Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2023 CanLII 101111 (ON LAT)

Citation: El-Dayeh v. Aviva General Insurance, 2023 ONLAT 19-006713/AABS - R

RECONSIDERATION DECISION

Before: **Lyndra Griffith, Adjudicator**

Licence Appeal Tribunal File Number: **19-006713/AABS**

Case Name: **Milad El-Dayeh v. Aviva General Insurance**

Written Submissions by:

For the Applicant: Mohamed Elbassiouni, Counsel

For the Respondent: Geoffrey Keating, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the Applicant.

[2] It arises out of a decision dated April 26, 2023 ("decision") and from a hearing held June 6-10, 2022, in which the Tribunal found that the Applicant was entitled to $750.00 for orthotics; Attendant Care Benefits (ACB) in the amount of $3,121.57 (less amounts paid) from June 14, 2021 to August 23, 2022; and interest.

[3] The Applicant submits that the Tribunal:

1. Violated the rules of procedural fairness, and/or erred in law by denying the Applicant's request for an adjournment;

2. Violated the rules of procedural fairness, and/or erred in law as it relates to the admission of new evidence after closing written submissions including:

    i. failing to schedule a motion to consider the Applicant's September 25, 2022 Notice of Motion;

    ii. failing to consider the most recent medical documentation dated May 26, 2022 which supported ACBs for supervisory care and safety concerns;

    iii. relying on the Rule 9.4 of the Tribunal's *Common Rules* as the basis for not considering the new evidence created after the date of the hearing; and

    iv. failing to consider the testimony of Dr. Mohammed El-Saidi, Dr. Fikry, and the Applicant's friend Sam which were consistent with the need for supervisory attendant care benefits;

3. Erred in law when it found that s.42 of the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (the "Schedule")* prevents the Applicant from having a Form 1 and assessment of attendant care needs form submitted to the insurer given that less than 52 weeks had passed since a Form 1 for each party had been submitted without giving the parties a chance to respond or make arguments regarding same; and

4. Erred in law when it failed to set out the new arguments raised in the Applicant's reply submissions and the evidence it found was incorrectly

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summarized both of which were not considered by the Tribunal in the reasons for Decision.

[4] The Applicant is seeking an order varying the Tribunal's decision.

[5] On May 25, 2023, the Tribunal sent a letter to the parties advising them of the timelines for submissions. The Applicant was invited to file reply submissions, if any, limited to 5 pages, exclusive of authorities, by June 28, 2023. The Applicant did not file reply submissions until August 1, 2023, over one month after they were due. The reply submission were also 8 pages, 3 pages over the 5-page limit. The Applicant did not bring a motion to ask the Tribunal to consider untimely submissions over the allowable page limit. I will not consider the Applicant's submissions as the submissions were not timely and were in excess of the limit ordered by the Tribunal.

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RESULT

[6] The Applicant's request for reconsideration is dismissed.

ANALYSIS

[7] The grounds for a request for reconsideration to be allowed are contained in Rule 18 of the *Tribunal's Common Rules of Practice and Procedure* (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 now seeking to introduce it, and would likely have affected the result.

[8] 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.

[9] The grounds that the Applicant argues in this case are found in Rules 18.2(a) and 18.2(b).

The Tribunal did not violate the rules of procedural fairness and/or err in law by failing to grant an adjournment of the hearing

[10] The Applicant relies on the Court of Appeal decision in *Law Society of Upper Canada and Igbinosun*, 2009 ONCA 484, which lists factors to consider when an adjournment of a hearing is requested. The factors include: a) a lack of compliance with prior court orders, b) previous adjournments that have been granted to the applicant, c) previous peremptory hearing dates, d) the desirability of having the matter decided, and e) a finding that the applicant is seeking to manipulate the system by orchestrating delay. The Applicant submits that, in this case, the only *Igbinosun* factor militating against granting the adjournment was a previous adjournment of a case conference held on May 13, 2021 which was adjourned due to the unavailability of counsel.

[11] The applicant further submits that the *Igbinosun* factors in support of the Tribunal granting the Applicant's request for an adjournment include: a) the fact that the consequences of the hearing are serious, b) that the applicant would be prejudiced if the request were not granted, c) and a finding that the applicant was honestly seeking to exercise his right to counsel and had been represented in the proceedings up until the time of the adjournment request. The Applicant submits that the consequences of the hearing are serious in that the Applicant sustained a catastrophic impairment and was assessed by both s.25 and s.44 assessors who found that the Applicant requires attendant care.

