Citation: [AH] v. Aviva Insurance Canada, 2021 ONLAT 19-004639/AABS - R

RECONSIDERATION DECISION

Before:	Theresa McGee, Vice-Chair
Date of Order:	09/27/2021
Tribunal File Number:	19-004639/AABS
Case Name:	**[AH]** v. Aviva Insurance Canada

Written Submissions by:

For the Applicant:	Kashif Ali, Paralegal
For the Respondent:	Geoffrey Keating, Counsel

OVERVIEW

[1] The applicant requests reconsideration of a decision dated July 14, 2021 (the "decision"). In the decision, the Licence Appeal Tribunal (the "Tribunal") found that the applicant was not entitled to an income replacement benefit or any of the medical benefits sought in his application. The application was dismissed.

[2] The applicant submits that the Tribunal made errors of fact and law such that a different result would have been reached had the errors not been made. He also submits that the Tribunal acted outside its jurisdiction and violated the rules of procedural fairness.

RESULT

[3] The Tribunal erred in fact by finding that the applicant failed to file an OCF-10 (Election of Income Replacement, Non-Earner or Caregiver Benefit Form). However, as the respondent has since conceded its liability under s. 36(6) of the *Schedule* and paid the appropriate penalty, the issue is now moot. No remedial order from the Tribunal is necessary.

[4] The applicant has failed to establish any of the remaining grounds for reconsideration. His request is therefore dismissed.

ANALYSIS

[5] The grounds for a request for reconsideration are contained in Rule 18.2 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)*, as amended (the "*Common Rules*"). A request for reconsideration will not be granted unless one of the following criteria are met:

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 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.

[6] The applicant submits that the Tribunal made the following legal and factual errors:

i. The Tribunal overlooked the OCF-10 (Election of Income Replacement, Non-Earner or Caregiver Benefit Form) that would have entitled him to an income replacement benefit for the period of the respondent's non-compliance with s. 36(6) of the *Schedule*;

ii. That the Tribunal failed to properly analyze the medical evidence;

iii. That the Tribunal exceeded its jurisdiction by allowing the respondent to raise grounds for denying a benefit which it had not previously disclosed; and

iv. That the Tribunal failed to properly apply s. 9(2) of the *Schedule*.

[7] I will address each of the applicant's submissions in turn.

Issue i: Section 36(6) of the Schedule is engaged, but the issue has become moot

[8] During the hearing, the applicant submitted that the respondent failed to request insurer's examinations within 10 business days of receiving his disability certificate as prescribed by s. 36(4) of the *Schedule*. At para. [16] of the decision, the Tribunal held that s. 36(6) of the *Schedule* imposes a clear obligation on an insurer to pay a benefit for any period in which it is non-compliant with s. 36(4). However, the Tribunal concluded at para. [18] of the decision that s. 36(6) was irrelevant in the circumstances because the applicant's claim for a income replacement benefit was deficient: the applicant had, he submitted, not completed an election of benefits because he did not feel that the request to do so was reasonable.

[9] In fact, contrary to the applicant's own submissions, the applicant had filed an OCF-10 (Election of Income Replacement, Non-Earner or Caregiver Benefit Form). And on the last day of the videoconference hearing, the respondent tendered that OCF-10, which it submitted it received from the applicant on or about June 17, 2017.

[10] The Tribunal erred in accepting the applicant's submission that he did not file an OCF-10. It overlooked the evidence tendered by the respondent to the contrary. However, the issue has since become moot and no remedial order from the Tribunal is necessary.

[11] In its responsive submissions to this reconsideration request, the respondent conceded its liability for payment of the income replacement benefit from June 17 to October 30, 2017 when it cured its non-compliance with s. 36. The respondent submits that it has issued payment in the amount of $5,906.79, inclusive of applicable interest, for the period in question.

