

**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**



Citation: C.B. vs. Allstate Insurance Company of Canada, 2019 ONLAT 18-009967/AABS

Tribunal File Number: 18-009967/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:

[C.B.]

Applicant

and

Allstate Insurance Company of Canada

Respondent

MOTION DECISION

Decision made by: Cezary Paluch
Date of Order: August 16, 2019
Counsel for the Applicant: Brent McQuestion
Counsel for the Respondent: Ryan Kirshenblatt

Motion Hearing Heard in Writing: August 15, 2019

OVERVIEW:

- [1] The applicant was injured in an automobile accident as a cyclist on June 4, 2016 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] Several case conferences were held in this matter on April 12, 2019, May 17, 2019 and July 30, 2019, before Adjudicator D. Neilson and an in-person hearing was scheduled to commence on September 4, 2019 for eight consecutive days. The main issue¹ in this case is whether the applicant is catastrophically impaired related to a traumatic brain injury. A finding of catastrophic impairment entitles the insured person to claim enhanced accident benefits provided they meet the eligibility criteria.

BACKGROUND:

- [3] Prior to the hearing, on April 24, 2019, the applicant filed a motion requesting: (i) that the future 'evidentiary motion' regarding the admissibility of Dr. Lawrence Tuff's evidence take place prior to the September 4, 2019 hearing; and (ii) that the hearing dates be peremptory on the respondent and the respondent be precluded from obtaining further s. 44 examinations to address the issue in dispute regardless of the outcome of the future evidentiary motion.
- [4] Subsequently, on May 31, 2019, the applicant filed the 'evidentiary motion' requesting: (i) that Dr. Tuff's evidence as it related to the examination that was conducted on September 28, 2017, be inadmissible at the hearing; and (ii) an order that any further s. 44 IE's are not reasonably necessary and that the respondent is precluded from obtaining further IE's on the issues in dispute (the "Applicant's Exclusion Motion").
- [5] On June 3, 2019, the Tribunal ordered that the Applicant's Exclusion Motion to exclude Dr. Tuff's evidence from the hearing be heard in writing on June 26, 2019 with written submissions to be submitted in advance of the hearing. A Notice of Motion Hearing was issued to the parties on June 6, 2019 also confirming the submissions dates of June 3, 17, 24, 2019. However, at that point, the parties then proceeded to another case conference which took place on July 30, 2019.
- [6] At the case conference, on July 30, 2019, it appears that respondent's counsel first realized that their entire responding motion materials (to the Applicant's Exclusion Motion) were not served by the due date of June 17, 2019, and he requested to file the omitted materials at the case conference. The applicant did

¹ The remaining issues are income replacement, attendant care, medical benefits, costs of examinations, award and interest.

not consent. As a result, the case conference adjudicator ordered, on consent of the parties, that the respondent's request for the extension of time to file responding materials (to the Applicant's Exclusion Motion) be heard by the same adjudicator that hears the Applicant's Exclusion Motion with submissions due: July 31, August 1 and 2, 2019.

- [7] As a result, on July 31, 2019, respondent filed their Notice of Motion seeking to extend the time to file its written submission (the "Respondent's Extension Motion"). The applicant filed their responding motion submissions on August 1, 2019, and the respondent filed a two-page reply on August 2, 2019. This was all in accordance with the deadlines in the Order.
- [8] This decision deals with the Respondent's Extension Motion only. I attempted to address the Applicant's Exclusion Motion but am unable to do so, at least at this time, because ultimately the record before me, as far that motion, is not complete and the motion is not ready to proceed. This is because I have allowed the respondent additional time to file their responding materials and in turn the applicant is also entitled to file responding submissions. Once those submissions are served and filed I will be in a position to address the Applicant's Exclusion Motion.

RESULT:

- [9] For the following reasons, the Respondent's Extension Motion is allowed. The respondent is allowed to serve and file their 15-page written submissions by **August 26, 2019**. The applicant is entitled to file further written submissions by **September 4, 2019**.
- [10] Consequently, the hearing dates of September 4-6 and 9-13, 2019 have to be vacated for two reasons: i) to allow for the respondent's submissions and applicant's reply submissions to be filed; and ii) once those are received for the Tribunal to adjudicate upon the Applicant's Exclusion Motion.

POSITION OF THE PARTIES:

- [11] On May 17, 2019, a case conference took place before Adjudicator Neilson who ordered that the applicant's motion to exclude Dr. Tuff's evidence from the hearing be heard in writing on June 26, 2019 with evidence and submissions due as follows: applicant's by June 3, 2019; respondent's by **June 17, 2019**; and reply by June 24, 2019 (the "May Order").²
- [12] The respondent submits that due to inadvertence and an administrative/clerical error on its part of its written submissions were not served or filed with the Tribunal on time. The entire responding materials comprising of three components - i. Written Submissions of 15 pages, ii. Affidavit of C. Chumney,

² See paragraph 10 of Order dated June 3, 2019 and released July 2, 2019.

and iii. Brief containing 13 tabs of documents and case law. However, only the Affidavit and Brief (items ii and iii) were served on June 17, 2019, and not the submission (item i). As well, on June 19, 2019, hard copies were couriered to the applicant on June 19, 2019, which also did not contain the written submissions.

