Tribunals Ontario
Safety, Licensing Appeals and Standards Division

77 Wellesley Street West, Box 250
Toronto ON M7A 1N3
Tel: 1-844-242-0608
Fax: 416-327-6379
Website: www.slasto-tsapno.gov.on.ca

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

77 rue Wellesley Ouest, Boîte no 250
Toronto ON M7A 1N3
Tél. : 1-844-242-0608
Téléc. : 416-327-6379
Site Web : www.slasto-tsapno.gov.on.ca

Ontario

RECONSIDERATION DECISION

Before: Avvy Go, Adjudicator

Date: June 25, 2019

File: 18-001945/AABS

Case Name: N.K. v. Primmum Insurance Company.

Written Submissions By:

For the Applicant: Arash Goneh-Farahani, Paralegal

For the Respondent: Ramandeep Pandher, Counsel

OVERVIEW

[1] This request for reconsideration arises from a decision on February 21, 2019 where the Tribunal found that the applicant, Nagamani Kolli, was not entitled to the non-earner benefits ("NEBs") that were claimed.

FACTS

[2] The applicant was injured in a motor vehicle accident on July 27, 2015, when the vehicle being operated by her husband was rear-ended. No ambulance was called. The applicant sought treatment from her family physician two days after the accident. The applicant reported physical injuries and pain, as well as emotional issues as a result of the accident.

[3] The applicant sought certain benefits pursuant to the Statutory Accident Benefits Schedule – Effective after September 1, 2010 (the "Schedule"), including a claim for Non-Earner Benefits (NEB). After paying the applicant the NEB for a short period, the respondent stopped the payment. The applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal (the "Tribunal").

[4] The Tribunal found the applicant was not entitled to the benefits claimed and, thus, no interest was payable.

[5] The applicant submits that the Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision; and the Tribunal acted outside its jurisdiction or violated the rules of natural justice or procedural fairness.

[6] Specifically, the applicant alleges that:

- The Tribunal erred by failing to appreciate the Applicant's contested submissions on the Minor Injury Guideline (MIG) as the respondent had previously recognized that the applicant was out of the MIG and has paid over the MIG limit to the applicant;
- The Tribunal referred to the s.44 Insurance Examination (IE) reports provided by the respondent to evaluate the issue of MIG; and
- The Tribunal failed to consider the reply submissions of the applicant on the mistaken belief that the reply submissions were not submitted, at no fault of the applicant.

[7] The applicant requests that the decision released February 21, 2019 be varied and an order be granted to review the applicant's reply.

[8] In their response submissions, the respondent seeks to have a portion of the decision reconsidered. Specifically, the respondent seeks:

- An order staying the decision dated February 21, 2019, in full; or
- An order to correct the error in law with respect to the denial date, from January 10, 2018 to March 18, 2016 or March 23, 2016 for the non-earner benefit;
- An order that the applicant is not entitled to the non-earner benefit from March 31, 2016 to date and on-going; and
- An order that the decision with respect to the MIG is revoked/removed from the decision dated February 21, 2019.

[9] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sched. 5, I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

RESULT

[10] Having considered the submissions from the applicant and the respondent, I find that I have made errors of law and fact in the February 21, 2019 decision, and have acted outside the Tribunal's jurisdiction. However, the applicant's request for reconsideration is denied, as the result would have been the same in light of the evidence before me.

[11] The respondent's request that the portion of the decision with respect to the MIG be removed from the decision dated February 21, 2019 is granted.

ANALYSIS

[12] The grounds for a Request for Reconsideration to be allowed are contained in Rule 18 of the Tribunal's Common Rules of Practice and Procedure. A request for reconsideration will not be grated unless one or more of the following criteria are met:

a. The Tribunal acted outside its jurisdiction or violated the rules of natural justice or procedural fairness;

b. The Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision;

c. The Tribunal heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or

d. There is new evidence that could not have reasonably been obtained earlier and would have affected the result.

