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Litigation Privilege, and Whether There is a Duty to Disclose Adverse Expert Medical Reports at WSIAT Proceedings

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The question of whether or not representatives have a duty to disclose adverse expert medical reports at Workplace Safety and Insurance Appeals Tribunal proceedings came up at the Law Society of Upper Canada's *Professionalism for Workers' Compensation Practitioners* continuing legal education program in March 2011. Speakers at the event took different positions on the issue. Worker representatives felt it was their duty to claim litigation privilege over an adverse expert medical report as it was commissioned in contemplation of Tribunal proceedings. They felt that as long as they met their duty to not mislead the Tribunal, there was no duty to disclose the report to either the Tribunal or the other side. Employer representatives saw it differently, and suggested that representatives indeed have a duty to disclose all medical reports regardless of whether or not they are favourable. Judging from the grumble that came from the audience over the issue, many representatives in attendance also took different positions.

There is no surprise that where speakers at the event stood on the issue of disclosure depended on whether they represented workers or employers. Underpinning the question is the perceived practical disadvantage employers have when it comes to having a worker examined by a medical expert for the purposes of obtaining expert medical reports: the worker and their representative will always know about the existence of the report and will request a copy as a result. On the other hand, worker representatives can refer their clients for an examination by a medical expert without the employer representative's knowledge. This means that if the subsequent expert medical report turns out not to be in the worker's favour, there is a possibility that the worker representative will not disclose the report's existence to the employer or to the Tribunal. Since expert medical reports can often be critical to the outcome of a workers' compensation claim, it is no wonder the question of disclosure became such a contested topic at the event.

It should be noted that this perceived advantage or disadvantage only occurs when a worker is *examined* by a medical expert. Under section 59(6) of the *Workplace Safety and Insurance Act, 1997*[1] (the "*Act*"), an employer representative may disclose a worker's personal health information to a medical expert for the purposes of obtaining a report without a worker's consent provided they disclose it "in a form calculated to prevent the information from being identified with a particular worker or case."[2] This

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[1] R.S.O. 1997, c.16 sch. A.

[2] See also section 7.0 of the Tribunal's *Practice Direction: Access to Workers' Information when the Issue in Dispute is at the Tribunal*, which holds that employers seeking to rely on an expert opinion obtained under section 59(6) must a) also provide a copy of the retainer agreement with the expert; and b) that the expert physician must undertake to use the health information only for the purposes of the opinion, must return the health information to

section means that both employer and worker representatives may commission an expert medical report based on paper review only without alerting the other side.

Whether or not there is a duty to disclose an adverse expert medical report has important implications for both employer and worker representatives, and I thought it would be helpful to explore the issue in more detail. In this article I discuss three questions:

1. Can a representative assert litigation privilege over an expert medical report commissioned in contemplation of Tribunal proceedings?
2. Is there a duty to disclose adverse expert medical reports?
3. What if a representative is specifically asked about the existence of any expert medical reports by another representative or the Tribunal?

1. Can a representative assert litigation privilege over an expert medical report commissioned in contemplation of Tribunal proceedings?

Litigation privilege allows representatives (or self-represented parties) to assert privilege over communications they have made with third-parties if the dominant purpose of the communication was to assist them with a contemplated or existing litigation.[3] The justification for the privilege is that it allows representatives in an adversarial context to prepare the evidence for their case without having to disclose how they prepared to the other side.[4]

Tribunal decisions have held that representatives cannot assert litigation privilege over any evidence that was made in contemplation of proceedings at the Tribunal because Tribunal proceedings are in fact not litigation.

The leading Tribunal decision on this point is *Decision No. 844/88I*, where a Tribunal Panel considered the narrow issue of whether or not a worker representative could claim litigation privilege over an expert medical report. The worker had made a claim for entitlement for a hearing loss disability. Quite by accident, the employer found out about the existence of an expert medical report after contacting the leading expert in the field of industrial hearing loss in order to arrange a medical examination of the worker. The expert agreed to conduct the examination, and also informed the employer representative that he had already examined the worker in the recent past at the request of the worker representative and written a report. Having learned about the report's existence, the employer representative then asked the worker representative to disclose the report. However, the worker representative refused claiming that the report was subject to litigation privilege. The employer representative then asked the Tribunal to compel the worker representative to disclose the report.

