

Dear Parties,

**RE: Tribunal File No: 21-002999/AABS
Stephen Adams vs. Economical Mutual Insurance Company**

Please see the attached Motion Order related to your Automobile Accident Benefits Service dispute.

If you have questions regarding the scheduling of a future event, please contact AABSScheduling@ontario.ca

Should you have any other concerns regarding this file, ***please contact Vishal Lall, the assigned Case Management Officer***, or the Tribunal via telephone at **416-326-1356** or via email at LATregistrar@ontario.ca.

Sincerely,

Pamela Austrie (Christian)
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Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis



Licence Appeal Tribunal File Number: 22-002999/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:

Stephen Adams

Applicant

and

Economical Mutual Insurance Company

Respondent

MOTION ORDER

Order made by: Craig Mazerolle, Adjudicator

Date of Order: September 1, 2022

BACKGROUND

- [1] The applicant was injured in an automobile accident on **April 25, 2019**, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “*Schedule*”).
- [2] A case conference is set for January 13, 2023.
- [3] The issues listed in the applicant’s application include: catastrophic impairment determination, an award request, and interest.

NOTICE OF MOTION

- [4] The respondent filed a Notice of Motion (submitted **June 3, 2022**) seeking to compel the applicant to consent to the use of surveillance as part of its insurer’s examinations (“IE”). In the alternative, the respondent asked for an order compelling the applicant to view the surveillance alongside its IE assessors.
- [5] The applicant opposed the motion.
- [6] A motion hearing was held on June 10, 2022.
- [7] For the reasons to follow, I find the applicant has not complied with his obligations under s. 44(9)(2)(ii) for one of the two IEs involving consent forms.

PARTIES’ POSITIONS

- [8] Section 44(9)(2)(ii) requires the insurer and the insured person to provide “such information and documents as are relevant or necessary for the review of the insured person’s medical condition”.
- [9] According to the respondent, the applicant’s failure to provide consent to its occupational therapy and neuropsychology assessors to review its surveillance is a breach of this section. Consent is required by the assessors’ professional colleges, and the respondent submitted that it would be prejudiced if its assessors could not rely on this crucial evidence. What is more, the key issue before the Tribunal is catastrophic impairment, and surveillance is often a highly relevant part of these assessments. In contrast, the applicant will not suffer any prejudice from allowing the assessors to review this evidence.
- [10] The applicant opposed the motion for several reasons. First, the applicant highlighted how there is no reference to surveillance in s. 44(9)(2)(ii), nor, for that matter, in the entire *Schedule*. This absence means that there is no obligation on him to take any steps in relation to this evidence. Further, there is no evidence that the IE assessors asked to view the surveillance, and there is no support for the proposition that surveillance would be relevant to the dispute. For example, the applicant’s claim for catastrophic impairment involves neuropsychological testing, and surveillance cannot assist in determining one’s cognitive capabilities.

Finally, s. 44(9)(2)(ii) requires the exchange of documents with an assessor “not later than five business days before the day scheduled for the examination”. The respondent cannot go back and provide a record retroactively.

ANALYSIS

[11] Section 44(9)(2)(ii) provides the following requirement for in-person IEs:

If the attendance of the insured person is required,

[...]

ii. the insured person and the insurer shall, not later than five business days before the day scheduled for the examination, provide to the person or persons conducting the examination such information and documents as are relevant or necessary for the review of the insured person’s medical condition...

[12] To start, I accept the respondent’s position that surveillance evidence is relevant to the determination of catastrophic impairment involving Criterion 4. Part of this analysis involves determining whether an insured person meets certain measures on the GOSE. This testing involves assessing a person’s level of function—a determination that is assisted by surveillance. Further, even if the occupational therapist is the assessor mainly tasked with assessing the applicant on the GOSE, it is reasonable for all of the IE assessors involved in these assessments to have access to the same evidentiary record, including the neuropsychologist.

[13] I would also add that, while surveillance is not explicitly mentioned in the *Schedule*, it has become a well-accepted part of accident benefits adjusting and adjudication. To find otherwise would upend years of established practice within the Tribunal and the accident benefits system writ large.

