Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Maharaj v. Aviva Insurance Canada, 2021 ONLAT 18-008710/AABS

AMENDED RECONSIDERATION DECISION

Before: Cezary Paluch

Date of Order: 09/10/2021

Tribunal File Number: 18-008710/AABS and 18-008717/AABS

Case Name: Maharaj v. Aviva Insurance Canada

Written Submissions by:

For the Applicant: Victoria Tchilikova, Paralegal

For the Respondent: Christina Chiu, Counsel

OVERVIEW

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

[2] It arises out of a decision dated January 19, 2021 (the “Decision”) in which the Tribunal found the applicant was entitled to a non-earner benefit (NEB) of $185.00 per week from February 20, 2018 to March 28, 2019 (up to the two-year mark), and medical benefits in the amount of $2,680.38 and $2,605.32 for physiotherapy services plus interest. The applicant was not entitled to payment in the amount of $1,995.33 for the psychological assessment or an award. Neither party was entitled to costs.

[3] The applicant seeks an order varying the Decision on the following issues in dispute: i) orthopedic assessment, ii) psychological assessment, and iii) NEB ongoing entitlement.

[4] The respondent disagrees and seeks to affirm the Decision.

RESULT

[5] The applicant's request for reconsideration is granted in part. I find that the applicant is entitled to the NEB in the amount of $185.00 per week from February 20, 2018 to March 28, 2019 and thereafter the amount $320.00 per week and ongoing.

[6] The applicant is also entitled to interest on the payment of any overdue benefits, in accordance with s. 51 of the Schedule.

[7] The remainder of the applicant’s request for reconsideration is denied.

BACKGROUND

[8] The applicant was involved in two separate automobile accidents on February 21, 2016 and March 28, 2017. Following each accident, he sought benefits pursuant to Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule")

[9] The applicant was denied certain benefits by the respondent and submitted two applications (18-008717 re 2017 accident and 18-008710 re 2016 accident) to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).

[10] A two day in person hearing was held on March 11 and 12, 2020 which included one day via teleconference on October 20, 2020 to address NEBs and written

submissions to address the balance of the issues being the medical benefits, award, and interest. The 23-page Decision was released on January 19, 2021.

ANALYSIS

[11] The grounds for a request for reconsideration 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 (“*Common Rules*”). A request for reconsideration will not be granted unless one or more of the following criteria are met:

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;

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

d. There is evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party seeking to introduce it and would have affected the result.

[12] In this request for reconsideration, the applicant submits that the Tribunal violated the rules of natural justice and procedural fairness as well as made a significant error of fact and law, acted outside of its jurisdiction, and displayed an apprehension of bias towards the applicant.

[13] A request for reconsideration will not be granted unless one or more of the criteria are met. The onus is on the applicant to prove grounds for Reconsideration.[1]

i) cost of examination in the amount of $2,200.00 for orthopaedic assessment

[14] The Tribunal found that the assessment to which this OCF-18 relates was conducted on January 19, 2018, prior to the submission date of this plan on January 25, 2018 and the applicant was not entitled to this treatment plan by virtue of s. 38(2), subject to certain exceptions, which do not apply.

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[1] *NR v Unifund Assurance Company*, 2020 CarswellOnt 18794 at para 11, tab C of respondent’s reconsideration submissions.

[15] The applicant submits that the Tribunal exhibited bias and mischaracterized the facts, in finding, at paragraph 54 of its decision, that the orthopedic assessment was incurred, and the Tribunal's decision is not supported by the evidence and that the Tribunal failed to look at the complete facts before it.

[16] The applicant has not provided any particulars of bias. The discretion afforded to an adjudicator to accept certain evidence and make a finding of fact, in order to better ascertain the issues is not evidence of bias. The mere fact that the applicant disagrees with the finding is not in itself proof of bias and I find no evidence of bias to support the applicant's submissions.

[17] With respect to the mischaracterization of the evidence relied on by the Tribunal, the factual basis for its finding is clearly laid out in paragraphs 53 and 54 of the decision. Moreover, at paragraphs 1b) and 1c) of the applicant's Reconsideration Submissions, the applicant is advancing an entirely new argument not previously advanced in his written hearing submissions that the assessment conducted on January 19, 2018 is not the orthopedic assessment as per the recommendations of the OCF-18 but an assessment for the purpose of medical evidence to justify the recommendations of the OCF-18. Such assessment was allegedly conducted and enclosed in the "additional comments" of the OCF-18.