The Panel considered the worker representative's argument that the expert medical report was subject to litigation privilege. At page 4 they stated that the Tribunal

> is not a forum for resolving disputes of a purely private nature. Although its role is partly adjudicative, it also has broad investigatory powers. The Tribunal operates in the public realm and its decisions have implications not only for the individual claimant but for the compensation system in this province. Its proceedings are not adversarial in nature and do

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the employer after completion, and must refrain from disclosing the health information except in a form calculated to prevent the information from being identified with a particular worker or case.

[3] Alan Bryant, Sidney Lederman & Michelle Fuerst, *The Law of Evidence in Canada*, 3d ed. (Toronto: Buttersworth, 2009) at §14.178 – 14.198.

[4] *Ibid* at §14.178

> not share the characteristics of a lawsuit before the courts. A claimant who appears before the Tribunal is in effect asserting a claim against the Accident Fund. In adjudicating this claim, the Tribunal is entitled, indeed obliged, to take account of all relevant matters. Its proceedings are inquisitorial, rather than adversarial.

The Panel concluded that Tribunal proceedings are not "litigation," and that the Tribunal's process would be impaired if parties were able to claim litigation privilege over relevant documents (page 5). The Panel ordered disclosure of the medical report by the worker representative.

Subsequent Tribunal decisions have followed the reasoning in *Decision No. 844/88I*, and have held that litigation privilege does not attach to medical reports completed for compensation purposes.[5] Presumably, this bar to asserting litigation privilege would extend to any written correspondence a representative may have with a doctor about the feasibility of an appeal.

So, while expert medical reports are communications between representatives and third-parties prepared in contemplation of or during existing Tribunal proceedings, they would not qualify for litigation privilege because Tribunal proceedings are not considered litigation. Representatives therefore cannot claim litigation privilege over adverse expert medical reports at the Tribunal.

2. Is there a duty to disclose the existence of an adverse expert medical report at the Tribunal?

If a representative cannot claim litigation privilege over an adverse medical report once it is requested by the Tribunal or another party, the key question becomes whether or not a representative has any obligation to disclose the existence of an adverse medical report in the first place. The answer to this question may have more important implications for worker representatives who, as discussed earlier, have the advantage of being able to commission expert medical reports based on an examination of the worker without the employer's knowledge.

The Tribunal has the power to determine its own practice and procedure in relation to its proceedings,[6] and disclosure obligations are more flexible than those of a civil or criminal proceeding.[7] Four Tribunal Practice Directions are helpful in determining the scope of a representative's disclosure obligations: *Disclosure, Witnesses, and the Three-Week Rule; Summonses and Production of Documents; Confirmation of Appeal and Hearing Ready Letter,* and *Expert Evidence*.

The Tribunal's *Practice Direction: Disclosure, Witnesses, and the Three-Week Rule* explains the purpose of disclosure under section 2.1. Disclosure practices are intended to give the parties, the Tribunal, and Tribunal adjudicators a chance to:

- understand what the case is about
- prepare for the hearing
- consider if they can resolve the case without the need for a hearing
- prepare documents of the evidence so that the parties and the Vice-Chair or Panel all have the same information for the hearing
- identify other information that may be needed at the hearing. This reduces adjournments and inquiries after the hearing; and

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[5] see *Decision No. 149/89* at page 2; *Decision No. 469/92I* at pages 3-6; and *Decision No. 1319/01I* at paras 12-22.

[6] Section 131 of the *Workplace Safety and Insurance Act, 1997*, R.S.O. 1997, c.16 sch. A.

[7] For more on general disclosure requirements in administrative settings see Andrew Pinto and Nitti Simmonds, *Disclosure Issues in Administrative Proceedings*, Online: Pinto Wray James LLP, http://www.pintowrayjames.com/pdf/Disclosure-Issues-Administrative-Proceedings.pdf.

- prepare for the hearing (e.g. allow enough time for the witnesses to testify).

Section 4.0 of the Tribunal's *Practice Direction: Disclosure, Witnesses, and the Three-Week Rule* provides that parties must disclose all available evidence when they submit their Confirmation of Appeal form to the Tribunal, and must disclose all other evidence to the Tribunal and the other parties no later than three weeks before the hearing date. The section suggests that the parties see the Tribunal's *Practice Direction: Confirmation of Appeal and Hearing Ready Letter* when considering this requirement.

