Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2023 CanLII 122943 (ON LAT)

Citation: Schindelheim v. TD General Insurance Company, 2023 ONLAT 22-003322/AABS - R

RECONSIDERATION DECISION

Before:	**Clive Forbes**
Licence Appeal Tribunal File Number:	**22-003322/AABS**
Case Name:	**Michael Schindelheim vs. TD General Insurance Company**

Written Submissions by:

For the Applicant:	Jonathan Mertz, Counsel
For the Respondent:	Geoffrey Keating, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the applicant. It arises out of a decision dated September 15, 2023 (“decision”), in which I found the applicant is not entitled to retroactive attendant care and housekeeping benefits, chiropractic treatment plan, occupational therapy services. I also found the applicant is not entitled to any interest pursuant to s. 51 of the *Statutory Accident Benefits Schedule Effective September 1, 2010 (including amendments effective June 1, 2016) (“Schedule”)* or an award under s. 10 of Regulation 664.

[2] The applicant has requested a reconsideration pursuant to Rule 18.2(a) and (b). He seeks to vary the decision to find the applicant is entitled to retroactive attendant care and housekeeping benefits, the chiropractic treatment plan in dispute, interest on any overdue payments and an award. In the alternative, he seeks a rehearing before a different adjudicator and based on the record adduced during the initial hearing. The respondent asks that the request for reconsideration be dismissed.

RESULT

[3] The applicant's request for reconsideration is dismissed.

ANALYSIS

[4] The grounds for a request for reconsideration are contained in Rule 18.2 of the *Licence Appeal Tribunal Rules, 2023* (“Rules”). The applicant’s request relies on the following criteria: 18.2(a) that I acted outside my jurisdiction or committed a material breach of procedural fairness; and 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.

[5] Reconsideration involves a high threshold. The requestor must show how or why the decision falls into one or more of the categories in Rule 18.2. It is well-settled that reconsideration is justifiable in cases where an adjudicator has made a significant legal or evidentiary error preventing a just outcome, where false evidence has been admitted, or where genuinely new and undiscoverable evidence comes to light at the conclusion of a hearing. The reconsideration process is not an opportunity for a party to ask the Tribunal to reweigh evidence or to re-argue its position where it disagrees with the decision or where it failed to satisfy its onus at first instance.

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[6] The applicant submits that I:

i. Committed a material breach of procedural fairness.

ii. Erred in fact.

iii. Erred in law.

[7] I find that the applicant's request falls under the premise of asking the Tribunal to reweigh evidence. His arguments on reconsideration essentially ask me to reconsider the evidence that was presented on the issue of entitlement to the benefits claimed. The applicant is asking me to reweigh the evidence and come to a different decision. This is not allowed under the rules for reconsideration.

No material breach of procedural fairness or reasonable apprehension of bias

[8] I find that the applicant has not established grounds for reconsideration under Rule 18.2(a) with respect to my treatment of key issues and central arguments advanced for the following reasons. The applicant argues that my conduct during the hearing and decisions resulting from hearings that I have presided over in the past give rise to a reasonable apprehension of bias.

[9] The test for a reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the tribunal, whether consciously or unconsciously, would not decide fairly: *Committee for Justice and Liberty et al. v National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394. There is a strong presumption of adjudicative impartiality. The burden lies on the party alleging bias to establish that there are "serious" or "substantial" grounds for such a finding: *Wewaykum Indian Band v Canada*, 2003 SCC 45 at paras 59, 76.

[10] The applicant's argument with respect to bias is that during the hearing I repeatedly sustained objections made by the respondent's counsel without giving the applicant's counsel the opportunity to make submissions. The applicant argues that I repeatedly misstated critical evidence favourable to him; made arguments on the respondent's behalf; insinuated that my decision was already half-drafted on the last day of the hearing before considering the parties' final submissions; and that I have presided over eleven hearings and argues that the pattern of my decisions in other cases demonstrates I am bias against the applicant.

