Citation: Davis v. Aviva General Insurance Company, 2022 ONLAT 20-005334/AABS - R

RECONSIDERATION DECISION

Before:	**Tavlin Kaur**
Licence Appeal Tribunal File Number:	**20-005334/AABS**
Case Name:	**Carrie-Anne Davis v. Aviva General Insurance Company**
Written Submissions by:	
For the Applicant:	Gordon W. Harris, Counsel
For the Respondent:	Geoffrey Keating, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the applicant in this matter.

[2] It arises out of a decision in which the Tribunal found that the applicant was not involved in an accident. In her request, the applicant alleges that the Tribunal made significant errors of law and fact and violated the rules of natural justice and procedural fairness by allowing a preliminary issue hearing to proceed. The respondent requests that the reconsideration be dismissed.

RESULT

[3] The applicant's Request for Reconsideration is dismissed.

ANALYSIS

[4] The grounds for a request for reconsideration to be allowed are contained in Rule 18 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 ("*Rules")*. A request for reconsideration will not be granted unless one or more of the criteria are met. For the purposes of this request, the applicant relies on the following grounds:

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;

[5] Under Rule 18.2, the threshold for reconsideration is high. The reconsideration process is not an opportunity for a party to ask the Tribunal to reweigh or reconsider evidence nor is it an opportunity for a party to re-litigate its position where it disagrees with the decision or where it failed to clearly meet its burden at first instance.

[6] I find that the applicant's request for reconsideration is such a request, and I reject her assertion that the Tribunal made significant errors of law, and that it violated the rules of natural justice and procedural fairness by allowing the motion for the preliminary issue hearing.

Rule 18.2(a): Allowing the notice of motion regarding the preliminary issue hearing

[7] The applicant submitted that the Tribunal violated the rules of natural justice and procedural fairness when it granted the respondent's Notice of Motion for an order setting a preliminary issue hearing. The preliminary issue hearing was regarding whether the applicant was involved in an "accident" as defined in s.3(1) of the *Schedule*. It was submitted that the respondent could have raised the issue of causation as a preliminary issue at the case conference dated March 2, 2021. The applicant stated that "not only did Aviva wait until July 13, 2021, mere weeks before the written hearing, but it altered its initial position on causation from an issue of pre-existing injury to an issue of whether the applicant was even involved in an accident."

[8] The respondent submitted that the applicant did not advance this argument during the course of the preliminary issue hearing. The Tribunal has confirmed that new arguments can be raised at the reconsideration stage only under exceptional circumstances. The respondent stated that "the applicant has not identified what exceptional circumstances exist with respect to the present reconsideration requests. In the event that the Tribunal does permit the argument to be raised, the respondent respectfully submits that it should nonetheless fail. While not explicitly stated, the applicant appears to be arguing that the respondent should be estopped from raising the issue." Moreover, the applicant has failed to explain why the respondent's position that the subject accident does not constitute an accident at four years post date of loss is in any way prejudicial.

[9] In response to the respondent's submissions, the applicant asserted that they did not raise a new argument, and therefore, need not identify any exceptional circumstances. In the alternative, should I find that the applicant is raising a new argument, the applicant argued that the respondent's alleged bad faith conduct constitutes exceptional circumstances.

[10] I find that the Tribunal cannot consider the argument that has been advanced by the applicant. The Tribunal's reconsideration process is not an avenue for advancing new arguments that a party could, but did not make, before the Tribunal during the hearing process. While there may be exceptional circumstances in which a new argument should be permitted on a reconsideration, this is not such a case. In my view, the respondent challenging that the applicant had been involved in an accident as a preliminary issue after the case conference was not indicative of bad faith. The respondent was not precluded from raising this preliminary issue.