[18] I find the applicant's submissions on this issue are largely an attempt to use the reconsideration process as an opportunity to reargue the merits of his case. The Tribunal's Rules do not permit it to reverse or set aside a decision on this ground.

ii) cost of examination in the amount of $1,995.55 for psychological assessment

[19] The Tribunal found that the assessment to which this OCF-18 relates was conducted on September 19, 2017, prior to the submission date of this plan on October 1, 2017 and the applicant was not entitled to this treatment plan by virtue of s. 38(2), subject to certain exceptions, which do not apply.

[20] The applicant again submits that the Tribunal exhibited bias in finding, at paragraph 69 of its decision, that the psychological assessment was incurred; and that the Tribunal's decision is not supported by the evidence; and that the Tribunal failed to look at the complete facts before it.

[21] The applicant again has not provided any particulars of bias. Moreover, with respect to factual basis for the Tribunal's decision, this is clearly set out at paragraphs 68 -70 of the Decision referring to the Application referencing that the date of this examination or report as September 19, 2017. Again, the mere fact that the applicant disagrees with the finding is not in itself proof of bias.

[22] The applicant is again advancing an entirely new argument at paragraphs 2b) and 2c) of his reconsideration submissions that the assessment conducted on September 19, 2017 is not the psychological assessment as per the recommendations of the OCF-18 but an assessment for the purpose of medical evidence to justify the recommendations of the OCF-18. Such assessment was allegedly conducted and enclosed in the "additional comments" of the OCF-18 dated September 19, 2017.

[23] These arguments were not previously advanced in his written hearing submissions. As stated in many Tribunal decisions, the reconsideration process is not an avenue for advancing new arguments that a party could but did not make at the hearing on the merits.

[24] The applicant may not agree or like the Tribunal's decision on this issue; however, the applicant has not proven that a reconsideration should be granted for this issue on any of the enumerated grounds under Rule 18.2.

iii) NEBs

[25] In paragraph 7 of the Decision, I stated:

> …with respect to the amount of weekly NEBs and time period in dispute, the applicant requested $185.00 per week from February 20, 2018 (being the stoppage date) to March 28, 2019 (up to two year mark) and thereafter $320.00 per week from March 29, 2019 and ongoing. However, there is no jurisdiction for me grant any amount past the two years since the $320.00 amount was eliminated with the June 1, 2016 changes to the Schedule. S. 12(3)(c) now states that the insurer is not required to pay a non-earner benefit for more than 104 weeks after the accident. This change applies to accidents after June 1, 2016.

[26] The applicant submits that the Tribunal made a significant error of fact and law when it only ordered the NEBs payable only up to the two-year mark by utilizing the wrong version of the Schedule. The applicant explains that the issue for determination was the NEB on an ongoing basis. Furthermore, that the Order must be amended to reflect post-104 weeks NEB weekly amount of $320.00 per week from March 29, 2019 to date and ongoing.

[27] The applicant explains that although the accident occurred-on March 28, 2017, the applicant parents' insurance policy was entered into on April 7, 2016 (therefore prior to the June 1, 2016 and after September 1, 2010). More

specifically, section 2(1.2) of the Schedule's application and transition rules section states that provisions of section 12, as they read immediately before O. Reg. 251/15 came into force on June 1, 2016, apply in respect of contracts entered into or renewed on or after September 1, 2010 and before June 1, 2016. As such, s. 12(4)(a) as it read immediately before O. Reg. 251/15 came into effect provided that an insurer is not required to pay a NEB for the first 26 weeks after the onset of the complete inability to carry on a normal life. Furthermore, s. 12(3) as it read immediately before O. Reg. 251/15 came into effect on June 1, 2016 provided that after 104 weeks the amount of the NEBs is $320 per week for each week that the insured person suffers a complete inability to carry on a normal life, less the total of all other income replacement assistance, if any, for the same week. As such, the Tribunal erred in making a decision that "change applies to accident after June 1, 2016," in relation to the NEBs.

[28] The respondent did not address this issue in their reconsideration submissions merely stating that the onus is on the applicant and the errors of fact or law must be "significant" such that the "Tribunal would have reached a different decision."

[29] I agree with the applicant that I erred in determining that June 1, 2016 Schedule applies and therefore there was no jurisdiction for me grant any amount past the two-year mark.

