LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

RECONSIDERATION DECISION

Before: Jesse A. Boyce, Adjudicator

Date: September 18, 2020

File: 17-006475/AABS

Case Name: M.M. and Aviva Insurance Co.

Written Submissions by:

For the Applicant: Victoria Tchilikova

For the Respondent: Ramandeep Pandher

OVERVIEW

[1] This request for reconsideration was filed by the applicant, M.M. It arises out of a decision dated March 18, 2020 in which I found that M.M. was entitled to payment for physiotherapy treatment and dental expenses that were reasonable and necessary as a result of the accident but that she was not entitled to payment for educational expenses or the cost of an accounting report, as they were not reasonable and necessary. In addition, I found that she was not entitled to payment for an income replacement benefit ("IRB") as she had not demonstrated a substantial inability to perform the essential tasks of her pre-accident employment for the period in dispute. M.M.'s request for reconsideration focuses on my IRB determination only. M.M. seeks an order cancelling my initial decision and granting a rehearing of the matter on the IRB issue alone.

RESULT

[2] M.M.'s request for reconsideration is dismissed.

REQUEST

[3] The grounds for a request for reconsideration are contained in Rule 18.2 of the Tribunal's *Common Rules of Practice and Procedure*. A request for reconsideration will not be granted unless one of the following criteria are met:

a) The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness;

b) The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made;

c) The Tribunal heard false evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or

d) There is evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would likely have affected the result.

[4] Here, the basis for M.M.'s reconsideration request falls under Rule 18.2(a), (b) and (c). M.M submits that I acted outside of the Tribunal's jurisdiction, abused the Tribunal's discretionary powers, displayed an apprehension of bias towards her, made significant errors of fact and law, heard false and misleading evidence and violated the rules of natural justice and procedural fairness. The specifics of each

assertion are addressed below. In response, Aviva opposes the request for reconsideration, seeking an order dismissing M.M.'s request.

ANALYSIS

The alleged reconsideration, jurisdiction

[5] M.M. asserts that "the Tribunal acted outside its jurisdiction by failing to exclude [Aviva's] submissions that formed part of reconsideration/rehearing request as such violating natural justice and procedural fairness." As I understand it, M.M. submits that the Tribunal used its discretionary power to grant Aviva "an extension of over 11 months to rehear/reconsider the Adjudicator Norris' Motion Decision without reasonable explanation" and that the Tribunal "used its discretionary power to allow for [Aviva] to have their position reheard/reconsidered with respect to Adjudicator Norris' Motion Decision despite the Tribunal's *Common Rules* regarding reconsideration requests."

[6] As Aviva submits, at no time did it ever request a reconsideration of Adjudicator Norris' preliminary issue decision on whether M.M. should be permitted to proceed with her application. Prior to the written hearing, M.M. did seek an order to exclude Aviva's motion submissions and award her costs, which was then ordered to be heard at the written hearing. At para. 8 of my decision, I considered the motion and determined that:

> [8] While the Tribunal is alive to all of M.M.'s submissions, I decline to grant any of the relief requested by M.M. To ensure a full and fair hearing and to truly understand the context of this dispute, all of the evidence was admitted, considered and, in the grand scheme of the evidence, assigned whatever weight was determined to be reasonable.

Suffice to say, this was not a reconsideration request from Aviva or rehearing of the Tribunal's previous decision. Rather, given the procedural issues that preceded the written hearing, I found it was necessary to include as much information as possible in order to understand the dispute, which I stated at para. 2 of the decision:

> [2] This written hearing was preceded by a preliminary issue decision, a change in applicant's counsel, numerous motions to include and exclude documentation and evidence, two adjournments, a hearing format change, an underlying dispute over

s. 33 compliance and, seemingly, disagreement between the parties over the exact issues in dispute.

On review of my decision, while I disagreed with some of the findings in the preliminary issue decision at para. 13, at no point did the Tribunal grant a reconsideration, did I reconsider the decision, grant an extension of time, a rehearing or place a limitation on the preliminary issue decision, as alleged by M.M. Indeed, para. 13 of my decision starts with the following sentence: "To begin, I cannot interfere with the decision of Adjudicator Norris on the two preliminary issues and the opportunity for Aviva to request reconsideration of that decision has long passed."

Errors of law and fact

[7] M.M. submits that the Tribunal, "despite noting that it accepted all of the [M.M.'s] submissions actually completely ignored the submissions of [M.M.] and applicable law which resulted in the Decision violating the laws of natural justice and procedural fairness." On review, I disagree.

[8] As with all files that come before the Tribunal, all of the submissions, evidence and case law was reviewed. It is well-settled that the Tribunal is not required to refer to every piece of evidence or case before it, however, I do endeavor to reference all of the evidence that materially affects the outcome in my reasons. On review of M.M.'s submissions, I am satisfied that I considered all of the evidence before me, including M.M.'s submissions on case law, and assigned appropriate weight to the evidence I found most persuasive and that led to my determinations at first-instance. I am not persuaded that there were errors of law or fact that would have "significantly affected" the outcome of my IRB determination, as alleged, or that I ignored the submissions of M.M.

