Citation: Morris v. Aviva General Insurance, 2021 ONLAT 19-002717/AABS - AR

AMENDED RECONSIDERATION DECISION

Before:	Lindsay Lake, Adjudicator
Date of Order:	11/05/2021
Tribunal File Number:	19-002717/AABS
Case Name:	Peggy Morris v. Aviva General Insurance

Written Submissions by:

For the Applicant:	Jono Schneider, Counsel
For the Respondent:	Matthew C. Owen, Counsel

OVERVIEW

[1] The respondent, Aviva General Insurance, filed a request for reconsideration of the September 18, 2020 decision[1] of the Licence Appeal Tribunal – Automobile Accident Benefit Services ("Tribunal").

[2] In the decision, I found, among other things, that the applicant, Peggy Morris, was entitled to two treatment plans submitted on February 28, 2018 and September 7, 2018, plus interest, as a result of the respondent's non-compliance with sections 38(8) and 38(9) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("*Schedule*").[2]

[3] The respondent requested a reconsideration of the decision. The respondent submitted that I acted outside of my jurisdiction and violated the rules of natural justice or procedural fairness, and that I also made a significant error of law such that I would likely have reached a different result had the errors not been made. Specifically, the respondent submitted that I erred by:

(i) Referring to case law in the decision that was not submitted by either party to the proceeding;

(ii) Denying the respondent the right to issue a proper denial notice; and/or

(iii) Misapplying s. 38(11) of the *Schedule*.

[4] The applicant opposed the request for reconsideration.

[5] In reply, the respondent sought its costs of the reconsideration pursuant to Rule 19 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission's Common Rules of Practice and Procedure, Version I* (October 2, 2017) as amended (*Rules*). The respondent sought its costs in the amount of $2,000.00 as it submitted that the applicant's reconsideration submissions were, among other things, vexatious.

RESULT

[6] The respondent's request for reconsideration is granted in part. I find that the applicant is entitled to the treatment plans submitted on February 28, 2018 and September 7, 2018 in the amounts of $1,361.50 and $2,486.00, respectively, plus interest in accordance with s. 51 of the *Schedule*, 30 days following the

[1] *P.M. v. Aviva General Insurance*, 2020 CanLII 80284 (ON LAT) (the "decision").
[2] O. Reg. 34/10.

submission of an invoice to the respondent for services rendered under these two treatment plans. **The respondent's request for costs is denied.**

ANALYSIS

[7] The grounds upon which a request for reconsideration can be granted are set out in Rule 18.2 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission's Common Rules of Practice and Procedure, Version I* (October 2, 2017) ("*Rules*"). The grounds that the respondent submitted apply in this matter are Rules 18.2(a) and 18.2(b), as the respondent submitted that I:

(i) Acted outside of my jurisdiction and/or violated the rules of natural justice or procedural fairness; and/or

(ii) Made several errors of law and/or fact such that I would likely have reached a different result had the errors not been made.

[8] In order to interfere with a decision under Rule 18.2(b), however, I must not only have made an error of law or fact, but that error of law or fact must be enough that, if corrected, I likely would have come to a different decision. Minor or inconsequential procedural or substantive mistakes are not enough to interfere with a decision made at first instance.

[9] For the reasons that follow, I find that I did not violate the rules of procedural fairness, act outside of my jurisdiction or make any error of law such that I would have likely come to a different decision. I do, however, agree with the respondent's alternative submissions and find that the decision requires a clarification that the applicant is entitled to the treatment plans submitted on February 28, 2018 and September 7, 2018 plus interest in accordance with s. 51 of the *Schedule*, 30 days following the submission of an invoice to the respondent for services rendered under these two treatment plans.

Referring to Case Law in the Decision not Submitted by the Parties

[10] The respondent submitted that I violated the rules of procedural fairness by referring to case law in the decision which was not submitted by either party to the proceeding. It is the respondent's position that this error denied it an opportunity to respond to or give submissions on the case law.

[11] The case law that I referenced in the decision which the respondent takes issue with is the Tribunal's reconsideration decision of *M.F.Z. v. Aviva Insurance*

Canada ("*MFZ*").[3] I referred to the portion of the *MFZ* reconsideration decision that addressed the modern approach to statutory interpretation to assist in interpreting s. 38(11)2 of the *Schedule*.[4] I cited *MFZ* in relation to the respondent's reliance upon the Tribunal's decision in *P.K. vs. Aviva Insurance Canada*[5] where the Tribunal held that pursuant to s. 38(11)2, the respondent was liable to pay for the goods and services listed in the disputed treatment plan which were *incurred* between the 11th business day and when a compliant refusal was provided.[6]

[12] The Tribunal's duty of procedural fairness to parties is to ensure they understand the case that they must meet and allow them to respond accordingly. While the applicant raised non-compliance issues with sections 38(8) and 38(9) of the *Schedule* in her initial hearing submissions, it was the respondent that raised the issue that the consequences of s. 38(11) only apply to goods and services *incurred* under the disputed treatment plans.[7] The applicant disagreed with this position in her reply submissions[8] and, therefore, it was an issue that needed to be determined.