[13] The applicant submits that Rule 18.2 applies as the Tribunal erred in making the following findings:

Error 1: Uncontested Issue of "MIG"

[14] The applicant submitted that the Tribunal made a significant error of fact by failing to appreciate the applicant's uncontested submissions of the Minor Injury Guideline ("MIG"). The respondent had previously recognized that the applicant was out of the MIG and has paid over the MIG Medical Rehabilitation limit to the applicant.

[15] In their submission, the respondent acknowledged that at the case conference, both parties agreed that MIG was not an issue in dispute at the hearing.

[16] However, the issue of MIG was erroneously included in the Case Conference Report and Order of the Tribunal as an issue in dispute. This error was not brought to the Tribunal's attention by the parties in their submissions for the written hearing, and the applicant in fact made submissions on the MIG issue.

[17] Knowing now that the MIG should not have been included as an issue of dispute, despite the fact that it was included in the Case Conference Order, I agree with the parties that it was an error for me to address an issue that was not a live issue before the Tribunal, and that the Tribunal did not have the jurisdiction to address this issue.

[18] My finding in respect of the MIG is cancelled.

Error 2: Determining the issue of "MIG" from the NEB's s.44 Assessments

[19] The applicant submitted that the Tribunal made a significant error of law by referring to the s.44 Insurance Examination Reports provided by the Respondent to evaluate the issue of MIG.

[20] The applicant also argued that the Tribunal should not have considered the clinical notes and records of her family physician, Dr. Asifa Bawangoanwala, as these were produced in the Case Conference summary but not submitted as part of the written hearing.

[21] As I have already found that I did not have any jurisdiction to determine the issue of MIG, an issue that was included in the Case Conference Order erroneously, I

agree that any finding I have made with respect to the MIG issue should also be cancelled and removed.

Error 3: Breach of Natural Justice/Procedural Fairness – Reply submission

[22] The applicant submitted that the Tribunal made a significant error of law by failing to consider the Reply Submissions of the applicant on the mistaken belief that the reply submissions were not submitted, at no fault of the applicant.

[23] As the applicant has correctly pointed out, my decision of February 21, 2019 was made without the benefit of the applicant's reply submission and I had concluded that the applicant did not submit any reply submission.

[24] Included with the applicant's reconsideration request, was an email exchange between the Tribunal and the parties dated January 11, 2019, in which the Case Management Officer inquired with the parties about their submissions. Counsel for the respondent replied by email dated January 11, 2019, confirming that the applicant's submissions were provided to all parties on September 25, 2018, and that the respondent's reply submissions were provided on October 22, 2018. Finally, the applicant also included an email dated October 22, 2018, attaching her reply submissions and a supporting document.

[25] I did not have the applicant's reply submissions at the time when the written hearing was conducted and when I made my February 21, 2019 decision. It was clearly an error to state that the applicant had not provided any reply submissions when in fact she had. As such, I agree with the applicant that an error was made in this regard.

[26] I will address the effect of this error when I consider the fourth and final error the applicant submitted that the Tribunal has made.

Error 4: The Applicant's Reply Submission – whether the Tribunal would have reached a different conclusion

[27] The applicant's final argument in support of her reconsideration request is that the Tribunal would likely have reached a different conclusion by finding that the Adjudicator was unable to assess the merits of the Applicant's Reply Submission.

[28] I now have the benefit of the applicant's reply submission dated October 22, 2018. The reply submission consisted of 14 paragraphs, all of which were devoted to the issue of procedural fairness, namely, that the applicant was not provided with a clear and unequivocal denial of the NEB as she did not receive any notice of the denial until she received the letter of January 10, 2018. The applicant reiterated her main argument set out in her initial submission, that she did not receive the letters dated March 18, 2016 from the respondent advising her that her NEB payment has been denied and stopped. As with the case of her main submission,

the applicant's reply submission did not address the substantive issue of her entitlement to the NEB based on the merits or her impairment.

