LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

RECONSIDERATION DECISION

Before: Patricia McQuaid, Vice Chair

Date: November 2, 2020

File: 18-003066/AABS

Case Name: Y.D. v. Certas Home and Auto Insurance Company

Written Submissions by:

For the Applicant: Andrew Franzke, Counsel

For the Respondent: Brian M. Yung, Counsel

OVERVIEW

[1] The Applicant Y.D. ("Applicant") asks for a reconsideration of the Tribunal's Decision released on May 19, 2020 (the "Decision") in which the Applicant was denied the cost of examinations recommended by Novo Medical Services in the amount of $26,400 for a determination of a catastrophic designation.[1] Certas Home and Auto Insurance Company ("Respondent") asks that the reconsideration be denied.

[2] The Applicant makes her reconsideration request under Rules 18.2 (a) and (b) 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* ("the *Rules*").

[3] The Applicant submits that the Tribunal, in the Decision, violated the Applicant's right to procedural fairness and made an error of law or fact such that the Tribunal would likely have reached a different decision had the error not been made[2] in relation to whether the treatment plans in dispute are reasonable and necessary.

RESULT

[4] The Applicant's Request for Reconsideration is dismissed.

ANALYSIS

[5] A reconsideration is not an appeal. The grounds for a request for reconsideration to be granted are set out in Rule 18.2 of the *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.

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[1] In the Decision, the Tribunal granted one of the medical benefits claimed by the Applicant and denied the remaining five benefits claimed. The Applicant is asking for reconsideration one denied claim only – the cost of examinations for a determination of a catastrophic designation.

[2] *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure*, Version I (October 2, 2017*, as amended* - Rules 18.2 (a) and (b).

[6] The onus is on the party seeking reconsideration to establish one or more of the Rule 18 grounds of reconsideration in order to be successful.

a. Jurisdiction and Procedural Fairness

[7] The Applicant does not argue that the Tribunal acted outside its jurisdiction. The Applicant does argue that the Tribunal violated the rules of procedural fairness by failing to address or consider the Applicant's initial submissions and failing to assess crucial evidence. In particular, the Applicant takes issue with the fact that the initial submissions were made by another person within the law firm, which has represented her throughout this proceeding, but the Tribunal only named the counsel who made the supplementary submissions in its Decision. From this, the Applicant states an inference can be drawn that her initial submissions were not considered at all. While it is correct that two individuals within the law firm representing the Applicant made submissions at two different points in time, the same law firm was her representative continuously and throughout. A failure to name both individuals does not logically equate to a failure to consider the earlier submissions and thus a breach of procedural fairness. At its highest, not specifically referencing the first individual was a minor or inconsequential mistake.

[8] It is trite law that a tribunal need not expressly address every piece of evidence and submission provided by a party. But it is worth noting that in the Decision, the Tribunal made reference to the Amended Submissions (and the evidence contained therein) of the Applicant filed by Carlos Ortiz of Magras Professional Corporation dated October 5, 2018 (in paragraphs 2, 11, 21 and 25 of the Decision, for example) and quoted from paragraph 12 of those particular submissions.

[9] It is clear from the Decision that all of the Applicant's submissions were before the Tribunal and were considered by it in making the Decision, both those made in October and November 2018 and in January 2020 by Andrew Franzke of the same law firm. To suggest, as the Applicant has, that her initial submissions were not considered by the Tribunal at all is simply not borne out by a reading of the Decision. That one report, for example, that of Dr. Pilowsky, was not specifically referenced may suggest that the Tribunal did not give it the weight that the Applicant felt it warranted, but it does not support an inference of a violation of procedural fairness.

[10] The Applicant has failed to demonstrate that the Tribunal violated the rules of procedural fairness.

b. Error of Fact or Law such that the Tribunal would likely have reached a different result had the error not been made.

[11] The Applicant submits that the Tribunal made an error in law by making a finding of fact on causation in the context of a "reasonable and necessary" analysis in relation to the proposed catastrophic assessment, both in the context of the cervical spine and psychological issues. In order for the Tribunal to interfere with

that decision, the Decision must reveal not only an error of law or fact, but that the error(s) must be such that if corrected the Tribunal would likely come to a different conclusion. Having reviewed the Decision, I am satisfied that it does not contain any such error of law or fact. The Tribunal's role is to determine if the recommendation for assessment is reasonable and necessary based on the evidence presented. The Tribunal did so.

