unfair advantage in knowing how much an insurer estimates a claim is worth and might have a feeling of entitlement to a settlement in that amount, especially since the reserve is nothing more than an intelligent estimate of the risk as a whole. I agree with this analysis.

[24] The respondent does not dispute the relevance of the log notes, but submits that they would have been provided under the *PIPEDA* request. For the reasons provided earlier, I am not convinced that the adjusters' log notes setting out communications with third parties (other than the respondent's lawyers) were provided pursuant to the *PIPEDA* request. Accordingly, the respondent shall

---

[4] *Statutory Powers Procedure Act,* RSO 1990, c S.22, s.5.4(2) ("*SPPA*")
[5] *Osborne v. Non-Marine Underwriters, Lloyd's of London*, 2003 CanLII 7000 (ON SC), [2003] O.J. No. 5500 (S.C.J.) at paragraphs 21 and 22 (*Osborne v. Lloyd's of London"*)

produce a copy of the log notes up to February 19, 2019, redacted for privileged information and reserve information. I am satisfied from the applicant's submissions that the respondent bears the onus of showing that documents are privileged. For this reason, the respondent shall provide the reasons for the redactions with enough particulars to show why the documents are privileged. The log notes shall be provided by the respondent within 10 days of the release of my report and order.

(8) Surveillance and Investigation Documents

[25] The respondent agreed to produce investigation reports and/or or surveillance videos prepared prior to the appeal being filed with the Tribunal on June 1, 2018 within 30 days of release of this order. Any surveillance the respondent intends to rely on for the hearing shall be produced by **September 30, 2019.**

(10) Policy Manuals

[26] The applicant's request for production the respondent's policy manuals or documentation relating to Coseco's adjustment of catastrophic impairment claims is denied. The respondent's submissions and evidence, which I accept, are that there are no policy manuals.

(11) All Invoices Showing Payment to the IE Assessors

[27] The applicant seeks copies of all the OCF-21 invoices showing the payment to all the respondent's IE assessors who examined the applicant. The applicant submits the invoices are relevant because if the respondent paid more than the limit of $2,000 per assessment, it may show that the IE assessors are biased. There is no dispute that IE assessors are paid for their assessments. I do not find that if an IE assessor was paid more or less than the maximum limit of $2,000 that the assessor would be influenced to change his or her opinion. The applicant will have an opportunity to test the thoroughness or bias of the respondent's experts when his counsel cross-examines them at the hearing. If there was any payment to an IE assessor in excess of the $2,000 maximum allowed under s.25 of the *Schedule*, the Tribunal is not the proper forum for dealing with such issues. I also accept from the letter of Rosen Sunshine and the respondent's submissions and evidence that the OCF-21's are in the possession of the applicant through his *PIPEDA* request. Accordingly, the applicant is in a position to assess whether there is any issue that needs to be addressed in the appropriate forum. Further, when asked if the applicant's intention was not to use any of the documents produced through the *PIPEDA* request at the hearing, the applicant was not prepared to make such an undertaking. For these reasons, the

applicant's request for production of the OCF-21 invoices for the IE assessors is denied.

(14) All Other Materials with the Applicant's Name Connected to it

[28] The applicant sought all other materials with the applicant's name connected to it in the possession of the respondent and connected to automobile insurance. The applicant was unable to provide a satisfactory explanation of how such materials are relevant to the issues in dispute before the Tribunal. I find the applicant's request is too broad and, accordingly it is denied.

B. Document Production Sought by the Respondent

[29] The respondent sought the following documents from the applicant:

(1) Decoded OHIP Summary from April 4, 2016 to date and ongoing

(2) The complete clinical notes and records for the period from January 1, 2012 to date and ongoing for the following:

a) Dr. Cho, family physician - updated from January 29, 2018 to date and ongoing

b) All diagnostic investigative reports including x□rays, ultrasounds, CT scans, MRIs, etc.

c) Treating occupational therapist

d) Treating neurologist

e) Dr. Weiser, psychologist

f) Any other treating psychologist

g) Treating psychiatrist

h) Dr. Awan Grewal, Otolaryngologist

i) Treating speech language pathologist

j) Any other treating healthcare practitioners

(3) To advise if the applicant attended at any other hospital the post-accident and to provide the complete hospital records

(4) The complete Credit Valley Hospital Records

(5) The complete Grey Bruce Health Services (GBHS) hospital records

(6) Complete WSIB file

(7) Complete Sun Life file including all correspondence, medical documentation, a copy of the policy booklet, and summary of benefits paid to date

(8) To advise if the applicant has coverage for collateral medical expenses from any source and to provide a copy of the policy booklet and summary of benefits paid to date

(9) To advise if the applicant applied for CPP disability benefits and to provide the complete file.