[29] The respondent on the other hand, argued that the Adjudicator's consideration of the applicant's reply submissions would not amount to such a "grave error of law or fact" that would necessitate reconsideration because the applicant's reply submissions did not include any new information separate and apart from the initial submissions. The applicant simply reiterated the procedural arguments made in the initial submissions in her reply submissions. The duplicative reply submissions of the applicant, argued the respondent, would not have had any weight with the Adjudicator, as there were no new arguments presented.

[30] In my February 21, 2019 decision, I rejected the respondent's argument that the applicant was notified of the denial of her NEB in March, 2016. Instead, I have decided to give the applicant the benefit of the doubt and found that the applicant was first notified of the denial of NEB on January 10, 2018. My decision in that regard would not have been changed even if I had received and reviewed the applicant's reply submissions at the time of the decision.

[31] The applicant argued then, and continues to argue now, that the January 10, 2018 letter did not constitute an unequivocal termination of her NEB and as such the benefits should be paid to her on an ongoing basis. As I have already found in my decision of February 21, 2019, the letter dated January 10, 2018 did clearly and unequivocally notify the applicant that her application for NEB had been denied based on the IME reports. It also advised the applicant of the last date of the payment of her NEB as well as her right to dispute the respondent's determination. As such, I find there is no breach of procedural fairness.

Respondent's Reconsideration Request

[32] The respondent, on their part, is also asking me to reconsider my decision but for a different reason. They argued that they have enclosed two letters dated March 18, 2016 addressed to the applicant which denied the NEB claim and cited the stoppage of the payment and the date. The respondent argued that I made an error in rejecting the March 18, 2016 letter as a proper notice of denial and denial date since s.64(8) of the Schedule states that a letter sent by regular mail is deemed to have been received by the applicant five days after it was sent. The respondent also submitted that I erred by finding that the respondent did not provide evidence that the letter was received by the applicant. They argue that section 64(18) states that in the absence of evidence to the contrary, a letter sent by regular mail will have been deemed to have been received. Giving the applicant the "benefit of the doubt" was an error in law as it was the applicant that was required to provide evidence that they did not receive the documents as a result of the deeming provision in the Schedule.

[33] Given my finding that no procedural fairness has been breached, and given, as the respondent pointed out, even if the decision was deemed to have been received by the applicant in March, 2016, the applicant was still within the 2 year limitation for the filing of the appeal. I therefore find it unnecessary to reconsider the issue of whether the deeming provision should have applied to this case.

[34] Apart from the procedural fairness issue, the applicant has not made any substantive argument in her reconsideration request with respect to my findings on the merits about her entitlement to the NEB. And as the respondent had noted, notwithstanding my error of addressing the issue of MIG, my February 21, 2019 decision also addressed the fact that the various IME reports do not support a finding that the applicant suffers a complete inability to carry on a normal life as a result of the accident and the applicant has not referred me to any evidence that would suggest otherwise. Indeed, the applicant has not provided any medical records upon which she is relying for her NEB claims. The only argument that the applicant has made and continues to make, is a procedural one.

[35] In view of the insufficient evidence to support her NEB claim and given the presence of the IME reports that support the respondent's denial of the NEB claim, while I find that several errors had been made in the February 21, 2019 decision, the result of the hearing would have been the same. As such, I deny the applicant's request for reconsideration.

CONCLUSION

[36] The applicant's request for the decision released February 21, 2019 be varied is denied.

[37] The respondent's request for an order staying the decision dated February 21, 2019, in full; or an order to correct the error in law with respect to the denial date, from January 10, 2018 to March 18, 2016 or March 23, 2016 for the non-earner benefit is denied.

[38] The respondent's request for an order that the decision with respect to the MIG is revoked/removed from the decision dated February 21, 2019 is granted in part, with the finding of the decision dealing with the MIG issue be removed.

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Avvy Go
Adjudicator
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: June 25, 2019