The Tribunal's *Practice Direction: Confirmation of Appeal and Hearing Ready Letter* provides that parties must send any documents they want to use at the hearing with the Confirmation of Appeal form. This is would seem to qualify the "all available evidence" part of section 4.0 of the *Practice Direction: Disclosure, Witnesses, and the Three-Week Rule* to mean all available evidence a party intends to rely on at the hearing.

The Tribunal's *Practice Direction: Summonses and Production of Documents* holds that "when documents are in the control of one of the parties, the parties are required to explore the release and exchange of documents" (section 5.1). If a party requires a summons for the production of certain documents, their request will usually be referred to a Vice-Chair or Panel for instructions (section **5.2).**

The Tribunal's *Practice Direction: Expert Evidence* states that any expert report disclosed by a party must include a) a copy of the report signed by the expert; b) the letter asking for the report, including the questions asked of the expert; and c) the expert's curriculum vitae outlining the expert's education, training, or expertise (section 4.2).

A plain reading of the Tribunal's Practice Directions suggests that there is only a duty for parties to disclose the evidence they *intend to rely on* for the appeal in a timely manner to the Tribunal and to the other parties. Given that a representative would likely not be relying on an expert medical report that goes against their interests, at face value the Tribunal's Practice Directions do not impose a duty to disclose the existence of an adverse expert medical report.

Tribunal decisions support this understanding of the Practice Directions. It is not uncommon for the Tribunal to use its investigative powers under section 132 of the *Act* to determine if there is any additional evidence that would be relevant to an appeal, and in some circumstances to compel a party to produce documents. This can happen in the pre-hearing stages, when Tribunal staff may notice a gap in medical reporting and obtain a worker's consent to collect medical evidence from a physician directly;[8] or in the course of a hearing, where a gap in evidence or a witness' testimony may prompt Tribunal adjudicators to request further evidence post-hearing.[9] Tribunal adjudicators also consider requests by parties for the Tribunal to compel production of certain documents that may be under another party's control.[10]

In Tribunal decisions considering issues of disclosure,[11] there are a number of instances where relevant documents were not disclosed by a representative from the outset. For example, in *Decision No. 469/92I* Tribunal staff obtained an expert medical report commissioned by the worker's representative in contemplation of a civil action when they sent a request to the worker's treating physician and asked the physician to forward his clinical notes on the worker's file to the Tribunal. The Tribunal had obtained the worker's consent through the worker's representative to obtain the notes, however the representative had

[8] See, for example, *Decision No. 469/92I* at pages 2-3.

[9] See, for example, *Decision No. 1113/03II at paras 54-68,* or *Decision No.415/95* at paras 51-53.

[10] See, for example, *Decision No. 1677/04I, Decision No. 1649/97I, Decision No. 930/96I, Decision No. 1076/94I, or Decision No. 202/94I.*

[11] *Ibid.* at notes 8, 9 and 10.

not anticipated that the report would form part of the physician's file and would be disclosed to the Tribunal. The worker representative claimed litigation privilege over the report. The Panel found that litigation privilege does not attach to medical documents at the Tribunal, including documents obtained in contemplation of litigation in a different forum. The Panel admitted the report into evidence. Similarly, in *Decision No. 844/88I* (already discussed earlier), the employer representative found out about the existence of an expert medical report when he coincidentally asked the same expert to write a report as well. Again, the worker representative's claim to litigation privilege over the report was not permitted, and the Panel ordered the worker representative to produce the report.

In these cases, Tribunal adjudicators ordered the production of documents not previously disclosed to the Tribunal or to the other party because the documents were relevant to the appeal. Yet, there was never any discussion of whether or not representatives who had the documents under their control had failed to meet their disclosure obligations. Inadequacy of disclosure was simply not an issue that was discussed in these decisions.

Based on a direct reading of the Tribunal's own Practice Directions, and a review of relevant Tribunal decisions, there does not appear to be an explicit duty for representatives to disclose the existence of adverse expert medical reports to the Tribunal or to other parties at a Tribunal proceeding.

3. What if a representative is specifically asked about the existence of any expert medical reports by another representative or the Tribunal?

While there may be no duty for representatives to voluntarily disclose the existence of an adverse expert medical report, what happens if the representative is specifically asked about the existence of any expert medical reports, including reports commissioned for civil proceedings, by another representative or the Tribunal? The idea here is that representatives could make inquiry into the existence of expert medical reports part of their standard pre-hearing practice when preparing for an appeal.