[12] The applicant submits that the respondent provided no calculation for the $5,906.79 payment. This is incorrect. The respondent tendered an Explanation of Benefits dated August 17, 2021 detailing the rate it used to calculate the payment amount. That document states:

> The IRB payment is based on the following calculation:
>
> > $264.92 per week June 16th to September 7, 2017 = $264.92 x 12 weeks = $3,179.04
> >
> > $198.69 per week September 8th October 30, 2017 = $198.69 x 7.57 weeks = $1,504.08
>
> This totals $4,683.12 plus $1,223.67 which covers the interest to date. The IRB payment covers the period from receipt of the OCF-10 to the date of when the section 44 insurer examinations were to take place. A cheque in the amount of $5,906.79, which will follow separately.
>
> As per the Case Conference Order of Adjudicator Kowal, dated January 10, 2020, the parties had agreed to waive any interest payable from January 14, 2020 to the day before the first day of the hearing. Our interest calculation reflects this.

[13] The weekly amounts paid out by the respondent for this period slightly ***exceed*** the weekly amounts listed in the applicant's own income replacement benefit report. The applicant does not challenge this evidence in his reply submissions. Therefore, I am satisfied that the respondent's payment for the period of June 16 to October 30, 2017 resolves this issue and no further remedial order by the Tribunal is necessary.

[14] Finally, the applicant submits that because he filed an OCF-10, his application for the benefit complied with the *Schedule* and he is entitled to receive an income replacement benefit beyond October 30, 2017. The applicant's submission misapprehends the *Schedule* and the Tribunal's decision. The respondent's liability for the period of June 16 to October 30, 2017 represents a penalty for failing to issue Notices of Examination within the timelines imposed by the

Schedule. As discussed at para. [18] of the decision, s. 36(6) obligates an insurer to pay ***regardless*** of an insured's underlying entitlement to the benefit. Since the Tribunal has determined that the applicant failed to satisfy the disability test for an income replacement benefit, ***there is no underlying entitlement*** and the insurer is not liable to pay anything beyond the period in which it was non-compliant with the notice requirement for insurer's examinations set out in s. 36(4).

[15] For these reasons, the applicant's request for reconsideration on this ground is denied.

Issue ii: The Tribunal appropriately weighed the medical evidence

[16] In his reconsideration submissions, the applicant repeatedly asserts that the Tribunal erred in failing to properly review and analyze the "enormous amount" of medical evidence which, he submits, shows that he was continuously suffering from shoulder pain from the date of the accident onwards. The applicant asserts that the Tribunal failed to review his evidentiary brief despite stating on the hearing record that it would do so.

[17] The applicant's submissions on this point are essentially an attempt to re-argue the position he advanced, unsuccessfully, at the hearing. It is also apparent that the applicant disagrees with the way the Tribunal weighed and assessed the evidence before it. Neither of these are a basis for reconsideration.

[18] The applicant cites numerous documents in the medical records that he submits would have led the Tribunal to a different conclusion had it considered them properly or at all. These records are either:

(i) considered in the decision, contrary to the applicant's submissions;

(ii) supportive of the Tribunal's factual and legal findings; or

(iii) irrelevant and/or unhelpful to the applicant's position for reasons explained in the decision.

[19] In short, nothing in the applicant's submissions constitutes a factual or legal error, and none of the records the applicant cites would have led the Tribunal to a different conclusion. However, because the applicant's allegations call into question the integrity of the Tribunal's process, I find it necessary to directly address the evidence he purports the Tribunal failed to consider.

i. **June 11, 2019 clinical note of Dr. Jing Jin, Athlete's Care**: This clinical note is the first encounter between the applicant and Dr. Jin in the record, to whom the applicant was referred on May 10, 2019 (nearly four years after the accident), by his family physician, Dr. Giancola. The only reference to a motor vehicle accident is in the patient's recorded subjective history. There is no attribution of the applicant's reported shoulder pain to the accident by Dr. Jin. Her assessment notes indicate queries for "Chronic right shoulder pain? OA, SSP partial tear? Bicipital tenosynovitis? SA bursitis?" and order follow-up after imaging. The clinical note does not establish or even suggest a causal connection between the accident and any right shoulder injury; rather, in line with the other medical evidence, it highlights the probability of degenerative causes (such as "OA", or osteoarthritis) for the applicant's shoulder condition.

