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Ontario

RECONSIDERATION DECISION

Before: Jonathan Batty, Associate Chair

Date: June 11, 2019

File: 16-002077/AABS

Case Name: C.R. and Scottish and York Insurance Company

Written Submissions By:

For the Respondent: Patrick Baker, Counsel

For the Applicant: RJ Ford, Counsel

OVERVIEW

[1] This request for reconsideration arises from a decision of the Licence Appeal Tribunal (the "Tribunal") accepting that the applicant is outside of the Minor Injury Guideline ("MIG") and denying a chiropractic treatment plan.

[2] Pursuant to her authority under s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sched. 5, the Executive Chair delegated to me her responsibility to decide this matter.

[3] As explained below, I grant this request for reconsideration.

FACTS

[4] The respondent filed a request for reconsideration in this matter on January 24, 2018 in respect of a decision dated January 9, 2018. The respondent asks that the decision be overturned and that the applicant found to be in the MIG.

[5] The respondent requests the decision be reconsidered in relation to the MIG determination for the following reasons:

(a) The adjudicator improperly shifted burden of proof on the respondent.

(b) The adjudicator failed to draw adverse inference based on the applicant's failure to produce relevant evidence in her possession especially because of late notice that the applicant suffered from chronic pain syndrome.

(c) The adjudicator misapplied the test that the pre-existing condition is an exception to MIG determination – the applicant failed to show evidence of a documented pre-existing condition.

(d) The adjudicator erred in accepting and misapplying the material contribution test

[6] The applicant opposes the request for reconsideration.

DECISION AND REASONS

[7] Rule 18.1 requires a request for reconsideration to include the reasons for the request, specifying the applicable criteria under Rule 18.2.

[8] Under Rule 18.2, one or more of the following four grounds needs to be established:

1) the Tribunal acted outside its jurisdiction or violated the rules of natural justice or procedural fairness;

2) the Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision;

3) the Tribunal heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or,

4) there is new evidence that could not have reasonably been obtained earlier and would have affected the result.

[9] Reconsideration is warranted in cases where an adjudicator has made a significant legal mistake that prevents a just outcome. This is one of those cases.

[10] The proper application of the test for pre-existing injuries has been considered by the Executive Chair in *D.T. v Wawanesa Mutual Insurance Company, 2017* CanLII 144648 (ON LAT). In that matter she noted the following (at paragraphs 27 and 28):

> Pursuant to s. 18(2) of the *Schedule*, the MIG's $3,500 monetary limit does not apply to an insured person if:
>
> > *his or her health practitioner determines and provides compelling evidence* that the insured person has a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the $3,500 limit or is limited to the goods and services authorized under the Minor Injury Guideline. [emphasis added]
>
> Given the wording of s. 18(2), the central inquiry does not focus solely on whether the insured person has a pre-existing condition. Rather, it is on whether the insured person has a pre-existing condition that was documented by a health practitioner before the accident and, more importantly, whether his or her health practitioner provides "compelling evidence" that this pre-existing condition will prevent maximal recovery if the insured person is treated under the MIG.

[11] The adjudicator found the following in respect of the evidence before him (emphasis added):

> "The information on the applicant's pre-existing injuries comes from: a) the applicant's submissions; and b) the expert reports of the assessors who examined the applicant. **The applicant did not provide clinical notes and records ("CNRs") of a treating health practitioner or her family doctor. Hence, <u>there is no evidence before me that outlines the applicant's pre-existing injuries, documented prior to the 2015</u>**

> **accident.** The applicant also does not specifically make submissions on whether the pre-existing injuries would prevent her maximal recovery under the MIG…" [paragraph 23].
>
> "While the CNRs of a treating health practitioner may serve as an important source of background information regarding the applicant's pre-existing injuries, the applicant is not mandated to produce them. It is left to the applicant's discretion to put forward the best evidence in support of its position. In this matter, **the applicant seemed content in relying on the expert reports of the assessors to establish that both her current and pre-existing injuries are a barrier to her maximal recovery under the MIG**." [paragraph 24].

[12] These evidentiary findings are determinative in this reconsideration.

[13] It is clear from these findings that the evidence before the adjudicator was far from meeting the threshold of being compelling evidence showing that her pre-existing condition will prevent maximal recovery. I have reviewed the applicant's submissions in this respect and I do not see that they can overcome the central fact of the adjudicator's evidentiary finding. I agree with the respondent that, in this case, simply relying on the applicant's assessors is insufficient for the applicant to meet her onus.

[14] Having found as he did, the adjudicator's suggestion that the respondent should not submit that the adjudicator should draw an adverse inference in light of the evidence before the Tribunal – but instead should have to call rebutting evidence – was problematic. Even though the adjudicator correctly cited that the onus is borne by the applicant on this question, the reasons provided raise some doubt whether he appropriately applied the test.

CONCLUSION

[15] Whatever other errors the respondent alleges the adjudicator made, the fundamental problem with the adjudicator's decision is that the application of the test for pre-existing injuries is not supported by his evidentiary finding. I find this was a significant error such that the Tribunal would have reached a different decision. For these reasons, this decision must be set aside as the respondent requests.

[16] In light of the evidence before the Tribunal, I find that the applicant has not demonstrated that she should be exempted from the application of the MIG on the basis of having a pre-existing condition.

Jonathan Batty
Associate Chair
Tribunals Ontario – Safety, Licensing Appeals
and Standards Division

Released: June 11, 2019