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[11] I find the applicant has not overcome the strong presumption of adjudicative impartiality. His submissions do not identify "serious" or "substantial" grounds for a finding of bias. Rather, they consist of broad assertions that are unfounded. Firstly, throughout the hearing both parties were given the opportunity to make submissions with respect to objections raised by the other party. Secondly, while it is not clear what evidence the applicant alleges that I misstated, I note that throughout my decision I highlighted all the relevant evidence and the weight I accorded the evidence. Thirdly, the allegation that I made arguments on behalf of the respondent concerning the evidence of Mr. Sasani is false. Furthermore Mr. Sasani's evidence did not form part of my decision. Fourthly, I did not mention that my decision was already half drafted on the last day of the hearing before considering the parties' closing submissions. Furthermore, I agree with the respondent that even if this assertion were correct this would not constitute bias in favour of the respondent as it was alleged to have happened before closing submissions from both parties. Lastly, my past decisions in unrelated matters are irrelevant to any claim of bias.

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[12] I find that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that I decided the application fairly. The applicant has not established reasonable apprehension of bias or that I breached my duty of procedural fairness.

[13] I see no material breach of procedural fairness or reasonable apprehension of bias.

No errors of fact in the analysis of each of the benefits claimed by the applicant.

[14] I find that the applicant has not established grounds for reconsideration under Rule 18.2(b) with respect to my analysis of the benefits claimed by the applicant for the following reasons. The applicant argues that I made several errors of fact in relation to each of the benefits claimed and that the Tribunal would likely have reached a different result had the errors not been made. He submits that I did not address his actual attendant care needs; mischaracterized his submission that the respondent should be precluded from advancing an affirmative defense that was not included in respondent's denial letter denying the claim and not pleaded in the respondent in its response; and failed to appreciate and interpret the *Insurance Act* in such a manner when considering the evidence presented. He also argues that I made findings of material facts where the finding was based on a complete absence of evidence or where such findings were made in complete disregard of the evidence.

[15] I disagree with the applicant that any such errors exist. Furthermore, I find the applicant's submissions are largely an attempt to use the reconsideration process as an opportunity to reargue the merits of his case. The Tribunal has long recognized that a reconsideration is not an opportunity to simply reargue one's case or to present new arguments. Reconsideration is not a forum for reweighing evidence.

[16] In my decision at paragraphs 11 to 41, I conducted a thorough analysis by considering and assessing all the testimony relevant to the issues in dispute and reviewing the medical and documentary evidence. When my decision is read in its entirety, it is clear that I considered all of the evidence in relation to each of the benefits claimed. The fact that the applicant would have preferred that I reached a different conclusion renders the reasons neither insufficient nor unfair or that I failed to appreciate and interpret the *Insurance Act*. From paragraphs 11 to 22, I provided a detail analysis for the reason the applicant was not entitled to retroactive attendant care benefits ("ACBs") and housekeeping home maintenance services ("HKHM").

[17] In my decision at paragraphs 19, 21 and 29, I made no error of fact in stating that within a few months after the accident, the applicant's father was given a copy of the *1996 Schedule*; that the respondent explained to the applicant and his family what accident benefits they were entitled to; and that the applicant participated in different medical assessments where ACB and HKHM needs were discussed. All these facts are captured in the medical and documentary records.

[18] Also, at paragraph 27 of my decision, I correctly stated that I was not directed to any documentary evidence that indicated that the applicant's mother, sister or wife sustained an economic loss as a result of providing ACB and HKHM services to the applicant, and the necessary detailed invoicing for same. The applicant also argues that I made an error when I concluded at paragraph 30 of my decision that he failed to produce particulars relating to incurred retroactive ACB expenses and retroactive HKHM claims because he provided the requested particulars via email dated July 5, 2023. However, when paragraphs 27 to 30 of my decision are read together for context, it is clear that what is referenced is that no documentary evidence was provided to support that the applicant's family members sustained economic loss as a result of providing the services. Furthermore, as stated at paragraph 27 there is no dispute that an OCF-3 was first submitted on August 2, 2022. In addition, based on the evidence, I correctly stated at paragraph 29 of my decision that the respondent did not act in bad faith and unreasonably withheld or delayed the payment of ACB and HKHM benefits for the reasons stated therein.

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[19] Moreover, the fact that I relied on the respondent's expert who considered and addressed the chiropractic treatment plan is not an error. In my decision I analyzed and provided reasons as to why more weight was placed on certain evidence. I agree with the respondent that it would be inappropriate for the Tribunal to refer to Dr. Steve Blitzer's chronic pain report and or opinion since he was not called to testify as a witness nor was his report entered as an exhibit at the hearing. Furthermore, at paragraph 36 of my decision, I made no error of fact in finding that the contemporaneous medical and documentary evidence does not reveal a diagnosis of chronic pain by any of the applicant's treating physicians.