ii. **June 11, 2019 letter from Dr. Jing Jin to Dr. Giancola**: Following Dr. Jin's assessment of the applicant, she reported that the applicant's "chronic neck, right shoulder, right lower back pain […] started after a motor vehicle accident in 2015." Dr. Jin further comments, "He also presents with right shoulder pain with chronic right shoulder ***pain likely secondary to osteoarthritis and supraspinatus partial tear"*** (emphasis added). The origins of the partial tear are analyzed extensively at paras. 23-30 of the Tribunal's decision and need not be restated here. Suffice to say, this letter reinforces the Tribunal's findings as to the degenerative origins of the applicant's shoulder condition.

iii. **Consult note from Dr. Sebastian Tomescu, orthopedic surgeon, to Dr. Giancola, dated October 20, 2015**: Importantly, this letter makes no mention of shoulder pain in discussion of the applicant's post-accident symptoms. Moreover, the letter states the following: "Often times ***patients with pre-existing arthritis*** with no significant symptoms have an exacerbation of pain after an injury such as a car accident" (emphasis added). This evidence corroborates the Tribunal's findings, made on a balance of probabilities arising from the medical evidence discussed in the decision, about the degenerative origins of the applicant's shoulder complaints.

iv. **X-ray report dated February 28, 2017**: The applicant submits that the Tribunal made no reference to this report in the decision. However, the decision refers to the x-ray imaging report three times, at paras. [25], [27], and [30] of the decision. The x-ray report supports the Tribunal's finding that the accident was not the cause of the applicant's rotator cuff tear,

which arose spontaneously in early 2017 without a history of trauma (see para. [25] of the decision).

The applicant submits the Tribunal erred in concluding that his rotator cuff tear was not related to the accident. He submits that the February 28, 2017 x-ray gave no indication of osteoarthritic changes. This is plainly false. The February 28, 2017 imaging report states, “Bony structures are intact but there is degenerative irregularity at the glenoid margin and at the acromioclavicular joints ***indicative of degenerative osteoarthritis***” (emphasis added). The Tribunal carefully considered this evidence, and it provides strong support for its conclusions.

v. **X-ray of the applicant’s bilateral elbow dated September 18, 2018**: the applicant submits this x-ray indicates issues with his right elbow. It is unclear how this evidence relates to the applicant’s shoulder pain. While the x-ray report refers to the possibility of “remote trauma” as a cause of calcification in the elbow joint, there is nothing in the record linking elbow joint calcification to the shoulder pain which the applicant submits he suffered continuously from the date of the accident. The applicant makes no submissions on any linkage between the elbow calcification and the accident in his reconsideration submissions, nor did he make such submissions in the hearing proper.

vi. **Dr. Giancola’s referral to Athlete’s Care dated February 22, 2017**: the applicant submits that this note makes reference to his shoulder pain. He makes no submissions as to how this evidence would have led the Tribunal to a different conclusion. The referral note refers to right shoulder pain with decreased range of motion “x 2 weeks” which is consistent with the evidence of Dr. Tam and Dr. Giancola, discussed at para. [25] of the decision, that suggests the spontaneous onset of shoulder pain absent a history of trauma. As the Tribunal notes at para. [25], “The onset of shoulder pain and the noted absence of trauma are not consistent with an accident-related injury.”

vii. **Letter from Dr. Tam to Dr. Giancola dated May 12, 2017**: The applicant submits that the Tribunal failed to consider Dr. Tam’s letter which states, “[the applicant] stated he has motor vehicle collision insurance because his shoulder pain is related to a collision.” The applicant submits this is evidence that the accident caused his shoulder injury. I do not accept this submission. The letter documents the applicant’s own report to Dr. Tam as to the causation of his shoulder pain. It is not a medical opinion on

causation In fact, in the same letter Dr. Tam makes a direct reference to the diagnostic imaging findings that the Tribunal cites in support of its finding that the applicant's injuries are likely degenerative, not traumatic, in origin: "imaging has revealed supraspinatus tendinopathy, ***osteoarthritis*** in the acromioclavicular joint, long head of biceps tenosynovitis, and glenohumeral ***osteoarthritis***" (emphasis added).