[12] Finally, the Applicant argues that had the adjournment been granted, the Respondent would have been afforded the opportunity to "respond to records concerning the Applicant's most recent [sic] which was relevant for the quantum of ACB for the period in dispute as well as his entitlement to ongoing ACB."

[13] I find that the Applicant has failed to prove that there would have been a material difference to the decision had the adjournment been granted as speculation is not grounds for an adjournment. The Applicant has failed to outline how affording the Respondent the opportunity to respond to the Applicant's most recent records would have had any impact on the decision. The Respondent has an obligation to adjust the Applicant's file and reviewed the documents once they were received. The Applicant could have resolved its dispute with the Respondent between the time that the documents were received and the release of the Tribunal's decision. The Respondent did not change its position despite having

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several months to do so and an adjournment would not have changed the outcome of the Tribunal's decision.

[14] Furthermore, it is well-settled that the Tribunal has the power to control its own procedure (s. 25.0.1(a), *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22) and is entitled to deference on matters requiring the exercise of discretion, such as scheduling and adjournment requests (*Riddell v. Huynh*, 2019 ONSC 2620 (Ont. Div. Ct.), at para. 33)).

[15] The respondent did not consent to the adjournment request and this is one factor I considered. In balancing the competing interests before me, I found that the administration of justice, including the timely resolutions of proceedings, outweighed any prejudice or disadvantage to the Applicant in denying the adjournment request. Accordingly, I did not violate the rules of procedural fairness and I find no error in law.

The Tribunal did not violate the rules of procedural fairness and/or err in law by failing to schedule a motion to consider the applicant's September 25, 2022 Notice of Motion

[16] The Applicant argues that the Tribunal violated the rules of procedural fairness and/or erred in law by failing to schedule a motion to consider the Applicant's September 25, 2022 Notice of Motion.

[17] The Applicant submits that neither the FSCO criteria from *Tran* and *Pilot Insurance (*no citations or decision provided) nor the Supreme Court of Canada (SCC) test from *R v. Palmer*, [1980] 1 S.C.R. 759 were considered by the Tribunal in finding that the Applicant's new evidence (the subject of the September 2022 Notice of Motion) could not be considered. The Applicant submits that failure to schedule a motion hearing to allow the parties an opportunity to make submissions in relation to the Applicant's September 2022 Notice of Motion violated the Applicant's right to procedural fairness. The applicant argues that failing to apply either the FSCO criteria from *Tran* and/or the SCC test from *R v. Palmer* in deciding whether the September 2022 evidence was admissible, constitutes an error of law. The Applicant submits that the new evidence could not have been adduced at the hearing, they were credible hospital records, and "would have been expected to affect the result as the 2021 Form 1 did not recommend attendant care for basic supervisory care which would have been reasonable and necessary if the September 2022 new evidence was admitted".

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[18] I do not find the Applicant has met his onus to establish how failing to schedule a motion to consider the applicant's September 25, 2022 Notice of Motion violated the rules of procedural fairness. As the hearing had concluded, it was well within my authority to decline to consider the new evidence pursuant to Rule 9.4 of the Rules. The new medical documentation was in support of basic supervisory care that was recommended in Ms. Donyanaz Afgo Ahmadi's second Form 1. It was not within the Tribunal's jurisdiction to consider this Form 1, as less than 52 weeks had passed since Ms. Ahmadi's prior Form 1. Even if I thought that basic supervisory care would have been reasonable and necessary in the circumstances, I was unable to consider Ms. Ahmadi's second Form 1 due to s.42(12) of the *Schedule.* As I found at paragraph 33, "according to s. 42(12) of the *Schedule*, at the time Ms. Afgo Ahmadi completed her second Form 1, neither party was permitted to submit a further Form 1, as less than 52 weeks had passed since a Form 1 for each party had been submitted and therefore, the applicant was not entitled to submit a new Form 1 until a year after completing the ACBs IE". I did not violate the rules of procedural fairness and I find no error in law, but, even if I would have included the new medical documentation it would not have changed the decision in any way. Rule 18.2(d) and states that when there is evidence that was not before the Tribunal when rendering its decision, the proper recourse is through reconsideration, which the Applicant has done. After reconsideration, the outcome is unchanged for the reasons articulated.