(1) to (5) OHIP Summary and Clinical Notes and Records

[30] The applicant submitted that the documents requested by the respondent were not relevant to the issues in dispute because they had not been requested by the respondent in the context of adjusting the applicant's claims under s.33 of the *Schedule*. The respondent submitted that most of the documents had been requested by the adjuster. I find the clinical notes and records requested are relevant because the issues in dispute are directly related to the applicant's medical history, and not because they were requested within the course of adjusting the claim.

[31] The applicant submits that, unless the documents were requested by the respondent under s.33 of the *Schedule*, I should not find that the clinical notes and records are relevant to the issues to be determined at the hearing. The applicant relies on s.5.4 (1.1) of the *SPPA*, which states that the Tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. The applicant also relies on s.280(4) of the *Insurance Act*,[6] which states that the dispute is required to be resolved in accordance with the *Schedule*. I do not agree with the applicant that this means that, if the respondent did not request the information pursuant to s.33 of the *Schedule* when adjusting the claim, that the information is not relevant. Section 33 of the *Schedule* deals with the obligations on the insured person to provide information requested by the insurer when adjusting the claim and the consequences to an insured person if she ignores those obligations when a proper request for information is made by

[6] *Insurance Act*, RSO 1990, c I.8

an insurer. Section 33 of the *Schedule* does not set out the authority of the Tribunal to order disclosure and production of documents. That power is found under s.3 of the *Licence Appeal Tribunal Act*, which states that the Tribunal is required to hold the hearings and has all the powers that are necessary or expedient for holding hearings. [7]

[32] I find that the provisions in s.5.4 (1.1) of the SPPA and s.280(4) of the *Insurance Act* mean that when the Tribunal determines a person's entitlement to accident benefits, the tests for entitlement and quantum are to be obtained directly from the applicable Schedule. I find that to the extent s.33 of the *Schedule* contains a test of relevancy for disclosure, it is in the reference to "any information reasonably required to assist in determining entitlement to a benefit." This is a fairly broad test. The applicant provided no case law or pointed to anything in the *Schedule* to support her submission that the Tribunal is limited in applying this broad test of relevance for the purpose of ordering disclosure if an insurer fails to request documents pursuant to s.33 of the *Schedule* that are relevant to issues in dispute before the Tribunal. I find that the limitation to the Tribunal's power to order disclosure suggested by the applicant is contrary to s.3(2) of the LAT Act, which gives the Tribunal all the power necessary to hold hearings and carry out its duties. Just because an insurer has enough information to deny a claim, does not mean that once that denial becomes an issue in dispute slated for a hearing, that the insurer is not entitled to further information that supports its denial or that such information is not relevant for the hearing adjudicator to determine entitlement. To limit the powers of the Tribunal in the manner suggested by the applicant would also mean that the Tribunal does not have the power to determine relevance, only the insurer does. Such reasoning is not supported by the *SPPA*, the *LAT Act*, the *Insurance Act* or the *Schedule*. For these reasons, the clinical notes and records of the health practitioners and the hospitals requested shall be produced.

(6) to (8) WSIB and Sun Life Files

[33] I find the WSIB and the SunLife file are relevant because they contain medical documentation. Further, to the extent that there is coverage available from either WSIB or SunLife for the benefits claimed, the respondent is not liable for paying for that portion of the benefits of claimed. Accordingly, these documents shall be produced.

