Citation: Bagla v. TD Ins. Meloche Monnex, 2022 ONLAT 20-004159/AABS-R

RECONSIDERATION DECISION

Before: Jesse A. Boyce, Vice-Chair

Licence Appeal Tribunal File Number: 20-004159/AABS
20-004158/AABS

Case Name: Kailash Bagla and TD Insurance Meloche Monnex

Written Submissions by:

For the Applicant: Stanley Razenberg, Counsel

For the Respondent: Geoffrey L. Keating, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the applicant. It arises out of a preliminary issue decision dated April 29, 2021, in which I found the applicant was statute-barred under s. 56 of the *Schedule* from proceeding with his application, as he failed to present a case to demonstrate that he appealed the denial within the two-year limitation or that the limitation period should otherwise be extended.

[2] A brief recap. The applicant was involved in two separate automobile accidents on March 3, 2014 and May 25, 2015. He sought benefits, including attendant care benefits ("ACBs"), from the respondent, TD Insurance, pursuant to the *Statutory Accident Benefits Schedule* - Effective September 1, 2010 (the "*Schedule*").[1]

[3] With respect to the March 3, 2014 accident, TD Insurance denied the applicant's claim for ACBs via letters dated January 12 and April 17, 2015. The applicant did not file his application with the Tribunal until January 17, 2020. With respect to the May 25, 2015 accident, TD Insurance denied the applicant's claim for ACBs via letter dated April 1, 2016. The applicant filed an application with the Tribunal on or around June 28, 2019.

[4] A case conference was held on November 25, 2020 to address the combined claims. Both parties attended and participated and, notably, the applicant was represented by counsel. An Order dated November 27, 2020 set down a preliminary issue written hearing for March 8, 2021 in order to determine whether the applicant was limitation-barred from disputing entitlement to ACBs in relation to both accidents, due to his failure to dispute the denials within two years, as stipulated by s. 56 of the *Schedule*. A Notice of Written Hearing was sent to the parties on January 25, 2021.

[5] TD Insurance filed its written submissions and evidence by its deadline of February 4, 2021. On February 18, 2021, one day prior to the due date of the applicant's submissions on the preliminary issue, the applicant's counsel notified the Tribunal and TD Insurance via letter that she was no longer representing the applicant. It is unclear when the relationship broke down, but counsel's letter requested that all future correspondence be directed to the applicant personally.

[6] The applicant did not file his written submissions and evidence on February 19, 2021. The Tribunal attempted to contact the applicant for clarity on whether he

[1] O. Reg. 34/10, as amended.

intended to proceed as a self-represented applicant, whether he was seeking new counsel or if he was abandoning his application. The Tribunal's attempts to reach the applicant were unsuccessful and he did not file submissions on the preliminary issue. The Tribunal released its decision on April 29, 2021.

[7] The applicant purportedly only became aware of the decision—as well as his former counsel's lack of submissions on his behalf—several months later. He secured new counsel, who promptly filed a motion for an extension of time to file reconsideration submissions on August 13, 2021.

[8] Motion submissions were heard on September 10, 24 and October 22, 2021. In a motion decision dated December 6, 2021, the Tribunal granted the applicant's request to extend the limitation period to file his reconsideration request under Rule 18. The applicant then filed this reconsideration request on January 6, 2022.

[9] In his request, the applicant submits that he was deprived of his right to participate in a hearing of great significance to his well-being and that the evidence concerning the circumstances surrounding the denial of his ACB claims were not before the Tribunal and it would likely have affected the result. Lastly, with this new evidence, he relies on *Tomec v. Economical,* 2019 ONCA 882*, Applicant v. TD Home and Auto Insurance Company,* 2020 CanLII 30438 (ON LAT) and *Haines v. Aviva,* 2021 CanLII 53157 (ON LAT) to submit that the doctrine of discoverability applies to his claims. He submits that it was an error to statute-bar his claims and, in the alternative, submits that the Tribunal should exercise its discretion under s. 7 of the *Licence Appeal Tribunal Act* to allow him to proceed to a substantive hearing.

[10] In response, TD Insurance submits that the applicant's assertion he was denied procedural fairness is baseless and has been rectified by allowing him to make submissions on reconsideration. Second, it argues that the applicant has not demonstrated how the previously unavailable evidence would have changed the outcome of the decision, which was based on the applicant's failure to dispute his entitlement to ACBs within two years and not on any substantive entitlement that would arise if he were later deemed catastrophically impaired. Finally, TD Insurance asserts that the applicant did not provide rationale to support overturning the Tribunal's refusal to utilize s. 7.

RESULT

[11] The applicant's request for reconsideration is granted.

ANALYSIS

[12] The grounds for a request for reconsideration are contained in Rule 18.2 of the Tribunal's *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017) (as amended*) ("*Common Rules")*. The applicant's request relies on criteria 18.2(a): that the Tribunal's decision breached his procedural right to participation; 18.2(b): that I made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made; and 18.2(d): that there was evidence not before the Tribunal which could not have been previously obtained but which would likely have affected the result.

[13] The test for reconsideration under Rule 18 involves a high threshold. Reconsideration is only warranted in cases where an adjudicator has made a significant legal or evidentiary mistake preventing a just outcome, where false evidence has been admitted, or where genuinely new and undiscoverable evidence comes to light after a hearing.

