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Ontario

RECONSIDERATION DECISION

Before:	**Derek Grant**
Date:	**04/03/2020**
Tribunal File Number:	**18-009319/AABS**
Case Name:	**M.K. and Aviva General Insurance**

Written Submissions by:

For the Applicant:	**Kiamehr Yazdani, Counsel**
For the Respondent:	**Jennifer Cosentino, Counsel**

OVERVIEW

[1] On November 22, 2019, the Licence Appeal Tribunal (the "Tribunal") issued its final decision in this matter arising under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). The issues before the Tribunal were M.K.'s entitlement to a non-earner benefit and interest. The Tribunal determined that M.K. was not entitled to the non-earner benefit, and as such, no interest was payable.

[2] M.K. has asked the Tribunal to reconsider that decision.

[3] 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.

RELIEF SOUGHT

[4] M.K. requests that my decision, dated November 22, 2019, be varied to grant her request because the Tribunal violated the rules of procedural fairness and/or made a significant error of law or fact.

RESULT

[5] M.K.'s Request for Reconsideration is dismissed.

BACKGROUND

[6] M.K. was injured in an automobile accident on May 15, 2017 and sought benefits from the respondent ("Aviva") pursuant to the *Schedule*.

[7] In my decision dated November 22, 2019, I concluded that M.K. was not entitled to the non-earner benefit or interest. My decision determined, on the evidence, that M.K. did not suffer a complete inability to carry on a normal life, and was therefore not entitled to the non-earner benefit.

ANALYSIS

[8] To be successful in a request for reconsideration, M.K. must satisfy one of the criteria set out in Rule 18.2 of the Tribunal's *Rules*[1], The criteria are:

[1] All references to a "Rule" are made to the *Licence Appeal Tribunal's Rules of Practice and Procedure, Version I (April 1, 2016).*

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

(ii) 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.

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

(iv) There is new evidence that could not have reasonably been obtained earlier and would likely have affected the result.

[9] M.K. asserts several arguments, including that the Tribunal improperly weighed and/or considered evidence. Aviva submits that M.K. is improperly attempting to "circumvent the process" by relying on new arguments and evidence that could have been submitted at the hearing. Thus, rather than addressing each point of dispute, I will focus on the most important.

Can M.K. rely on new evidence or arguments in this reconsideration?

[10] Rule 18.2(d) is clear that previously available evidence cannot be introduced for the first time on reconsideration. For instance, *16-000066 v Waterloo Regional Municipalities Insurance*, 2017 CanLII 19186 (ON LAT), explained that the "reconsideration process cannot be used to re-litigate matters that should have been addressed in the first instance."

[11] Aviva submits that M.K. is attempting to do exactly that – i.e. introduce new evidence (Dr. Nayeri's records - M.K. reconsideration submissions at Tab 9).

[12] I agree with the respondent that this new evidence and argument is barred by Rule 18.2(d). I see no explanation of why these documents and arguments were not used in the hearing. All of Dr. Nayeri's records submitted by the applicant for this reconsideration predate her September 10, 2019 submissions at the hearing. Thus, when M.K. argues that the Tribunal made a significant error and refers to Dr. Nayeri's clinical notes and records, she relies on evidence that the Tribunal never saw. The Rule does not allow such after the fact evidence or argument.

The Tribunal exercised its discretion regarding the post-accident medical evidence of Dr. Nayeri

[13] M.K. submits that I made an error of law and denied natural justice and procedural fairness because I did not apply the appropriate legal test in reviewing and analyzing the evidence to reach my decision.

[14] In her reconsideration submissions,[2] M.K. states that I did not permit Dr. Nayeri to testify. M.K. submits that:

> *In fact, on the day of the hearing Dr. Nayeri came with his medical records to testify for [the applicant]. Unfortunately, Adjudicator Grant kicked him out from the Hearing Room. We listed Dr. Nayeri as witness in our Case Conference Summary and we discussed this at the Case Conference Hearing*

[15] I agree that I disallowed Dr. Nayeri from giving evidence at the hearing, with the following explaining the sequence of relevant events.

[16] In the Tribunal Order dated March 4, 2019, Adjudicator Corapi noted the list of witnesses that M.K. intended to rely on for the in-person hearing. Dr. Nayeri was not listed as a witness.

[17] At the in-person hearing, Dr. Nayeri appeared with the applicant's medical file, with the intention of being called by the applicant to give evidence. Aviva objected to Dr. Nayeri being called as a witness as this was the first time since the March 4, 2019 case conference that Aviva was aware that Dr. Nayeri would be a witness for M.K.