[13] I find that I did not breach the rules of procedural fairness in referring to the principles of statutory interpretation as set out in *MFZ*. In paragraph [39] of the decision, I did not rely upon *MFZ* regarding a specific fact-driven application of the *Schedule*. Instead, I cited *MFZ* in relation to the Supreme Court of Canada's decision in *Rizzo & Rizzo Shoes Ltd. (Re)*[9] regarding statutory interpretation. The parties are expected to know the current state of the law and failing to take into account legal principles in rendering my decision, such as statutory interpretation, would have been patently unreasonable and, therefore, could very well have led to a finding that I erred in law. Furthermore, it was the respondent that raised the issue of "incurred" under s. 38(11) and, as a result, I find that it had an opportunity to be heard on the issue.

[14] I also referred to *MFZ* in finding that an analysis as to the reasonableness and necessity of the proposed treatment plans under s. 15 of the *Schedule* was no longer required because the respondent failed to cure its defective notice prior to the decision being rendered.[10] This is simply what s. 38(11)2. of the *Schedule*

[3] 2017 CanLII 63632 (ON LAT).
[4] *Supra* note 1 at para. 39.
[5] 2020 CanLII 14478 (ON LAT).
[6] *Ibid*. at para. 17.
[7] Hearing Submissions of the Respondent, paras. 98 and 101-102.
[8] Reply Hearing Submissions of the Applicant, para. 20.
[9] [1998] 1 S.C.R. 27, 1998 CanLII 837 (SCC).
[10] *Supra* note 1 at para. 36.

states. I cited *MFZ* in relation to rephrasing s. 38(11)2. and not whether the insurer in that case had an opportunity to cure a defective denial notice. Moreover, my finding that the respondent no longer had the opportunity to issue a proper denial notice in the decision did not turn in any way on my reference to *MFZ*. This was a finding that was open for me to make in the decision regardless of my reference to *MFZ*.

[15] For all of these reasons, I find that I did not breach the rules of procedural fairness by referencing *MFZ* in the decision either in relation to the principles of statutory interpretation or in my finding that an analysis as to the reasonableness and necessity of the proposed treatment plans under s. 15 of the *Schedule* was no longer required as the respondent failed to cure its defective notice prior to the decision being rendered.

Denying the Respondent an Opportunity to Issue Compliant Denial Notices

[16] The respondent submitted that I erred in law by vitiating its right to "cure" its deficient notices regarding the treatment plans submitted on February 28, 2018 and September 7, 2018 under s. 38(11) of the *Schedule*. It is the respondent's position that an insurer's liability for payment of goods and services under a treatment plan as a result of its failure to comply with sections 38(8) and 38(9) of the *Schedule* only ends upon delivery of a compliant denial notice pursuant to s. 38(11), and not as a result of a decision of the Tribunal. I disagree.

[17] If I were to accept the respondent's position, then the outcome of the decision would only be a finding that the respondent's denial notices were non-compliant with sections 38(8) and 38(9). Such a finding would neither resolve the substantive issues between the parties nor provide any clarity to the applicant on whether she is entitled to the benefits in dispute had they not yet been incurred.

[18] Moreover, I find that the respondent's position runs afoul of the *Schedule*'s consumer protection mandate. It is well settled that the *Schedule* must be read generously with any limitations construed narrowly. In this context, I consider it unlikely that the legislature would have intended to bring a dispute over benefits between the parties to a conclusion by relying upon the respondent to determine when, and if, it would provide a denial notice that complied with sections 38(8) and 38(9) of the *Schedule*. In my opinion, this position would amount to an absurd, unreasonable, and inequitable result and would also strip the Tribunal of

its jurisdiction to resolve accident benefit matters as set out in s. 280 of *the Insurance Act*.[11]

[19] For all the reasons set out above, I find that I made no error of law in finding that the respondent's opportunity to cure its defective denial notices ended upon the issuance of the decision.

Misapplying s. 38(11) of the *Schedule*

[20] In regards s. 38(11) of the *Schedule*, the respondent first submitted that I erred in law by requiring it to pay to the applicant the amounts owing under the treatment plans submitted on February 28, 2018 and September 7, 2018 despite no amounts being incurred prior to the decision being rendered. The respondent also submitted that consideration should be given as to whether an insured person intends to and/or avails themselves of their s. 38(11) "right to obtain treatment" with the assurance that the cost would be covered by an insurer.

[21] I find that this submission by the respondent effectively requests that I re-weigh the hearing evidence and submissions rather than pointing to any error in the decision. I considered the respondent's hearing submissions regarding the issue of "incurred" and s. 38(11) and I disagreed. While it is certainly open for the respondent to disagree with the decision, this is not a basis for a reconsideration to be granted.