The Tribunal did not violate the rules of procedural fairness and/or err in law by failing to consider medical documents dated May 26, 2022

[19] The Applicant argues that the Tribunal violated the rules of procedural fairness and/or erred in law by failing to consider medical documents dated May 26, 2022.

[20] The Applicant's claims are unfounded and without merit, as at paragraph 9 of my decision I stated that "I allowed all the evidence submitted after the deadline into evidence, including the applicant's most recent medical documentation dated May 26, 2022." I did not violate the rules of procedural fairness and I find no error in law because I considered the evidence submitted by the Applicant in my decision, contrary to his submission.

The Tribunal did not violate the rules of procedural fairness and/or err in law by failing to consider new evidence created after the hearing

[21] The Applicant argues that the Tribunal violated the rules of procedural fairness and/or erred in law by failing to consider new evidence created after the hearing.

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[22] The Applicant submits that Rule 9.4 is not the relevant rule or test for considering whether new evidence should be admitted as Rule 9.4 necessarily contemplates and/or relates to information and records that was/were in existence at the time the production and other deadlines were scheduled for the Licence Appeal Tribunal proceeding.

[23] Although the Applicant has failed to specify what actual documents he is referring to, I assume he is referring to all documents submitted after the hearing. As the Applicant has failed to specifically identify the new evidence that is the grounds for his request for reconsideration, I find the applicant has not established grounds for reconsideration under Rule 18.2(b) or (d).

[24] Furthermore, the ACB in dispute was narrowed by the parties on December 1 and 2, 2022, to be between June 14, 2021 and August 23, 2022. As such, I had all of the relevant information before me to determine the quantum of ACB for this time period. The new evidence the Applicant is likely referring to may have been helpful in determining the quantum for basic supervisory care. As stated above however, having found that Ms. Ahmadi's second Form 1 (which recommended basic supervisory care) could not be considered by the Tribunal, it was not necessary for me to consider new evidence that addressed basic supervisory care. As such, I did not violate the rules of procedural fairness and I find no error in law.

The Tribunal did not violate the rules of procedural fairness and/or err in law with respect to the oral evidence of Dr. El-Saidi, Dr. Fikry, and Sam

[25] The Applicant argues that the Tribunal violated the rules of procedural fairness and/or erred in law by failing to consider the oral evidence of Dr. El-Saidi, Dr. Fikry, and the applicant's friend Sam.

[26] The Applicant submits that his hospitalization on May 27, 2022 falls within the period for which the quantum of ACB was in dispute. He argues his hospitalization and deteriorating condition as testified to by Dr. El-Saidi, Dr. Fikry and the Applicant's friend Sam, were also relevant to the Applicant's entitlement to ongoing ACBs

[27] The Applicant submits that the testimony of Dr. El-Saidi was not mentioned or considered, and the oral evidence of Dr. Fikry at the Applicant's June 2022 hearing, was not mentioned or considered in the Tribunal's decision other than in reference to the clinical notes and records of Dr. Fikry. The applicant argues that the safety issues that arose for the Applicant in 2022 were not mentioned or considered in the Tribunal's decision. He argues that there is no mention of the

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nature of the Applicant’s hospitalizations on or prior to May 26, 2022, no mention of his suicide attempts and/or “overdose” notwithstanding that the Applicant’s witnesses all testifying to the Applicant’s safety issues and need for supervisory attendant care during this time.

[28] Although the evidence of these witnesses was not specifically cited, their evidence was considered by the Tribunal. There is no requirement that the Tribunal must explicitly refer to every piece of evidence or testimony it considers in its decision. The Applicant’s main argument for why he believed these witnesses’ evidence was not considered was in relation to the applicant’s need for basic supervisory care. As stated above, because basic supervisory care was not relevant to the applicable Form 1s in dispute, so there was no need to include the details of their testimony. Accordingly, I did not violate the rules of procedural fairness and I find no error in law.

The Tribunal did not err in law by failing to permit the second form 1 relied upon by the applicant to be submitted into evidence without providing the parties an opportunity to make submissions on the issue.

[29] The Applicant submits that the Tribunal “infringed the Applicant’s procedural fairness rights” by not inviting the parties to make submissions with respect to the admissibility of the second Form 1. The Applicant also argues that by failing to allow the parties to make submissions, the Tribunal violated the essential “rights to be heard”.