viii. **March 7, 2017 letter from Dr. Tam to Dr. Giancola**: The applicant submits that the Tribunal overlooked this letter, which he submits supports his position on the causation of his right shoulder pain. It does not. The letter does contain an opinion on causation, though the applicant omits this portion of the letter from the excerpt contained in his reconsideration submissions. That opinion is as follows: "Abul has been experiencing right shoulder pain that is most likely related to right acromioclavicular joint osteoarthritis/effusion and supraspinatus tendinopathy." Osteoarthritis is a degenerative condition. Dr. Tam makes no link between the accident and the applicant's right shoulder condition. The letter supports the Tribunal's findings.

ix. **Clinical note of Dr. Giancola dated May 10, 2019**: This note refers to the applicant's reports of issues with his right shoulder causing difficulty lifting groceries. There is no dispute that the applicant was having right shoulder pain in 2019. The Tribunal was asked to determine the ***causation*** of his right shoulder pain, which it did through thorough and careful analysis in the decision. This clinical note does nothing to contradict or undermine the Tribunal's findings.

x. **Clinical note of Dr. Jing Jin dated July 2, 2019**: The clinical note documents follow-up on the applicant's complaints of right shoulder pain four years after the accident. Dr. Jin refers the applicant to a pain clinic. It is unclear from the applicant's submissions how he considers this note to support of his position. There is no suggestion of a link between the "right SSP partial tear, bicipital tenosynovitis" referenced in the note and accident-related trauma. The Tribunal's findings on the origins of the applicant's shoulder condition are laid out in detail in the decision and are extensively supported by the record. Dr. Jin's July 2, 2019 clinical notes from 2019 are not evidence of accident-related impairment.

xi. **Dr. Giancola's August 12, 2019 referral to a chronic pain clinic**: the applicant refers me to a clinical note of Dr. Giancola that references a referral to a chronic pain clinic. He made no submissions to contextualize

this record at the hearing, and he makes no submissions as to its significance in his request for reconsideration other than to simply list the record. Nevertheless, given that the dispute lies with the causation of the applicant's pain symptomatology, not the fact that the applicant reported pain, the evidence that this referral was made does not alter the outcome of the Tribunal's analysis.

xii. **Therapy received from Physiotherapy Associates from June 21, 2018 to November 5, 2018**: though the applicant submits that the Tribunal ignores these records, they are referred to at para. 29 of the decision in relation to the applicant's knee condition. Dr. Tam's cites the following reasons for her referrals: "right knee OA. Left knee OA" (May 29, 2018 referral form) and "R+L low back pain 2º degenerative changes" (October 5, 2018 referral form). I interpret these notations to refer to osteoarthritis ("OA") and pain secondary to, ("2º"), or resulting from, degenerative changes. The records from Physiotherapy Associates support the Tribunal's conclusions on the causation of the applicant's pain and limitations. The Tribunal properly considered these records in light of the entire evidentiary record.

xiii. **The evidence of Dr. Getahun**: The applicant submits that the Tribunal "completely ignored" the opinions of Dr. Getahun and "believes that the applicant should be left with his accident-related injuries to suffer." The Tribunal dedicated a full paragraph of the decision, para. 30, to the evidence of Dr. Getahun. The Tribunal explained in detail why it gave limited weight to Dr. Getahun's opinions. It is not necessary to repeat that analysis here.

[20] The Tribunal carefully and conscientiously considered the medical evidence tendered by the applicant in this proceeding. The applicant's suggestion that the Tribunal ignored evidence that would have led it to a different conclusion is without merit. The record supports the Tribunal's finding that the applicant's shoulder condition was degenerative in origin and unrelated to the accident. The Tribunal made no error of fact or law in reaching its conclusions.

Issue iii: The Tribunal acted within its jurisdiction

[21] The applicant submits that the Tribunal acted outside its jurisdiction by allowing the respondent to raise his non-attendance at Insurer's Examinations as a basis for its denial of his income replacement benefit report. The applicant submits this was procedurally unfair because the respondent did not cite this reason in its denial letter. The applicant also objects to the respondent making other

arguments at the hearing, such as the income replacement benefit formula being straightforward and not requiring expert analysis, because he was not expecting to have to argue those issues. The applicant then attempts to re-argue his position that the income replacement benefit calculation was not straightforward.