[12] The burden of proof was on the Applicant to prove that the assessment for determination of the catastrophic assessment was reasonable and necessary. The Applicant does not dispute this; rather, she submits that any 'findings' with respect to causation were an error of law.

[13] The Applicant's submissions (specifically those made in January 2020) made several references to causation. At paragraph 10, she stated that 'on a balance of probabilities, it has been established that (the Applicant's) ongoing issues with her cervical spine were caused by the subject accident", as were her current psychological diagnoses. At paragraph 11 of those same submissions, the Applicant made the following submission: "If the Tribunal accepts the Applicant's submissions with respect to causation then a finding that the treatment plans and costs of examinations in dispute are reasonable and necessary should follow".[3]

[14] The Tribunal clearly did not accept the Applicant's submissions with respect to causation and explained why it reached its conclusion. The Applicant is now essentially attempting to re-argue her case. Re-weighing the evidence is not the task on a request for reconsideration.

[15] In circumstances such as these, where an applicant is seeking an assessment, she need not prove that she is in fact entitled to the benefit (or as here prove that she meets the definition of catastrophic impairment), but the Tribunal jurisprudence is clear that there must be some reasonable suggestion that the specified condition exists to make an investigatory assessment reasonable and necessary.[4] The evidence presented to the Tribunal did not meet that threshold. As was clear from the Decision, all of the medical evidence was considered and weighed. The Applicant's October 2018 submissions recited in detail the medical evidence relied upon, including that of Dr. Pilowsky, The Decision made specific reference to the reports and records of the Applicant's treating physicians – Dr. Beland, Dr. Marmor and Dr. Ghuman, her psychiatrist[5] and weight given to that evidence. The Decision did not make a determination whether the Applicant was in fact catastrophically impaired. The Decision addressed whether the assessment was reasonable and necessary which was the issue before the Tribunal to determine.

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[3] Applicant's submissions dated January 15, 2020

[4] *17-06956 v. Guarantee Company of North America* 2018 CanLII 110952 (ON LAT) at para 37 and the Reconsideration Decision: 2018 CanLII 130858 (ON LAT) at para 15.

[5] Tribunal Decision: Y.D. v. Certas Home and Auto Insurance Company, 2020 CanLII 37594 (ON LAT) paras 17-19

[16] In her submissions to request reconsideration, the Applicant has referenced the decision of the Tribunal in *17-003496 v. TD Insurance* [6]. This decision was not devoid of a discussion of causation. In that case, the Tribunal stated that the insurer's submission on causation were generally compelling, but the context of the case was exceptionally unique.[7] There, the applicant had been declared incompetent, had a litigation guardian and relied on family for assistance in completing daily tasks. The insurer had previously denied an assessment but then conducted its own catastrophic assessment and paid for 13 reports to rebut the applicant's claim. This was very much a decision in which the applicant's particular and unusual circumstances steered the conclusion reached by the adjudicator. By no measure can this case be read as on all fours with the Applicant's. The decision being reconsidered, at paragraph 25 for example, highlights the significant contrast between the two claimants.

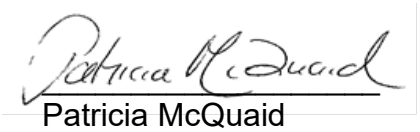
[17] I am satisfied that no error of fact or law was made. The Tribunal applied the correct legal test and found that the Applicant failed to establish that the assessment for a catastrophic determination was reasonable and necessary. The Tribunal considered the Applicant's medical evidence and found it lacking.

[18] The Tribunal explained why findings of fact were made and conclusions reached. There is no misapprehension of the evidence. As noted above, the weight to be given to evidence at the hearing is a matter to be determined by the Tribunal.

[19] I find that the Applicant has not established this or any other ground for reconsideration as required by the Rule. The grounds are limited and specific. The Applicant has requested reconsideration and the onus is on her to prove her grounds. She has not done so. Instead, the Applicant's submissions appear to be an attempt to re-argue her case before the Tribunal in a new way. As stated above, this is not the function of reconsideration.

ORDER

[20] For the reasons noted above, I deny the Applicant's Request for Reconsideration.



Patricia McQuaid
Vice Chair
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: November 2, 2020

[6] 2018 CanLII 13167 (ONLAT)
[7] *Ibid* , paragraph 27