[11] Furthermore, I do not see any prejudice to the appellant as the respondent's motion was filed almost seven weeks prior to the hearing date, and the appellant has failed to explain the nature of the prejudice they asserted they suffered. In my view, the timing of the respondent's motion does not constitute bad faith or exceptional circumstances such that it would warrant the Tribunal to consider a new argument on reconsideration. As such, I will not consider this argument.

Rule 18.2(b): Error of law or fact

[12] The applicant submitted that the Tribunal made a significant error of fact or law by failing to properly apply the causation test as set out in *Chisholm v. Liberty Mutual Insurance Group* and *Greenhalgh v. ING-Halifax Insurance Co.* It is alleged that the Tribunal failed to consider the applicant's evidence and apply all the relevant jurisprudence before it. Moreover, it is asserted that the Tribunal failed to thoroughly analyze and apply the "but for" test, as well as the test's sub-considerations established by the jurisprudence cited in the applicant's submissions. Specifically, the applicant stated that:

> The Tribunal erred in finding that causation was not established. The applicant stated that "the Tribunal applied the "but for" test in an overly broad scope, only giving consideration for the "mainstream" jurisprudence such as *K.P. v. Aviva General Insurance, Chisholm, Greenhalgh,* and *Porter*. The applicant acknowledges that these decisions remain prevalent and at the forefront of the causation test, the rest of the jurisprudence must also be considered to ensure that [each] case is decided on its *own* facts and merits and not solely on blindly following the latest insurer and Tribunal trend of perverting the *Schedule* and negating the supreme objective of consumer protection.

[13] The applicant further submitted that the Tribunal failed to consider the jurisprudence that has confirmed that a large and liberal interpretation must be given when interpreting the term "accident" and in applying the causation analysis.

[14] The respondent submitted that the applicant criticizes the Tribunal for only giving consideration to the mainstream jurisprudence, including the *Chisholm*, *Greenhalgh*, and *Porter* decisions. In this regard, the applicant fails to appreciate that the Tribunal is bound by these court issued decisions. It would be a significant error of law for the Tribunal not to have followed them. Furthermore, the applicant also cites decisions of the Tribunal and FSCO. The Tribunal is not bound by its own decisions, nor the decisions of FSCO. The decisions cited

either pre-date *Porter* or do not address a fact scenario involving a slip and fall on an icy surface.

ANALYSIS

[15] The applicant claims that my conclusion was hastily made without sufficient analysis and only brief reasons were provided. It is stated that "while intervening acts and direct cause were appropriately considered, they were not appropriately applied to the factual situation." I disagree. I provided extensive and coherent reasons as to why I was not persuaded by the applicant's position. Paragraphs 25 to 37 of my decision clearly set out my analysis and reasons for not finding in the applicant's favour.

[16] Although I considered other decisions from the Tribunal, I am not bound to follow them and nor did I find them to be persuasive. I am bound by the decisions in *Chisholm, Greenhalgh* and *Porter*. I was quite persuaded by the *Porter* decision as it was directly applicable to this particular set of facts. In her reconsideration submissions, the applicant did not explain why the Tribunal should have departed from the reasoning in *Porter*, which I am bound by. To disregard this decision would have resulted in an error of law.

[17] I am not persuaded by the cases that the applicant has submitted in support of her reconsideration request. They are distinguishable from facts in this case. Moreover, I am not bound by them.

[18] I find that no error of law or fact was made, let alone an error of fact or law such that I would likely have reached a different result. Her submission that I incorrectly applied the causation test is a position that is not supported. There was no error made by the Tribunal in its application of the correct legal test for causation. I applied that test to the facts before me.

[19] The onus is on the applicant to establish her grounds and she has not done so. Dissatisfaction with the result is not a ground of reconsideration. Not accepting the applicant's submissions, evidence or case law at the hearing is not an error of law. Although the applicant may disagree with the Decision, reconsideration is not an opportunity for the applicant to re-argue her position.

ORDER

[20] For the reasons noted above, I dismiss the applicant's request for reconsideration.

Tavlin Kaur
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: August 2, 2022