(9) Canada Pension Plan ("CPP") Disability File

---

[7] *Licence Appeal Tribunal Act, 1999, SO 1999, c. 12, Sch. G* (the *"LAT Act"*)

[34] The applicant did not know if he had applied for CPP disability benefits. They are not deductible from NEBS. However, the respondent submitted that the medical documents in the file are relevant to the issues in dispute. I find that the applicant's medical condition is an issue in dispute and that documents relating to the cause of his medical condition are relevant to that issue. In order to apply for CPP disability benefits, the applicant would have to submit medical documents to support his claim. Accordingly, the medical documents in the CPP file, if the applicant has applied, would be relevant to the issues in dispute. For this reason, the applicant must advise if he has applied for disability benefits and produce the medical documents in his CPP disability file if he has.

DOCUMENTS FOR THE HEARING

[35] The parties must exchange and file with the Tribunal indexed copies of evidence that they plan to use at the hearing by **September 30, 2019.**

(i) No additional or new evidence may be submitted for use at the hearing beyond the date in this paragraph.

(ii) The documents shall be limited to those relevant to the issues in dispute and that the parties will refer to in the hearing.

(iii) Document pages must be consecutively numbered and bookmarked or tabbed.

(iv) Document briefs must contain an index with the name of the author of the document, the author's occupation, the date of the document, the tab number and the page number.

(v) The parties are encouraged, but not required, to produce a joint document brief and/or an agreed statement of facts.

(vi) The documents filed by the parties with their application, response or for the case conference will not be part of the evidence at the hearing. Documents that the parties wish to rely on must be resubmitted to be used for the hearing.

(vii) For an oral hearing, the parties shall bring a hard copy of the documents to the hearing for the aid of the hearing adjudicator.

(viii) The hearing adjudicator will be the final decision-making authority regarding the above noted requirements.

PRELIMINARY ISSUE HEARING DETAILS

[36] The parties have already served and filed their written submissions and evidence with the Tribunal. The applicant was provided with an opportunity to file further submissions and declined. **The respondent may serve and file reply submissions by June 12, 2019.**

SUBSTANTIVE ISSUE HEARING DETAILS

[37] The respondent objects to the applicant calling the following as witnesses at the hearing:

a. Dr. Abdal Hakim Mustafa, neurologist;

b. Sharon Murphy, National Specialist for Coseco;

c. Susan Mathew, Unit Specialist for Coseco;

d. Lindsay, an administrator of Focus Assessments; and

e. Lara, an operations manager of Focus Assessments.

(a) Dr. Mustafa

[38] I previously heard submissions from the parties on the applicant's witnesses. I asked the parties to provide the case law and authority in support of their submissions. The applicant submits that there is no property in a witness and that he is entitled to call the Dr. Mustafa, a s.44 insurer's medical examiner ("IE assessor") as his witnesses. He is not seeking to have the respondent make Dr. Mustafa available for cross-examination, but intends to conduct an examination-in-chief of the witness. This means the applicant would be limited to asking questions only set out in the IE assessor's report, unless the applicant met with the IE assessor beforehand. The only way the applicant could cross-examine his own witness is if Dr. Mustafa was declared a hostile witness. The Court of Appeal in *Moore v. Getahun*, 2015 ONCA 55 (CanLII) pointed out that the ethical and professional standards of the legal profession forbid counsel from engaging in practices likely to interfere with the independence and objectivity of expert witnesses.[8] This means the applicant's lawyers are prohibited by ethical concerns from deliberately baiting the applicant's witnesses into being hostile.

[39] The respondent submits that Dr. Mustafa's evidence is not relevant to any of the issues in dispute. I find that the evidence of any medical assessors whose

[8] *Moore v. Getahun*, 2015 ONCA 55 (CanLII),

reports are being relied on by either party is clearly relevant to the issues in dispute. The respondent submits that if the applicant calls an IE assessor as a witness, it will lengthen the hearing and will be a duplication of evidence, which is contrary to the Tribunal's principles of efficiency, proportionality and timeliness to secure the just, most expeditious and cost-effective determination of every proceeding on its merits. However, the evidence of Dr. Mustafa is only going to take about an hour in total, which I find is proportional to the claims made.