[18] In support of its objection, Aviva referred to the Case Conference Report and Order of Adjudicator Corapi. Further, Aviva submitted that while it sent M.K.'s representative a letter on September 3, 2019 containing Aviva's witness list and the schedule of their respective evidence, M.K.'s representative did not respond to Aviva's letter. Aviva submits it had no prior notice of M.K.'s intention to call Dr. Nayeri as a witness.

[19] Aviva also objected to the inclusion of Dr. Nayeri's clinical notes and records into evidence. I heard from Aviva first in this respect. Aviva argued that the records had not been produced in accordance with timelines set out in the Case Conference Report and Order or at any time prior to the first day of the hearing. Aviva did not have an opportunity to review Dr. Nayeri's file and it would have been prejudicial to it to allow those records into evidence, along with Dr. Nayeri's oral evidence which would be based on those records.

[20] In response to Aviva's objections, M.K. indicated that Dr. Nayeri was indicated as a witness in the Case Conference Summary. This is not true. The May 2, 2019 Order did not have Dr. Nayeri listed as a witness.

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[2] M.K. reconsideration submissions at page 5.

[21] In its concluding remarks on the objection, Aviva submitted that M.K. had ample opportunity after the release of the Case Conference Report and Order to bring a motion varying the Order. M.K. failed to do so and did not provide any other reasonable explanation as to why notice was not given as to the anticipated evidence of Dr. Nayeri and reliance on the clinical notes and records.

[22] After considering the submissions of Aviva and M.K. regarding Dr. Nayeri, I granted Aviva's objection and disallowed the evidence of Dr. Nayeri.

[23] This does not end the discussion about the applicant's reconsideration argument that I failed to consider post-accident evidence. M.K. states that I erred in not considering the post-accident evidence from Drs. Javanmard and Shaul.

[24] At paragraph 1C(iii)[3] of her reconsideration submissions, M.K. states that "we simply did not call any other medical witnesses as we feared the same event could happen", referring to the exclusion of Dr. Nayeri's testimony and clinical notes and records.

[25] Aviva submits that M.K.'s submission mischaracterizes the chronology of events on the first day of the hearing. The confirmation of witnesses was discussed before the motion with respect to Dr. Nayeri took place. Other than confirming that M.K. and Dr. Nayeri would give evidence on the commencement of day one, the parties agreed that there were no other witnesses that would give testimony. The fact that Dr. Javanmard and Dr. Shaul did not give testimony had nothing to do with the motion that was decided in favour of Aviva. Dr. Javanmard and Dr. Shaul were already listed as witness on the May 2, 2019 Tribunal Order.

[26] For the reasons noted above, I therefore do not accept M.K.'s submissions and find that the Tribunal properly denied the admission of Dr. Nayeri as a late witness, and his medical file as evidence that would prejudice Aviva.

Additional Evidence

[27] M.K. further submits that I further violated the rules of natural justice or procedural fairness because I did not consider particular evidence, specifically, the psychological report and the testimony of M.K.

[28] Although M.K. directed me to the reports of treatment she received, and an assessment of her accident-related psychological impairments, the medical evidence and testimony did not persuade me that M.K. suffered a complete

[3] M.K. reconsideration submissions at page 5.

inability to carry on a normal life, and I subsequently found that she was not entitled to a non-earner benefit.

[29] A review of my decision shows that I considered all relevant factors typically considered in a 'complete inability' analysis. In hearing the merits of M.K.'s claim, I considered and weighed the evidence presented, and applied my findings of fact to the law. In exercising my discretion, I acted within my jurisdiction in determining that M.K. was not entitled to the non-earner benefit as she did not suffer from a complete inability carry on a normal life as a result of the accident. In addition, the Tribunal is not required to expressly address every piece of evidence, argument, or case submitted by a party.

[30] For the reasons discussed above, I find the reasons in the decision to be balanced, reasonable, sufficient, and responsive to the parties' submissions. I find there was no error of law nor was there a violation of the rules of procedural fairness in rendering a decision in this matter.

[31] My decision was based on the totality of the evidence before me. As such, I do not agree that I failed to consider relevant evidence such that a different conclusion would likely have been reached. Further, I do not find that an error of law or fact was made in considering the evidence of the parties. M.K. did not persuade me that she suffered a complete inability to carry on a normal life, and as a result was entitled to a non-earner benefit, which was the onus that was placed on her.

CONCLUSION

[32] For the reasons set out above, M.K.'s request for reconsideration is dismissed.

Released: April 3, 2020

Derek Grant, Adjudicator
Tribunals Ontario- Safety, Licensing Appeals and Standards Division