Tribunal File Number: 18-005028/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:

Niall Forde

Applicant

and

Allstate Insurance

Respondent

MOTION DECISION

Order made by:	**Heather Trojek, Vice Chair**
Date of Order:	**January 8, 2019**
For the applicant:	Helen Chiasson, paralegal
For the respondent:	Andrew McKague, counsel

Motion heard via teleconference on December 10, 2018

OVERVIEW

[1] The applicant was injured in an automobile accident on August 11, 2016, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule").*

[2] The applicant was denied entitlement to non-earner benefits, attendant care benefits, and various medical and rehabilitation benefits. The applicant did not agree with the respondent's denial of benefits and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[3] A case conference took place on October 26, 2018. The matter did not resolve. With the consent of the parties, a written hearing was scheduled for December 10, 2018. The parties were directed to exchange all the documents they intended to rely upon at the hearing by November 1, 2018. A timetable for the filing of written submissions and evidence was established with the agreement of the parties.

MOTION

[4] The applicant filed a Notice of Motion dated December 3, 2018 and sought the following relief:

(i) An order permitting the applicant to file four new documents at the hearing. The documents which the applicant seeks to be admitted into evidence are:

a) A disability certificate from the applicant's family doctor dated November 12, 2018 and clinical notes and records ("CNRs") from June 22, 2018 to November 12, 2018;

b) A four paragraph letter/statement from the applicant dated December 1, 2018;

c) A letter from the ASHL Hockey League; and,

d) A letter from the applicant's employer.

[5] The respondent opposes the applicant's motion. The respondent submits it would be procedurally unfair and prejudicial to allow the applicant to submit new documents into evidence because the respondent has already filed its evidence and submissions.

RESULT

[6] The applicant's motion is denied.

ANALYSIS AND REASONS

[7] The applicant argues that he will be prejudiced or unable to make his case to the Tribunal if he is not allowed to submit the four documents in question into evidence. He argues that these documents are crucial to establish his entitlement to non-earner benefits (NEBs).

[8] Rule 9.2 of the Tribunal's *Common Rules of Practice and Procedure* ("*Rules*") require that parties shall disclose the documents they intend to rely upon 10 days prior to the hearing or as otherwise ordered by the Tribunal. In this case, the parties were directed by the Tribunal to exchange the documents they intended to rely upon by November 1, 2018. The applicant filed his motion one month after the deadline to exchange documents and only seven days prior to the hearing. I find that the applicant did not comply with the Tribunal's direction or with the Tribunal's *Rules* regarding the exchange of documents prior to a hearing.

[9] The applicant failed to provide a persuasive or reasonable explanation why the documents he now wishes to file were not provided to the respondent, as directed by the Tribunal. Moreover, the subject accident took place more than two and half years ago. I find that the applicant has had sufficient time to provide the respondent with any documents he believed were relevant to his claim. However, the applicant's lack of a reasonable explanation was not determinative in my decision to dismiss this motion.

[10] The Tribunal's *Rules* should be liberally interpreted. Orders can and should be varied to admit relevant evidence and to ensure a just hearing on the merits of each case. The normal practice of the Tribunal is to vary prior orders to allow relevant documents into evidence. Curing any potential prejudice to the other side is achieved by adjourning the hearing and giving the other party additional time to respond

[11] I reject the Tribunal's customary approach in this case because, on balance, the prejudice, delay, and cost of adjourning the hearing outweighs the evidentiary value of the documents which the applicant requested be submitted into evidence.

[12] Having reviewed the documents, I find that they are either not reliable, not relevant and/or have little or no probative value.

ASHL Hockey League Letter

[13] The applicant states that the letter from the ASHL Hockey League confirms that he was registered in the League but did not play hockey during the 2016/2017 season. The letter states that although the applicant did not play hockey, other people played under the applicant's name. The letter in question is not on ASHL

letterhead and is not signed by an official from the league. The letter is signed by the applicant and by four other individuals. The contact information of these individuals is not provided nor is there any information regarding their relationship to the applicant or their position in the League. I agree with the respondent and find that this letter is not reliable and has no evidentiary value.

Employment letter from ENGIE MultiTech

[14] The applicant argues that the letter from his employer dated December 3, 2018 is relevant because it confirms that his employment does not require physical labour. Contrary to the applicant's submissions, the letter from the applicant's employer states that the applicant commenced his employment on February 27, 2017 and works on a CNC machine. The letter provides no description of what working on a CNC Machine entails or a description of any of the applicant's job functions. Due to the lack of detail contained in the letter, I find it has little evidentiary value. Moreover, the applicant was not employed at the time of the accident so it is not relevant to the test for NEBs, which compares the applicant's activities of daily living ("ADLs") before and after the accident.

Disability Certificate and updated CNRs

[15] The issue to be determined at the hearing is the applicant's initial entitlement to NEBs. In order to be entitled to NEBs an applicant must suffer a complete inability to carry on a normal life as a result of and within 104 weeks of the accident. In order to establish his entitlement to NEBs the applicant confirmed that he submitted the CNRs of his family doctor into evidence. CNRs of family physicians are often the best evidence of what injuries an applicant sustained in the accident. They are also highly probative in terms of the applicant's functionality and activities of daily living before and after the accident.

[16] The disability certificate which the applicant requests be submitted into evidence was written in December 2018, two and a half years after the accident. Given the probative value of CNRs which the applicant has already submitted into evidence, I am not satisfied that the applicant would suffer any significant prejudice with the exclusion of the 2018 disability certificate and the post-June 2018 CNRs from the evidence.

Statement/Letter from the applicant dated December 1, 2018

[17] The applicant's letter is brief and focuses primarily on a workplace injury that the applicant had prior to the accident. It provides minimal information regarding the applicant's ADLs prior to or after the accident. I am not satisfied that the applicant would be prejudiced by not allowing this letter into evidence. The parties confirmed that the respondent filed into evidence any activities of daily living form which the applicant completed following the accident. As with the 2018 disability certificate, I find that the contemporaneous evidence contained in

the ADLs form is the best evidence of the applicant's pre-and-post ADLs.

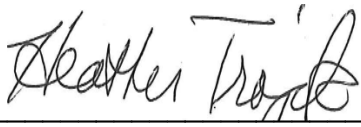
[18] In addition, if the applicant was of the view that his own evidence was crucial to make his case before the Tribunal, he should not have consented to a written hearing. If I were to allow this letter into evidence, it would be prejudicial to the respondent, as it would not have the opportunity to cross-examine the applicant. Allowing the letter to be admitted into evidence would likely result in a second case conference and potentially a change in the format of the hearing. Based on the evidence already filed for the hearing and the lack of relevant evidence contained in the applicant's letter, I find the cost and delay to both parties outweighs any potential prejudice the applicant may sustain by denying its admittance into evidence.

CONCLUSION

[19] I find the four documents which the applicant requests be submitted into evidence are either not relevant, not reliable or have little, if any, probative value. Admitting these documents into evidence would cause unnecessary delay, cost, and potential prejudice to the respondent. These consequences outweigh any potential prejudice that the applicant may suffer as a result of the documents being excluded as evidence in the hearing.

[20] For the reasons noted above, the applicant's motion is dismissed.

Date of Issue: January 8, 2019



Heather Trojek
Vice Chair