[14] By finding the surveillance is relevant, I can then conclude that a completed consent form from the applicant is a document “necessary for the review of the insured person’s medical condition”. Put simply, without a completed consent form, the assessors cannot review this highly relevant document.

[15] The applicant challenged this line of reasoning in several ways, but I do not find his arguments alter my conclusion.

[16] First, the applicant disputed the inclusion of surveillance and the related consent forms as “information and documents” under s. 44(9)(2)(ii). Put simply, legislators could have easily added a reference to surveillance, but—by choosing not to—they demonstrated their intention to leave out this category of evidence. I do not accept this submission. By pairing the open-ended term “information and documents” with the equally broad qualifier “relevant or necessary”, I find the

legislative intent behind this provision was to cast a wide net that would capture a diversity of items. In fact, a restrictive reading of s. 44(9)(2)(ii) would hinder the ability of parties to work together to ensure a comprehensive documentary record was before the IE assessors—an interpretation that would disrupt the collaborative model envisioned by the *Schedule*.

- [17] The applicant then challenged the position that consent is required by the assessors' colleges. When asked to expand on this submission, the applicant added that the colleges' need for consent likely arises from its members receiving requests to consider surveillance as part of IEs. As such, the requests to review surveillance do not come from the assessors themselves, nor does it stem from a specific provision in the *Schedule*.
- [18] I do not accept this argument, and I rather agree with the respondent's position that the fact its IE assessment company required the applicant to complete consent forms is evidence enough that these forms are needed by the IE assessors. Whatever the reason is for requiring these completed forms is, therefore, irrelevant, because it is clear that consent is necessary for the assessors to review this relevant evidence.
- [19] Where I do depart with the respondent's position is the timing of the request for one of these consent forms. Once again, s. 44(9)(2)(ii) requires parties to provide "information and documents" to the assessor at least five business days before the IE. If an insurer does not provide a blank consent form to the insured person at least five business days before the IE, the insured person cannot meet this requirement. I take issue with this situation.
- [20] The timeline required by s. 44(9)(2)(ii) is important for the effective functioning of IEs, as it provides assessors with preparation time prior to meeting with the insured person. This requirement is especially important for surveillance, as the related videos, photographs, social media posts, etc. may be extensive and time-consuming to review. It would also be unreasonable for assessors to use their limited preparation time reviewing potentially voluminous forms of evidence without first knowing that consent has been received to review it.
- [21] There is also an important aspect of consumer protection in requiring at least five business days' notice for the provision of consent. An insured person may have questions about how this surveillance was obtained and how it will be used. These concerns would be especially pertinent if a blank consent form was the first time they learned this evidence even exists. As such, an insured person may need time to speak with their family, doctor, legal representative, etc. to determine whether they will sign the form. This process takes time, so I find sending the consent form less than five business days before the IE is not in line with the consumer protection mandate of the *Schedule*.
- [22] With these concerns in mind, I find the applicant's failure to provide consent in advance of the December 8, 2022 IE with the occupational therapist did not


constitute a breach of s. 44(9)(2)(ii). In this case, the applicant was not told he had to provide a completed consent form until the respondent sent his legal representative an e-mail on December 3, 2020—less than five business days before the IE.

- [23] However, in the case of the neuropsychology IE, I find that the applicant was provided the consent form with sufficient time prior to the IE. The assessment was set for January 12, 2021, and the consent form for this IE was appended to the same December 3, 2020 e-mail that included the form for the occupational therapy IE. The applicant had over five business days to return this form, so I am satisfied that his failure to do so is a breach of s. 44(9)(2)(ii).
- [24] Despite this breach though, I do not find it is necessary to alter the present timetable for this application at the Tribunal. The parties are set to attend a case conference in January 2023, so there is enough time prior to this next adjudicative stage to remedy the parties' deficiencies noted above.
- [25] Due to my findings, it is not necessary to rule on the respondent's alternative relief, i.e., to compel the applicant to view the surveillance with the IE assessors.

ORDER

- [26] The parties shall attend the case conference set for January 13, 2023.
- [27] Except for the provisions contained in this order, all previous orders made by the Tribunal remain in full force and effect.

Released: September 2, 2022



Craig Mazerolle
Adjudicator