[22] There was no error of jurisdiction and no failure of procedural fairness in the way the Tribunal conducted the hearing. It is open to any insurer to raise non-attendance at Insurer's Examinations as a defence to claims made against it. There is no requirement in the *Schedule* that an insurer disclose its intention to raise this defence prior to a hearing. Similarly, the submissions the respondent made on the reasonableness and necessity of the income replacement benefit report were within its purview to raise.

[23] The applicant had the benefit of closing and reply submissions to address any issues arising from the respondent's submissions. He used his right of reply to make his submissions on the validity of the Notices of Examination and the reasons for his non-attendance. The applicant attempts to raise the very same arguments in his reconsideration submissions. Setting aside that a reconsideration is not simply 'another kick at the can,' it is unclear how the respondent's defence can be characterized as "trial by ambush" as the applicant suggests when, months later, the applicant seeks to advance the very same arguments he raised in reply submissions during the hearing. The Tribunal is not responsible for a party's lack of preparation for arguing the issues in dispute. A defence raised at a hearing is distinct from reasons provided for a denial. The latter is governed by the provisions of the *Schedule*. The applicant has identified no procedural impropriety and no jurisdictional error by the Tribunal.

[24] The applicant submits that the Tribunal's refusal to even look at the calculation prepared by his paralegal "shows that the member had already decided to deny the cost of the report and even the IRB and did not need to know the proper quantum of IRBs."

[25] The applicant's allegation that the Tribunal predetermined this matter calls into question the integrity of the Tribunal's process. It is a serious allegation. It is also an unsubstantiated one. As the Tribunal discusses at para. 41 of the decision, the report at issue failed to properly identify the period in dispute. The Tribunal did not place weight on the calculation the applicant's paralegal prepared because it is not evidence. The applicant's paralegal is not an expert witness in this proceeding. Indeed, an advocate cannot be a witness in the same matter. Submissions are not evidence. It was unhelpful for the applicant's paralegal to

introduce his own calculations in an attempt to rectify the deficiencies with the evidence.

[26] The Tribunal's finding that the report was neither reasonable nor necessary are supported by its analysis at para. 41 of the decision. There is no basis for the applicant's submission that the Tribunal had predetermined this issue or the issue of the income replacement benefit. There is no error of fact or law, and no violation of procedural fairness.

Issue iv: The Tribunal made no error in applying s. 9(2) of the Schedule

[27] The Tribunal referred to the applicant's submission on s. 9(2) of the *Schedule* at para. 13 of the decision. The applicant submits that the Tribunal misapplied this section of the *Schedule*. It did not. The applicant invoked s. 9(2) in support of his position that his employment records were irrelevant to the issues in dispute. As the Tribunal discussed at para. 9 of the decision, employment records would have assisted in clarifying the essential tasks of the applicant's pre-accident employment, a matter central to any analysis of entitlement to an income replacement benefit. The applicant's return to work post-accident relates directly to the issue of his accident-related impairments, and whether they prevented him from working. The records would likely have helped to establish, as the Tribunal noted at para. 10 of the decision, whether the applicant required modified duties, reduced hours, or other workplace accommodations.

[28] The Tribunal did not misapply s. 9(2) of the *Schedule*; it did not apply that section at all. Section 9(2) is simply not engaged in the circumstances of this case. An exemption from deductions for post-accident income only comes into play where there is entitlement to an income replacement benefit in the first place. Since the applicant failed to establish underlying entitlement to an income replacement benefit, no discussion of the exemption under s. 9(2) was called for.

CONCLUSION

[29] The Tribunal erred in overlooking the filing of an OCF-10 (Election of Income Replacement, Non-Earner or Caregiver Benefit Form) by the applicant, but the issue of the respondent's liability under s. 36(6) of the *Schedule* is now moot because it has paid the applicant $5,906.79 to cover its non-compliance with s. 36(4) of the *Schedule*. No remedial order from the Tribunal is necessary.

[30] The applicant has failed to establish any of the remaining grounds for reconsideration and his request for reconsideration is accordingly denied.

_____
Theresa McGee
Vice-Chair
Tribunals Ontario - Licence Appeal Tribunal

Released: September 27, 2021