- [13] The respondent explains that the written submissions were prepared and intended to be filed with the Affidavit and Brief on June 17, 2019, and it would be prejudicial if it was denied the opportunity to properly articulate its position due to a technical error. They cite *Rule 3.1* emphasising “effective participation” by all parties in the hearing process.
- [14] The applicant opposes this motion to vary the filing timelines in the Tribunal order and requests that the motion scheduled for June 26, 2019, be adjudicated on the materials as filed, or in the alternative, that the applicant be permitted an opportunity to file further written submissions if the extension is granted. The applicant argues that what is missing in the respondent’s motion materials is when the respondent first discovered that the written submission had not been served. Further noting that the applicant addressed the issue of the respondent’s lack of written responding submissions in the applicant’s reply submissions that were provided on June 24, 2019.

ANALYSIS and REASONS:

- [15] It is clear that the respondent did not fully comply with para.10 of the Tribunal Order dated June 3, 2019, by failing to file its responding submissions. The Order dated June 3, 2019, is clear with respect to the deadline that was missed. Tribunal Court orders should be followed. When they are not followed, there should be consequences. However, in my view, this is not a situation where the respondent entirely failed to comply with a deadline in the order. Again, it is uncontested that two of three components of the responding materials being the Affidavit and Brief were served on time and only the third component was missed.
- [16] It appears that respondent’s counsel only realized this error approximately 44 days later when on July 30, 2019, it finally provided the submissions to the applicant. In this case the missed appeal deadline was through no fault of the insurer respondent but rather their counsel who attributes it to an administrative/clerical error. I accept that based on the record before me. I also accept that respondent’s counsel intended to file the submissions with the other materials and it was inadvertently missed. In these types of situations, it is hoped that counsel can contact each other directly, explain what happened and cooperate amongst themselves to mutually rectify any such mistakes. Cooperation amongst counsel positively leads to efficiency and effectiveness of the Tribunal. Without such cooperation it becomes much more difficult for the Tribunal to function and be efficient. Unfortunately, without laying blame on anyone, it appears that this did not happen here and led this motion.

- [17] A party who has missed the filing deadline has an obligation to move quickly to apply to extend the filing deadline. Here, I accept the respondent counsel's explanation that they believed all three components of the motion materials were served on time and only when they attended the case conference on July 30, 2019, did they realize their error. Subsequently, they moved as quickly and diligently as possible by first asking to file the written submissions at the case conference and when not permitted, only one day later, on July 31, 2019 filing their Notice of Motion.
- [18] Moreover, if I did not allow the respondent to file their submissions in their entirety, what appears to be an inadvertent clerical error, the respondent would not be able to adequately respond to Applicant's Exclusion Motion which requests that a critical report from one of the IE CAT assessors be excluded. This would not be fair and effectively limit the respondent's participation in the motion process. Simply put, the respondent would be denied an opportunity to present their case fully and completely. Written Submissions are clearly relevant and important as they are equivalent to a factum and contain a parties' clear and concise argument on the very issues in dispute with reference to relevant authorities. The Tribunal is also entitled to have the best submissions and evidence reasonably available to arrive at its decision. In my view, the respondent's submissions are likely necessary to the determination of the issues in dispute as part of the applicant's motion.
- [19] As a separate but related matter, although I recognize that the parties agreed that the dates in the Order were made orally and took immediate effect.³ However, I also note that the actual Order itself was not released to the parties until July 2, 2019, some 6 weeks after the May 17, 2019 case conference took place and the respondent did not have the benefit of an issued order before it which may have prompted them to respond much earlier. I do believe that having the actual issued Order and Case Conference Report is very helpful to the parties as it assists them in confirming what took place at the conference as well the time deadlines. In this instance, the length of the delay is not great enough that I can assume any prejudice to the applicant when recognizing that most of the materials were served on time and that the motion has not yet been adjudicated upon.
- [20] The Tribunal is guided by *Rule* 3.1 that provides that the Tribunal *Rules* will be liberally interpreted and applied and may be varied or applied to facilitate "a fair, open and accessible process." In my view, not allowing the respondent to file their submissions would be unfairly disproportionate and not in adherence with a fair hearing process. I note that Applicant's Exclusion Hearing has not yet taken place so there is still time to allow parties to file additional submissions before a decision is rendered. As well, any prejudice to the applicant can be cured by

³ See para. 13.

providing him time to review the submissions and respond by way of further written submissions if he feels it is necessary.

- [21] The applicant also submits that he has exhausted all medical and rehabilitation funding available without a declaration that he has suffered a catastrophic impairment, and that any delay in the proceeding will prejudice the applicant. I am very mindful of that and recognize the importance of moving this matter forward. However, I also recognize that the process how an outcome is reached is also important – it must be patently fair and can not be disregarded in the interest of efficiency. Here, I also note that it is the applicant that has brought the initial motion to exclude evidence which appears to be complex and may take some time and the hearing can not proceed until that motion is dealt with so it is likely that the September 4 hearing would not proceed in any event.
- [22] Therefore, to strike the appropriate balance between fairness and the importance of complying with Tribunal Orders, I will extend the time and allow the applicant to serve and file its written submissions (the same submissions that were already provided to the applicant on July 30, 2019 comprising of 15 pages) subject to the respondent also having an opportunity to file any reply submissions. To address the applicant's concern in para. 46, I also order that submissions be dated and legible.

ORDER:

- [23] For the reasons above, I order that:
- i. the respondent's motion is allowed. The respondent shall serve and file their written submissions by **August 26, 2019**. The applicant is entitled to file further written reply submissions by **September 4, 2019**, if any;
 - ii. the hearing dates of September 4-6 and 9-13, 2019 are vacated;
 - iii. parties are to contact the Tribunal within 15 days of the release of the Applicant's Exclusion motion either to scheduled new hearing dates or a further case conference.
- [24] All remaining terms of the previous Orders remain in full force and effect.

Released: August 23, 2019

Cezary Paluch
Adjudicator