[30] The Applicant further submits that the Tribunal decision in *S.M. v Unica Insurance*, 2020 Canlii 12718 (ON LAT), where it is noted at paragraph 24 that, pursuant to s.42(9) of the *Schedule*, “A new Form 1 can be submitted any time there is a change that leads to an increased amount of the benefit”, is consistent with the objectives of the SABS which provides accident benefits such as medical and rehabilitation benefits based on the severity of the insured person’s impairment and extent of functional limitations.

[31] The Applicant argues it is inconsistent with the purpose of the S*chedule* and the ACB to preclude an insured person, whose medical condition has deteriorated, from submitting a new assessment of attendant care needs within the last 52 weeks of the last one being submitted. The Applicant submits that the Tribunal’s interpretation of s.42 of the *Schedule* is inconsistent with the purpose and objective of the Schedule and the attendant care benefit.

[32] Finally, the Applicant submits that had the Tribunal not erred in its interpretation of s.42 of the *Schedule*, Ms. Afgo Ahmadi’s Form 1 dated May 11, 2022 would

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have been considered and supervisory attendant care which was not recommended in either the s.25 or s.44 Form 1s from 2021 would have been considered, affecting the quantum of the Applicant's entitlement to ACB.

[33] I disagree with the applicant's reliance on S.*M. v Unica Insurance* and I find that it is distinguishable from this case, as this decision was overturned on reconsideration and upheld at the Divisional Court (*Malitskiy v. Unica Insurance Inc*., 2021 ONSC 4603 (CanLII)). Specifically at paragraph 46 of *S.M. v Unica Insurance Inc*., 2020 CanLII 61460 (ON LAT) states: "With respect to the new Form-1 submitted by Ms. Chalova on behalf of S.M. in November 2017, I find the Tribunal made two separate findings in the decision dismissing Ms. Chalova's Form-1. First, at para. 25, the Tribunal states that it is "not satisfied that this change is so significant as to warrant consideration of Ms. Chalova's Form-1 contrary to s. 42(12) of the Schedule" because it was submitted within 52 weeks of the initial Form-1 from Ms. Kalp. Further to this point, I agree with Unica that under s. 42(12), it would not have been able to request an additional assessment for 52 weeks and therefore, its adjuster should not be "impugned for abiding by the restrictions" of the Schedule."

[34] Contrary to the Applicant's submissions, the second Form 1 was never excluded from the evidence and was the subject of this dispute. The parties had ample opportunity to make submissions on the applicability of Ms. Afgo Ahmadi's second Form 1 during their closing submissions. At the hearing, the Respondent's counsel put s. 42(12) of the *Schedule* to claims specialist Christine Mansbridge in his redirect. The Respondent's counsel asked Ms. Mansbridge when Ms. Ahmadi's first Form 1 was received by the Respondent and the answer was June 21, 2021. Ms. Mansbridge was then asked to explain what s. 42(12) of the *Schedule* meant, in her experience as a litigation specialist. Ms. Mansbridge stated that it meant that "no further attendant care assessments should be done within 52 weeks after the last Form 1 was done". Following the respondent's redirect, the Applicant's counsel specifically put it to Ms. Mansbridge that she violated s. 42(12) of the *Schedule* by requesting that the applicant attend a further s. 44 assessment for ACBs. Ms. Mansbridge then replied that she sent the Applicant for an addendum because the new Form 1 was still considered new information, and when she receives new information on a file, she presents it to the assessors to review to see whether the new information would change their opinion. She further stated that in good faith it was her obligation that any new information she received was sent to the assessor.

[35] Despite being a live issue at the hearing, the Applicant did not make any submissions on the applicability of s. 42(12) of the *Schedule* in his initial

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submissions. The Respondent on the other hand did address this in its submissions, at paragraph 51, noting the following:

> As the Applicant criticizes the Respondent for not scheduling a further "physical" assessment upon receipt of Ms. Ahmadi's second Form 1. The criticism is also odd given the circumstances. As per section 42(12), at the time Ms. Ahmadi completed her second Form 1, neither party was to submit a further Form 1, as less than 52 weeks had passed since a Form 1 for each party had been submitted. The Applicant opted to ignore the requirements of section 42(12). This put the Respondent in a difficult position. On one hand, it had a duty to treat the Applicant in good faith. On the other, any meaningful attempt to address the Form 1 would run contrary to section 42(12). Given the situation, and particularly the Applicant's non-compliance with section 42(12), it does not appear appropriate for the Applicant to now level criticisms at the Respondent for how it responded to the issue. The Respondent simply attempted to address a difficult situation to the best of its ability.