[20] Assigning less or more weight or preferring certain evidence is not an error; it is an intrinsic function of the Tribunal. The reconsideration process involves a high threshold. It is not an invitation for the Tribunal to reweigh evidence, or an opportunity for a party to re-litigate its position where it disagrees with the decision, or the weight assigned to the evidence. Throughout my decision I highlighted the evidence that I considered more relevant to the issue in dispute and assigned weight accordingly. On this basis, I found that the applicant was not entitled to the benefits claimed.

[21] I see no error of fact that would have affected the outcome of my decision.

No errors of law such that the Tribunal would likely reach a different result had the errors not been made.

[22] I find that the applicant has also not established grounds for reconsideration under Rule 18.2(b) with respect to alleged errors of law.

[23] The applicant submits that I made errors of law in allowing the respondent to advance an unpled affirmative defense; and that section 19(3)4 of the *Schedule* was a substantive amendment to the *Schedule* made in 2014 and therefore is not applicable to this case. He also argues that I made errors of law in finding that his entitlement to interest on overdue payments are governed by the *2010 Schedule*; and that I erroneously concluded that he failed to prove his claim on a balance of probabilities because he was unable to provide documentary evidence demonstrating that his family sustained economic loss for providing ACB and HKHM services. He further submits that I applied the incorrect version of the *Schedule* to his claim and that I failed to apply the mandatory provisions of s. 32 of the *1996 Schedule* and the *2010 Schedule*.

[24] I disagree with the applicant. Firstly, at paragraphs 17 of my decision, I addressed the applicant's argument about affirmative defence. I agree with the

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respondent that the matter before the Tribunal is administrative in nature and therefore does not involve pleadings nor the rules surrounding same as outlined in the *Rules of Civil Procedure* and associated case law. My decision to follow binding case law that had been put to the applicant by the respondent in two instances prior to the commencement of the hearing does not constitute an error of law.

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[25] Secondly, at paragraphs 14 to 17 of my decision, I addressed the applicant's argument about an affirmative defence while also highlighting the test to be met by the applicant for retroactive ACBs and HKHM as confirmed by the Divisional Court in *Morrissey v. Wawanesa Insurance Company*, 2022 ONSC 4398 (CanLII). Furthermore, as stated in my decision, the applicant did not provide evidence that the submitted retroactive Form 1 was due to urgency or impossibility or impracticability of compliance with the requirements of the *2010 Schedule* or whether expenses for attendant care services were incurred as defined by the *2010 Schedule*. Therefore, it was not necessary to provide a detail analysis of his attendant care needs.

[26] Thirdly, as stated in the decisions of *17-005604 v Wawanesa Mutual Insurance Company*, 2018 CanLII 140989 (ON LAT), *Motor Vehicle Accident Claims Fund v Barnes*, 2017 CarswellOnt 5680, and *Lehman v GAN Canada Insurance Co*., 1998 CarswellOnt 6256, s. 19(3)4. of the *2010 Schedule* is of immediate application regardless of whether an accident occurred prior to February 1, 2014.

[27] Fourthly, even if I referenced the wrong version of the *Schedule* for entitlement to interest on overdue payment, this would not support reconsideration because the Tribunal would not have reached a different result had the error not been made. At paragraph 44 of my decision, I stated no interest is payable to the applicant. As such it does not matter which version of the *Schedule* is applicable.

[28] Furthermore, it is not an error of law to require insured persons to submit documentary evidence and detailed invoicing in order to establish that non-professional service providers have sustained economic loss as a result of providing the services. Also, I made no error in law in applying s. 32 of the *Schedule*. It is clear from paragraphs 19 and 20 of my decision, that the respondent, in accordance with s. 32 of the *1996 Schedule,* provided the applicant's father with sufficient documentation including an accident benefits package and a letter on May 29, 1997, explaining the benefits available to the applicant.

[29] As a result, I do not see any error of law or fact such that I would likely have reached a different result had the error not been made.

[30] I find the applicant has not established grounds for reconsideration pursuant to Rule 18.2(a) and (b).

CONCLUSION

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

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Clive Forbes
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: December 22, 2023

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