Citation: A.W.A. vs. Certas Home and Auto Insurance, 2021 ONLAT 18-007207/AABS

RECONSIDERATION DECISION

Before:	Paul Gosio, Adjudicator
Date of Order:	March 12, 2021
Tribunal File Number:	18-007207/AABS
Case Name:	Abdul Wahid Ahmadi vs. Certas Home and Auto Insurance

Written Submissions by:

For the Applicant:	Paul DeLuca
For the Respondent:	Jonathan Schrieder

OVERVIEW

[1] In a Decision released on May 27, 2020, the Tribunal found that the applicant was not entitled to an examination expense in the amount of $24,400.00 for catastrophic impairment assessments pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*").

[2] The applicant requested a reconsideration of the Decision on the basis that the Tribunal made errors of law and fact such that the Tribunal would likely have reached a different result had the error not been made. The applicant asks that that the Tribunal quash this decision and have the matter re-heard. In the alternative, the applicant asks that the Decision be varied, and a finding be made that the applicant is entitled to the cost of the catastrophic impairment assessments.

[3] The respondent submits that the Tribunal did not make an error of law or fact and claims that the applicant's request for reconsideration is without merit. The respondent submits that the applicant is attempting to reargue this issue inappropriately and requests that this reconsideration should be dismissed.

RESULT

[4] After reviewing the submissions of the parties and for the reasons articulated below, I have dismissed the applicant's request for reconsideration.

ANALYSIS

[5] The grounds for a request for reconsideration are contained in Rule 18.2 of the Tribunal's Common Rules. A request for reconsideration will not be granted unless one or more of the following criteria are met:

I. The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness;

II. 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;

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

IV. There is new evidence that could not have reasonably been obtained earlier and would have affected the result.

Error in Fact

The OCF-18

[6] The applicant submits that the adjudicator mistakenly believed that the OCF-18 in question proposed funding for assessments concerning whether the applicant was catastrophically impaired in accordance with Criterion 8 only. The applicant submits that this mistaken belief meant that the adjudicator failed to adjudicate the OCF-18 insofar as it related to Criterions 1-7.

[7] I agree with the applicant's position. In reviewing the Decision, it is clear that the adjudicator was under the mistaken belief that the proposed catastrophic impairment assessments concerned whether the applicant was catastrophically impaired in accordance with criterion 8 only. This is an error in fact. The disputed OCF-18 did not confine itself to criterion 8.

[8] The applicant submits that the adjudicator would have likely found that the assessments were reasonable and necessary had he not made this error. The applicant notes the following in support of its position. First, the applicant points out that at paragraph 27 of the Decision, the adjudicator accepted the applicant's evidence pertaining to his chronic pain, and the resulting impairments from it, in relation to his entitlement to pre-104 income replacement benefits. Second, the applicant states that given his physical condition, even a marginal psychological impairment could push the applicant over the 55% hurdle indicated in criterion 7.

[9] I disagree with the applicant's position. Properly assessing the disputed treatment plan within the context of criteria 1 through 8 would likely lead to the same finding. The applicant bears the onus of establishing on a balance of probabilities that he is entitled to the proposed assessments by establishing that they are reasonable and necessary. In this case, the assessments in dispute are designed to determine if the applicant meets the catastrophic impairment threshold. In order for them to be deemed reasonable and necessary, there must be some suggestion that the applicant meets the catastrophic impairment threshold thereby warranting further investigation. In this case, the threshold has not been met.

[10] The hearing adjudicator's finding with respect to the applicant's chronic pain and resulting impairments (within the context of the pre-104 income replacement benefit analysis) would naturally be considered when assessing the reasonableness and necessity of the disputed catastrophic impairment assessments, but likely would have led him to the same finding. Entitlement to pre-104 income replacement benefits does not in itself warrant catastrophic impairment assessments. The entitlement test for an income replacement benefit is different that the entitlement test for catastrophic impairment assessments. The applicant must establish a link between the entitlement to pre-104 income replacement benefits and the need for catastrophic impairment assessments.

[11] The applicant attempts to do this by suggesting that given his physical condition, even a marginal psychological impairment could push him over the 55% hurdle indicated in criterion 7. Given this, the applicant submits that there is a suggestion that the applicant meets the catastrophic impairment threshold under criterion 7, thereby warranting further investigation. The applicant's position assumes that his physical condition brings him marginally close to the 55% hurdle indicated in criterion 7. The evidence before the hearing adjudicator does not support this suggestion and as such, I do not find that the hearing adjudicator would have likely reached a different outcome had the error not been made.

The Applicant's English Language Skills

[12] The applicant submits that the adjudicator inappropriately gave little weight to Dr. Pilowsky's opinion because there was no interpreter present during her assessment. The hearing adjudicator found this to be of importance given the applicant's limited English language skills. The applicant submits that this was inappropriate because he relied, in part on, Dr. Ladowsky-Brooks' opinion. Dr. Ladowsky-Brooks stated in her IE report, that the applicant "had a working knowledge of English…The interpreter assisted with the conversation at times because the client's accent was hard to understand."

[13] There is no error in fact in this regard. The exercise of weighing evidence is well within the prerogative of the hearing adjudicator. The hearing adjudicator, based on the evidence before him, found that there was a need for an interpreter, even if one was required only "at times". As noted at paragraph 39 of the Decision, the applicant himself, acknowledged that it would have been "beneficial" to have an interpreter present during the assessment. The applicant's attempt to re-argue a point that was made at the initial hearing is inappropriate.

Error of Law

[14] The Applicant submits that as a result of the above noted error of fact, the Tribunal failed to apply the appropriate law to the impugned OCF-18. That is, the hearing adjudicator failed to consider the impugned OCF-18 in light of criteria 1 through 7 of the *Schedule*. This has already been addressed above.

[15] Furthermore, with respect to the impugned OCF-18 which the hearing adjudicator did consider in light of criterion 8, the applicant submits that the hearing adjudicator applied inappropriate law to those facts. Namely, the applicant submits that the hearing adjudicator failed to consider the Supreme Court of Canada's decision in *Saadati v. Moorhead*, 2017 SCC 28 ("*Saadati*"), which stands for the principle that a finding of legally compensable injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric injury.

[16] The Applicant further states that the impact of that decision is such that it is not necessary to prove psychological or behavioural mental disorders only by way of

expert evidence, and that it can be proved, in appropriate cases, by way of lay witness evidence alone.

[17] Firstly, *Saadati* can be distinguished from the present case, as it addressed mental injuries in the context of the application of the common law of negligence in Canadian tort law. In order to be entitled to accident benefits, a claimant must prove he or she is entitled to the benefit by meeting the appropriate legal tests as set out in the *Schedule*.

[18] In this case, the proper legal test is whether the catastrophic impairment assessments were "reasonable and necessary." The hearing adjudicator properly reviewed and weighed the evidence within this context. I find no error in law in this regard.

CONCLUSION

[19] For the reasons noted above, the applicant's request for reconsideration is dismissed.

Paul Gosio
Adjudicator
Tribunals Ontario – Safety, Licensing Appeals and Standards Division