False and misleading evidence, bias

[9] M.M. asserts that the Tribunal displayed an apprehension of bias towards her "as there is an appearance of the Tribunal accepting evidence of [Aviva's] despite the [M.M.'s] evidence and submissions showing that [Aviva's] submissions and evidence are false and misleading." As I understand it, M.M. submits that I was misled by Aviva's s. 33 and s. 36 arguments and this fact, combined with her previous allegation that I dismissed her submissions in their entirety, violated the laws of natural justice and procedural fairness. Specifically, M.M. submits that I "displayed an apprehension of bias" towards her in my IRB determination where I favoured the surveillance footage that showed her at her place of employment during the period of time where she claimed she could not work, accurately

referred to her employer as her spouse, “advocated on behalf of Aviva” in considering the addendum report of Dr. Tu that M.M. motioned to exclude, misinterpreted the neurological opinion of Dr. Roussev and “incorrectly attributed [M.M.’s] submissions to seeking payment for [the IRB] report.” On reconsideration, I find no evidence of bias to support M.M.’s submissions.

[10] I agree with Aviva that acceptance of surveillance evidence cannot be construed as a reasonable apprehension of bias. I find this is especially so in difficult IRB cases where there are opposing medical opinions on function. In this matter, I afforded the surveillance evidence considerable weight at paras. 21-23 of the decision because the medical opinions diverged. At para. 21, I found the footage problematic for M.M. because it showed “M.M. at the convenience store servicing customers, moving around, using the register, stocking shelves and driving her vehicle, which contradicts the medical evidence before the Tribunal that she was unable to work.” As the trier of fact, this is not bias, this is my role.

[11] While I agreed with M.M. that surveillance footage does not capture psychological or emotional struggles that someone is facing, on review of para. 22, I find no basis to support an allegation of bias or misleading evidence where I determined that the footage revealed appropriate function for the purposes of the IRB entitlement test under the *Schedule*. The same paragraph also addresses M.M.’s concerns regarding irrelevant reference to her employer/spouse, which, as a fact, I disagree is evidence of any bias on my part or somehow constitutes a privacy issue for either of M.M. or her employer/spouse:

> [22] However, in my view, what the footage does illuminate is M.M.’s seeming ability to do many, if not all, of the routine tasks identified in her resume and what she claims she could not do in her self-reporting to various assessors, like servicing customers, driving, squatting, standing for long periods, *etc*. Further—and perhaps most troubling when it comes to credibility—the surveillance illuminates the fact that M.M. was able to perform these essential tasks on her own, at the earliest, in October 2017, which is three months before she claims she was able to return to work in January 2018 on modified duties and quite early in the 104-week entitlement period. In submissions, M.M. does not offer an explanation as to why or how she was able to work during this period of alleged functional limitation, instead focusing on how the footage does not adequately capture her struggle. The letter from her supervisor/spouse states that she was merely visiting the store and not working. The footage is not particularly damning, but as the trier of fact, I found it difficult

> to reconcile M.M.'s claim that she suffered a substantial inability to perform her essential work tasks as a result of the accident during this period, as either a Manager or Administrative Assistant, with the footage before the Tribunal.

[12] Further, I disagree with M.M.'s allegation that the inclusion and consideration of the addendum report of Dr. Tu constitutes an apprehension of bias or is somehow evidence of the Tribunal advocating on behalf of Aviva. As noted above, I addressed M.M.'s motion to exclude Dr. Tu's evidence and Aviva's submissions on same at para. 8 of my decision, admitting all of the evidence available in order to better understand the issues in dispute. As there was a significant amount of procedural wrangling prior to the written hearing, I found it was reasonable to have as much information and evidence before me as possible. The discretion afforded to an adjudicator to allow more evidence and submissions in order to better ascertain the issues is not an error, evidence of bias or advocacy.

[13] In a similar vein, I disagree that I misinterpreted Dr. Roussev's one-and-a-half-page neurological report, as it was only one piece of medical evidence I considered in a voluminous file and only a single sentence is dedicated to his findings in my decision. In my view, the limited weight I assigned to this report does not constitute error, bias or advocacy on behalf of Aviva, and, in any event, the report did not materially affect the outcome of the IRB determination at first-instance and would not alter the outcome on reconsideration here. While M.M. may disagree with my allocation of weight to evidence that was not favourable to her case, I do not find any indication of bias and no evidence that I was advocating on behalf of Aviva in doing so, an allegation that I find to be quite brazen where I did find in her favour on two of the other issues in dispute.

[14] Finally, with regards to incorrectly addressing the cost of the IRB report in my decision, I find no error or bias. Indeed, although M.M. submits on reconsideration that this was raised as support for her claim for an award under s. 10 of O. Reg. 664, M.M.'s submissions did reference s. 7(4) of the *Schedule*, which governs payment for IRB reports. In any case, I regret any confusion it caused but find it did not materially affect the outcome of my decision.

CONCLUSION

[15] M.M.'s request for reconsideration is dismissed.

Released: September 18, 2020

Jesse A. Boyce, Adjudicator