[22] The respondent relied upon the Court of Appeal decision in *Stranges v. Allstate Insurance Company of Canada* ("*Stranges*")[12] in its reconsideration submissions to support its position that procedural non-compliance does not create substantive entitlement to benefits on its own. This is a new argument which is not permitted in a reconsideration request and, therefore, is not properly before me. Even if the argument was considered, I find that it also fails on its merits as *Stranges* is distinguishable from this case on the facts. In *Stranges*, the inadequacy of a notice of termination of income replacement benefits was at issue. *Stranges* did not deal with s. 38(11) of the *Schedule* and the requirement that a benefit be paid if a denial notice failed to comply with sections 38(8) and 38(9).

[23] That being said, the respondent also submitted that I erred in law by finding that it was required to pay to the applicant the amounts owing under the treatment plans submitted on February 28, 2018 and September 7, 2018 regardless of

[11] R.S.O. 1990, c. I.8.
[12] 2010 ONCA 457.

whether they are *ever* incurred by the applicant. The respondent submitted that such a position would amount to a lump sum monetary windfall to the applicant which is outside of the Tribunal's jurisdiction.

[24] While I found that the treatment plans submitted on February 28, 2018 and September 7, 2018 were payable, the decision was silent on whether the treatment plans were ever required to be incurred prior to payment. Therefore, while this silence does not rise to a level of an error of law, I find that the decision could have been clearer regarding my interpretation of s. 38(11) and my finding that the treatment plans were payable.

[25] Therefore, I agree with the respondent's alternative submissions in its reconsideration request that even though I found that the treatment plans submitted on February 28, 2018 and September 7, 2018 were payable and need not be incurred *prior to* a decision being made on the issue regarding the respondent's compliance with s. 38, the benefits to which the applicant is entitled are only payable 30 days after an invoice has been submitted for services rendered in accordance with s. 38(15). This interpretation is in keeping with the respondent's reliance upon s. 49 of the *Schedule* which also requires an invoice for expenses to be submitted.

Costs

[26] **In its reply submissions, the respondent requested its costs of the reconsideration in the amount of $2,000.00 pursuant to Rule 19 of the *Rules*. Rule 19.1 of the *Rules* provides that a party may make a request to the Tribunal for its costs where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.**

[27] **On September 7, 2021, the respondent asked the Tribunal for a finding on the issue of costs as it was inadvertently not addressed in my original reconsideration decision.**

[28] **In an email to the Tribunal dated October 19, 2021, applicant's counsel submitted that the appropriate step for the respondent's requested relief would be an appeal to the Divisional Court as opposed to asking me to amend my reconsideration decision. The applicant also took the position that requesting costs in a reply is not permitted.**

[29] **I agree with the applicant that, in the normal course, where a decision is issued, the Tribunal would be *functus officio*. However, I find that I am not *functus officio* in this matter as my original reconsideration decision did**

not address the issues of costs. Moreover, Rule 19.2 allows a request for costs to be made to the Tribunal in writing or orally at a case conference or hearing, at any time before the decision or order is released. As the respondent's request for costs was included in its reply reconsideration submissions, I find that the respondent complied with Rule 19.2 and, as a result, the issue of costs is properly before me. However, the respondent's requests for costs of the reconsideration is denied.

[30] **As the basis for its requests for costs, the respondent set out several submissions made by applicant's counsel in the applicant's reconsideration submissions which it characterized as, "unprofessional, disrespectful, and unbecoming of a lawyer and Officer of the Court,"[13] inflammatory,[14] served no purpose in the dispute before the Tribunal,[15] were an attempt to villainize the respondent,[16] showed a lack of respect and civility,[17] and were vexatious.[18]**

[31] **While applicant's counsel may have made flippant and even careless statements in the applicant's reconsideration submissions, these statements were tangential and are not the kind of serious conduct that in my view attracts an order for costs from the Tribunal. Additionally, the submissions that the respondent took issue with did not interfere with my ability to carry out a fair, efficient and effective reconsideration process. Therefore, the respondent's request for costs is denied.**

CONCLUSION

[32] For the reasons noted above, the respondent's request for reconsideration is granted in part. I find that the applicant is entitled to the treatment plans submitted on February 28, 2018 and September 7, 2018 in the amounts of $1,361.50 and $2,486.00, respectively, plus interest in accordance with s. 51 of the *Schedule* 30 days following the submission of an invoice to the respondent for services rendered under these two treatment plans. **The respondent's request for costs is denied.**

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[13] Reply Submissions, para. 1.
[14] *Ibid*. at para. 8.
[15] *Ibid*. at para. 6.
[16] *Ibid*. at para. 8.
[17] *Ibid*. at para. 9.
[18] *Ibid*. at paras. 4, 6 and 9.

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Lindsay Lake
Adjudicator
Licence Appeal Tribunal
Tribunals Ontario

Released: November 5, 2021