[36] The Applicant made submissions with respect to s. 42(12) *Schedule* at paragraph 99-101 of his reply submissions. The relevant paragraphs state:

> The Respondent failed to acknowledge as part of its submissions in paragraph 51 that not only did the Respondent fail to comply with s.44 in terms of providing relevant medical records to its assessors for its s.44 assessment (which includes the paper review), its position mischaracterizes or misunderstands the requirements of s.42(12) which must be read in conjunction with s. 42(9) and s. 42(10).
>
> Moreover, if no s.44 could have been conducted because it was within 52 weeks of a prior attendant care assessment, that means that the Respondent was not entitled to conduct a paper review which according to s.44 is still an insurer examination.
>
> In response to the Respondent's submissions in paragraph 52, the Applicant submits that it doesn't matter whether the Respondent's assessor's opinion remained unchanged. The SABS requires that when there is a request for a change in the amount/entitlement to attendant care, a new form 1 is required. Moreover, it was Ms. Mansbridge's evidence that she requested

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and expected Mr. Campos to complete a new form 1 in response to the Applicant's second Form 1."

[37] It is clear from the Applicant's questioning of the Respondent's witness, as well as the submissions made in his reply submissions, he was aware that s. 42(12) of the *Schedule* was a live issue at the hearing. Both parties were afforded the opportunity to make submissions on this issue. Section 42(9) clearly states that it is "Subject to subsection (12)" and therefore must be read in conjunction with s.42(12). As previously stated, even if I thought that basic supervisory care would have been reasonable and necessary in the circumstances, I was unable to consider Ms. Ahmadi's second Form 1 due to s. 42(12) of the *Schedule*, as stated at para 33 of my decision. While the applicant may disagree with the legislature's intention, I find no error in law in my application.

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The Tribunal did not err in law by failing to set out the new arguments raised in the applicant's reply submissions and evidence that it did not consider on the basis that the new arguments/evidence had been incorrectly summarized

[38] The Applicant submits that the Tribunal did not state which arguments in the Applicant's reply submissions it did not consider because it found that the arguments were new, not the proper subject of reply, or facts were inaccurately stated. The Applicant submits that it is an error of law to provide reasons for a decision which do not allow the parties and a reviewing court to understand how the Tribunal made its findings.

[39] Paragraph 13 of the decision states "I did not consider the parts of the evidence that were inaccurately summarized in the applicant's submissions, nor did I consider the new arguments raised by the applicant for the first time in reply. The hearing was 5 days in length, the applicant's closing submissions were 52 pages in length and his reply submissions were 26 pages in length."

[40] The respondent contacted the Tribunal by email on July 18, 2022 to submit that the Applicant's reply submissions contained new arguments at the following paragraphs: 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 32, 58, 63, 65, 66, 67, 68, 69, 70, 72, 73 (both paragraphs marked 73), 74 (both paragraphs marked 74), 75, 76, 77, 78, 80 (both paragraphs marked 80), 79, 92, 97, 98, 99, 100, 101, 102 and 105. The Respondent further submitted that the Applicant provided incorrect citations of the evidence at the following paragraphs: 27, 39, 44, 49, 51, 52 and 81.

[41] The purpose of the closing submissions was to allow the parties to summarize the evidence in support or their positions. The Tribunal is not required to refer to

every submission made by a party. I was presented with the relevant evidence at the hearing and although closing submission may be helpful to a decision maker, ultimately the evidence is what is persuasive. The Applicant's submissions and reply submissions were lengthy. It is not the best use of the Tribunals resources to address every point that each party makes in closing submissions, as to address every issue would be a burdensome task. The issues in dispute were fairly narrow in proportion to the length of the closing submissions from the Applicant, and I did not see the utility in addressing all of the Respondent's objections to the Applicant's reply submissions in detail. My decision focused on the material facts, evidence, and issues. Therefore, I find no error in law.

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CONCLUSION

[42] The Applicant's request for reconsideration is dismissed.

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Lyndra Griffith
Adjudicator

Released: November 1, 2023