



Licence Appeal Tribunal File Number: 21-001411/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:

Nick Vassos

Applicant

and

Heartland Farm Mutual Inc.

Respondent

MOTION ORDER

VICE CHAIR:

Terry Hunter

APPEARANCES:

For the Applicant:

Slavko Ristich, Counsel

For the Respondent:

Rohan R. Hate, Counsel

**Motion heard by
Teleconference:**

November 14, 2022

BACKGROUND

- [1] The applicant was injured in an automobile accident on **December 18, 2019**, 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 **November 25, 2021** and an order was issued scheduling a five day video conference hearing .
- [4] On October 21, 2020, the respondent requested surveillance of the applicant .
- [5] The surveillance was conducted from November 16, 2020 to November 18, 2020.
- [6] On January 22, 2021, six days prior to the initial psychological insurer examination (IE), the surveillance video was sent to the respondent's psychologist, Dr. Talebizadeh.
- [7] On January 28, 2021 the applicant attended the in-person psychological IE with Dr. Talebizadeh. During the assessment the applicant was shown the surveillance video. Applicant's counsel was not provided a copy of the surveillance video nor were they advised it was to be used at the upcoming IEs.
- [8] On February 4, 2021 the applicant filed his application with the Licence Appeal Tribunal.
- [9] On February 4, 2021, the surveillance evidence was provided to applicant's counsel.

MOTION

- [10] On October 11, 2022, the applicant filed a Notice of Motion requesting that the Tribunal;
 - i. Exclude the existing surveillance video from the hearing.
 - ii. Exclude any report or assessor who relied on the surveillance from the hearing, all evidence used in relation to the surveillance of the applicant, including the Insurer's Examinations be excluded from the hearing.

RESULT

[11] The applicant's motion is denied.

REASONS

- [12] The applicant's position is the respondent waived any privilege it may have had over the surveillance evidence, scheduled IEs without copying applicant's counsel, held on to the surveillance video for months and only sprung it on the applicant at the IE. The respondent's failure to advise and provide the applicant with the surveillance in advance of the IE is a breach they submit of the insurer's duty of good faith.
- [13] The respondent's position is that to exclude the surveillance evidence and the assessors who relied on it would remove the insurer's statutory right to insurer's examinations. I note the respondent has not claimed litigation privilege over the surveillance evidence.
- [14] The question I must answer is whether the respondent's actions in providing the surveillance evidence to its assessors prior to the examination is such a breach of the respondent's obligations that the surveillance evidence and assessors should be excluded. A starting point is section 15.(1) of the *Statutory Powers Procedure Act* R.S.O. 1990, Chapter S.22 which provides a tribunal may admit as evidence any testimony or document or thing relevant to the subject matter of the proceeding.
- [15] There is no provision in the *Statutory Accident Benefits Schedule (SABS)* imposing a duty on the insurer to disclose particulars of surveillance to the applicant. This contrasts with the provisions which do impose a duty of disclosure. For example, section 36(7) of the SABS requires an insurer who has obtained a section 44 report to address entitlement to a specified benefit to provide the report to the insured.
- [16] The applicant has not provided any section of the SABS which would prohibit the introduction of the report. There is nothing in the SABS or caselaw that describes the respondent's actions as unfair or deceptive. Instead, the applicant relies on the Rules of Civil Procedure which require surveillance be disclosed prior to an examination for discovery. As has been stated numerous times in LAT decisions reference to the Rules of Civil Procedure is not helpful as the processes are dissimilar.
- [17] Although I have not excluded the surveillance evidence or the assessors who

received the surveillance evidence if it is to be relied on there is the question of weight to be given to their evidence. The applicant will be in position to address the question of weight if this evidence is relied on by the respondent.

[18] The respondent seeks its cost of the motion. Costs are granted to maximum of \$1,000.00 for a full day. The respondent's cost outline greatly exceeds that amount. Costs are not compensatory but to dissuade conduct. I am not prepared to make an order for costs in the circumstances of this case.

[19] **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

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

Released: November 16, 2022



**Terry Hunter
Vice-Chair**