(b) and (c)The Respondent's Employees

[40] The applicant submits that the evidence of the respondent's employees is relevant to the claim for a special award. The respondent submits that calling two employees is a duplication of evidence and just adds to the length of the hearing. I agree. The applicant submits that Sharon Murphy and Susan Mathew have different positions and will be able to speak to their own particular responsibilities and the role they played in the adjusting of the applicant's claim. I find that the either of them is in a position to explain the role of the other employee and the role that employee played in the adjusting of the claim, which will also be apparent from the adjuster's notes. Accordingly, the applicant is only entitled to call one of either Sharon Murphy or Susan Mathew.

(d) and (e) Focus Assessments' Employees

[41] The applicant submits that the evidence of the Focus Assessment employees is relevant to the claim of a special award. The respondent submits it is not relevant because Neither Focus Assessments nor its employees play any role in determining what benefits are payable to the applicant or when those benefits are payable. The applicant submits that Focus Assessments plays a role in the delay of benefits because Focus Assessments interfered with when the applicant could provide medical information to the IE assessors. The applicant submits that both employees are necessary because they can describe their role in the IE assessment process.

[42] I agree with the respondent that Focus Assessments is not responsible for the adjusting of the applicant's claims and has no say in what benefits are paid or when. Therefore, I do not find that the roles of either Lara or Lindsay or any difference in their role is relevant to the whether the respondent unreasonably delayed in paying the applicant benefits to which he is entitled. Any delay that Focus Assessment may have played in setting up the IE assessments can be explored through the evidence of the respondent's employee. The applicant's request to call the Focus Assessment's employees as a witness is denied.

[43] The **in-person hearing** shall be limited to the exhibits filed and the testimony of the witnesses listed below. The time allotted for each witness is subject to the discretion of the hearing adjudicator.

(i) The applicant may call the following witnesses and shall make the witnesses available for cross-examination with the following time limits:

Name:	**Examination-in-Chief:**	**Cross-Examination:**	**Redirect:**
The applicant, Mr. Tipping	1 hours	45 minutes	15 minutes
Applicant's spouse Maureen Tipping	1 hour	1 hour	15 minutes
Maria Roth, occupational therapist	45 minutes	45 minutes	15 minutes
Dr. Kumchy, neuropsychologist	45 minutes	45 minutes	15 minutes
Dr. Chandrasena, psychiatrist	30 minutes	45 minutes	15 minutes
Dr. Van Reekum, neuropsychiatrist	45 minutes	1 hour	15 minutes
Ms. Walker, the adjuster	1 hour	30 minutes	15 minutes
Dr. Abdal Hakim Mustafa, neurologist	30 minutes	20 minutes	15 minutes
Either Sharon Murphy, National Specialist for Coseco, or Susan Mathew, Unit Specialist for Coseco	20 minutes	20 minutes	15 minutes

(ii) The respondent may call the following witnesses and shall make the witnesses available for cross-examination with the following time limits:

Name:	Examination-in-Chief:	Cross-Examination:	Redirect:
Service provider if other than the applicant's spouse (respondent to be advised)	45 minutes	30 minutes	15 minutes
Dr. Cho, family physician	1.5 hours	30 minutes	15 minutes
Mara Hunter- Kenyon, treating occupational therapist	45 minutes	30 minutes	15 minutes
Dr. Isreali, treating neurologist	45 minutes	30 minutes	15 minutes

(iii) Opening statements: Each party shall be provided 30 minutes.

(iv) Closing submissions: Each party shall be provided an hour.

[44] The parties are encouraged, but not required to schedule a teleconference between their counsel a week before the hearing to discuss the scheduling of witnesses.

OTHER PROCEDURAL MATTERS

[45] The dates for the submissions on the respondent's preliminary issue motion were rendered as an order to the parties orally by me orally on **June 4, 2019**. The parties acknowledged the receipt of my order and that it took immediate effect. The parties acknowledged that they would not wait for formal release of the order in writing before the order is in force and effect.

[46] Except for the provisions contained in my order, all previous orders made by the Tribunal remain in full force and effect.

[47] If the parties resolve the issues in dispute, the applicant shall immediately advise the Tribunal in writing.

Released: September 23, 2019

Deborah Neilson
Adjudicator