[30] I also note that s. 12(1)2 of the Schedule also contains an additional condition to qualify for NEB (the "schooling qualification"):

> i. was enrolled on a full-time basis in elementary, secondary, or post-secondary education at the time of the accident, or
>
> ii. completed his or her education less than one year before the accident and was neither employed nor a self-employed person after completing his or her education and before the accident, in a capacity that reflected his or her education and training.

[31] The applicant has included his parents' policy slip at tab 1 of the reconsideration submission which was not provided as part of the applicant's hearing document brief showing that the policy was entered into on April 7, 2016. This is new evidence and was not provided at the hearing. Again, the onus at the hearing was on the applicant to prove his case including providing proof of policy coverage dates especially when the transition rules were applicable. Rule 18.2(d) of the Rules provides that the Tribunal can consider new evidence where the party can show: (a) the evidence could not have been obtained previously by the

party; and (b) would likely have affected the result. The applicant has not raised this criterion in their reconsideration.

[32] However, there may be exceptional circumstances in which a new evidence should be permitted on a reconsideration, such as where the interests of justice require as much and where the argument can be fully and fairly determined on the basis of the Tribunal's record.[2] I find that this is one of those rare and exceptional circumstances where there was a clear misunderstanding as to when the policy came into effect and correspondingly what Schedule applies and the interests of justice, including fairness, requires that this new evidence be allowed on a reconsideration. To do otherwise would be significantly prejudicial and cause injustice to the applicant as he would be denied ongoing benefits based on an error of fact. I also find that this new evidence would have affected the result and I would have likely come to a different decision on this issue if this evidence was included in the hearing documents.

[33] In this case, the applicant has now provided documented evidence (i.e., policy renewal slip) that the date policy was renewed was April 7, 2016 and prior to the to the June 1, 2016 Schedule changes. The respondent did not object to the renewal date or provide any evidence to the contrary or provide any argument that the prior Schedule applies. Therefore, in accordance with the transition rules in the Schedule, and the policy renewal date, the pre-June 1, 2016 Schedule applies.

[34] With respect to the schooling qualification in s. 12(1)2, the undisputed evidence at the hearing was that the applicant was a student in grade 11 at a secondary school at the time of the first accident (February 21, 2016).[3] The applicant returned to school after one week but did not complete grade 11 in 2016 because of accident related symptoms.[4] With respect to the second accident (March 28, 2017) the Disability Certificate (OCF-3) dated May 9, 2017 completed by D. Mirian, chiropractor, indicates that the applicant was enrolled in an educational program and was not working at the time of the accident.[5] The In Home Occupational Therapy Examination dated June 1, 2018 completed by D. Rogozinsky, OT, indicated that the applicant returned to school taking two courses after the first accident and stopped attending classes in March 2017 after his second accident.[6] This information was also consistent with Dr. D. Rozen's Chronic Pain Report dated April 2, 2019 that stated that shortly before

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[2] *D.S. v. Travelers Insurance*, 2019 CanLII 94018 (ON LAT) at para. 24.
[3] Applicant's Hearing Written Submissions at para. 5.
[4] Dr. Ato Sekyi-Oto Assessment dated December 1, 2016 at page 5.
[5] Applicant's Hearing Document Brief at page 136.
[6] Applicant's Hearing Document Brief at page 90.

the second accident the applicant had returned to school, taking two classes per term, and he was unable to return to classes after the second accident in 2017 and he has been unable to work in any capacity.[7] The applicant also provided detailed school records from Fletcher's Meadow Secondary School and Peel Alterative North confirming that he was enrolled in school at around the time of both accidents with the last entry in June 30, 2017 (Semester 2 Final) being grade 12. Therefore, the applicant was either enrolled in school on a full-time basis at the time of the accident or completed his education less than one year before the accident and was neither employed nor a self-employed person after completing his education.

[35] For completion, I find the error of fact was significant such that I would have reached a different decision by allowing ongoing payments of the NEB in accordance with the applicable Schedule.

CONCLUSION AND ORDER

[36] The request for reconsideration is granted in part.

[37] Based on this new information of a policy slip, an error in fact occurred in the decision and the order is amended to reflect that the entitlement to NEB is $185.00 per week from February 20, 2018 to March 28, 2019 and thereafter the amount $320.00 per week and ongoing

[38] I dismiss the **applicant's** request for reconsideration on all remaining grounds.

Cezary Paluch
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: September **13**, 2021

[7] Applicant's Hearing Document Brief at page 115.