Procedural fairness includes participatory rights

[14] There is no governing section under the *Common Rules* dictating how long the Tribunal is obligated to wait to receive a party's submissions before rendering a decision. Similarly, there is no guiding principle as to how long the Tribunal should wait to proceed with a hearing where a party has failed to respond to its communications. Here, the Tribunal attempted to contact the applicant and waited over two months before rendering its decision. The Tribunal's Motion Order found that this was procedurally unfair but did not provide insight into what else the Tribunal was supposed to do in the circumstances. It is not a denial of procedural fairness by the Tribunal when it provides a party with the opportunity to participate, and that party fails to participate or respond to its communications.

[15] However, a proceeding is either procedurally fair or it is not. Procedural fairness includes participatory rights to ensure that administrative decisions are made using a fair and open procedure, with an opportunity for those affected by the decision to put forward their views and evidence fully and to have them considered.[2] An applicant should not suffer because of the mistake of their counsel where the Tribunal can rectify that mistake.[3] On review, and on the very unique facts of this case, I agree that through no fault of his own, the applicant was unable to participate at first instance when his previous counsel abandoned

[2] *Baker v. Canada (Minister of Citizenship & Immigration),* 2 S.C.R. 817.
[3] *Medawatte v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2005 FC 1374.

him on the eve of the hearing. Given his age and his subsequent eye surgery, I accept that the applicant was not aware that his previous counsel failed to present a case on his behalf, that he was not aware that the Tribunal was attempting to contact him, and that he only became aware of the Tribunal's decision some three months following its release. These facts are sufficient to meet the criteria for reconsideration under Rule 18.2(a). It would be contrary to the Tribunal's mandate and frustrate access to justice if the Tribunal were to deny the applicant's request on these facts.

***Tomec* applies and the applicant may proceed with his ACB claim at the substantive hearing**

[16] Accordingly, I accept that as a result of the above, the applicant was unable to present his case, as it is clear from my initial decision that I was relying solely on TD Insurance's evidence and submissions to glean an understanding of the dispute, as that was all that was before the Tribunal at the time. This reliance on one party's evidence obviously affected the outcome of the decision, as I did not have the benefit of a full evidentiary record or submissions from the applicant outlining his theory of the case. This was noted at paragraph 10 of the decision.

[17] On reconsideration, I find it was an error to statute-bar the applicant's ACB claims from proceeding, as TD Insurance's denial was unrelated to the accrual of the cause of action, which is the type of absurdity that the *Tomec* Court found should not apply. With submissions and a full evidentiary record before me, I find that TD Insurance pre-emptively denied the applicant's claims for ACBs in 2015 and 2016 and, contrary to my finding at first instance, I find that *Tomec* and the doctrine of discoverability are applicable. At the time of denial, I find that the applicant was either not entitled to the ACBs he now claims, as he was functional and independent with his personal care tasks, or could not have appreciated that his accident-related impairments would get worse over time to the point where he would need them in the future. It is not reasonable to expect insureds who receive a pre-emptive denial to also contest the denial pre-emptively in order to preserve substantive entitlement at some later date in the event they may need the benefit. It is well-settled that the *Schedule* is consumer-protection legislation.

[18] Here, it is my understanding that the applicant is seeking a catastrophic impairment designation at a substantive hearing. If he is deemed so, he will gain access to a higher tier of benefits which includes greater amounts for post-104-week ACBs that he may very well need. If I were to uphold my finding at first instance, the applicant would be unable to claim post-104-week ACBs even if the Tribunal determined that he sustained a catastrophic impairment requiring them,

which is the only way he could access these benefits in the first place. This would be the type of absurdity highlighted by *Tomec* and for which the doctrine of discoverability is meant to apply. Without comment on the applicant's substantive entitlement, I find that my decision at first instance to statute-bar the applicant's ACB claims was an error of law that would have changed the outcome had it not been made. Left to stand, the decision in effect would have cut off the lifeline to an applicant whose claim for post-104-week ACBs was pre-emptively denied prior to his condition deteriorating to the point, many years later, where he may actually require the pre-emptively denied ACBs.[4]

[19] For these reasons, it was an error of law and fact to statute-bar the applicant under s. 56 of the *Schedule* and to not exercise discretion under s. 7 of the *Licence Appeal Tribunal Act* to allow the applicant to proceed in the circumstances. With a full evidentiary record, I find that the applicant had a bona fide intention to appeal, that there is limited prejudice to TD Insurance given the Court's direction in *Tomec* and that, on the substantive issues in dispute, there is obvious merit to the applicant's appeal. Accordingly, the factors weigh in favour of the applicant to grant an extension of time under s. 7.

ORDER

[20] The applicant's request for reconsideration is granted and the preliminary issue decision dated April 29, 2021, is set aside.

[21] The applicant may proceed with his ACB claim at the substantive hearing. The parties are directed to contact the Tribunal to schedule a case conference in order to determine how to proceed.

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Jesse A. Boyce
Vice-Chair
Tribunals Ontario – Licence Appeal Tribunal

Released: April 20, 2022

[4] *See*: *Haines v. Aviva Insurance Company of Canada*, 2021 CanLII 53157 (ON LAT).