Representatives at the Tribunal are encouraged to speak with one another about exchanging relevant documents in advance of hearing. As stated above, section 5.1 of the Tribunal's *Practice Direction: Summonses and Production of Documents* holds that "when documents are in the control of one of the parties, the parties are required to explore the release and exchange of documents." Section 5.2 states that if a party requires a summons for the production of certain documents, their request will usually be referred to a Vice-Chair or Panel for instructions.

Representatives also have a duty to be honest with each other and the Tribunal. Under the Tribunal's *Code of Conduct for Representatives*, representatives who appear before the Tribunal (whether licensed by the Law Society of Upper Canada or not) are expected to "honestly represent their clients; they must not knowingly put forward any information known to be untrue, or assist or encourage a party to mislead or misrepresent the facts" (section 2.1). Lawyers subject to the Law Society's *Rules of Professional Conduct* may not knowingly attempt to deceive the Tribunal,[12] and must be courteous, civil, and act in good faith to the Tribunal[13] and with all persons with whom the lawyer has dealings with in the course of his or her practice.[14] Paralegals subject to the Law Society's *Paralegal Rules of Conduct* may not knowingly attempt to deceive the Tribunal,[15] and must be courteous and civil, and shall act in good faith with all persons with whom he or she has dealings in the course of his or her practice.[16] A representative's

[12] Rule 4.01(1)(e).

[13] Rule 4.01(6).

[14] Rule 6.03(1).

[15] Rule 4.01(5)(c).

[16] Rule 2.01(2).

duty to be honest is taken seriously, and representatives who breach the Tribunal's *Code of Conduct for Representatives* may be suspended from appearing at the Tribunal, or referred to the Law Society.[17] Lawyers and Paralegals who breach Law Society rules can be subject to disciplinary proceedings.[18]

This would mean that if a representative is asked whether or not they have any expert medical reports in their control by either another representative or the Tribunal, they would have a duty to answer the question honestly and in good faith. This would allow a representative who would otherwise not know about an adverse medical report's existence to find out about it, and subsequently request disclosure of the report if they think it is relevant.

While the Tribunal's Practice Directions may not impose a duty for representatives to disclose the existence of an adverse medical report, arguably the Practice Directions in conjunction with the Rules of *Professional Conduct/ Paralegal Rules of Conduct* do impose a duty for representatives to be honest about the existence of any medical reports if specifically asked about them. Although a representative is arguably not required to actively go out of their way to inform the Tribunal or the other side about the existence of an adverse medical report, conversely, they cannot actively try to hide a report's existence if asked.

Conclusion: What does this mean for advocates on either side?

As I explained in the introduction, the question of whether representatives at the Tribunal are required to disclose adverse expert medical reports caused quite a stir at the *Professionalism for Workers' Compensation Practitioners* continuing legal education program in March 2011. The divided reaction likely stemmed from the perceived disadvantage employer representatives feel they have as compared to worker representatives, as employers generally have no way of knowing when a worker representative commissions an expert medical report based on an examination of the worker.

What I think the research in this article shows is that any advantages or disadvantages perceived by employer representatives or worker representatives over the disclosure of expert medical reports are actually not as significant as they might seem. Both representatives have the ability to commission an expert medical report based on a paper review of the worker's file without informing each other (so long as the employer representative removes any identifying information from the file, in accordance with section 59(6) of the *Act*). Both representatives have an obligation to provide a truthful answer to each other about the existence of such a report if asked, and cannot claim litigation privilege over the report.

For expert medical reports based on an examination of the worker, while a worker representative may not have a duty to disclose any commissioned reports which turn out not to be in their favour, they also cannot claim litigation privilege over those reports and are obliged to give a truthful answer to the employer representative or the Tribunal of the report's existence if specifically asked. Making these types of inquiries is not difficult for any representative, and seems to resolve the disadvantages an employer representative would otherwise have.

[17] Section 3.0 of the Tribunal's *Code of Conduct for Representatives.*

[18] See *Law Society of Upper Canada v. Irene Mary Kimberley*, 2009 ONLSHP 11 (CanLII) for an example of a case where a lawyer knowingly attempting to deceive a Tribunal.