CITATION: Sahadeo v. Pafco Insurance Company, 2023 ONSC 2542
DIVISIONAL COURT FILE NO.: 425/22
DATE: 2023/04/28

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Stewart and Newton JJ.

BETWEEN:	
RICHARD SAHADEO Appellant	*Ashu Ismail*, for the Appellant
– and –	
PAFCO INSURANCE COMPANY and LICENCE APPEAL TRIBUNAL Respondents	*Jonathan B. Schrieder*, for the Respondent, Pafco Insurance Company *Douglas Lee*, for the Respondent, Licence Appeal Tribunal
	HEARD at Toronto by videoconference: April 13, 2023

H. SACHS J.

[1] This appeal raises the question of whether the Licence Appeal Tribunal ("LAT") can supplement its reasons given in its original decision in its reconsideration decision.

[2] The Appellant, Richard Sahadeo, appealed to the Divisional Court from the June 28,2022 decision of the LAT in which it dismissed his claim for a catastrophic impairment designation.

[3] The Appellant's claim for such a designation was based on his position that he had a "marked" mental behavioural impairment in his ability to function in work or work-like settings ("adaptation"). His claim revolved around his diagnosed somatic symptom disorder (formerly known as pain disorder) and his other mental health diagnoses stemming from a car accident on October 26, 2015.

[4] The basis for his appeal were his allegations that the LAT committed three errors of law in how it considered his diagnosed pain condition. First, the LAT failed to follow the methodology set out by the Court of Appeal for Ontario in *Pastore v. Aviva Canada Inc.*, 2012 ONCA 642 for assessing a catastrophic impairment due to a mental behavioural component. That methodology required the LAT to first determine what the diagnosed mental health disorders were and to then determine the impairment that flowed from those disorders. The LAT's June 28, 2022 decision failed to determine what the Appellant's mental health disorders were. Second, the LAT improperly excluded the Appellant's pain related impairments, which arose from a diagnosed pain disorder. Third, the LAT failed to advert to or grapple with the Appellant's most significant evidence, which consisted of a psychiatric report from Dr. Harnick that explained each post-accident psychiatric diagnosis and how the combined effect of those conditions rendered the Appellant incapable of managing work and work-like stress.

[5] In addition to filing his appeal from the June 28, 2022 LAT decision, the Appellant also filed a request for a reconsideration of that decision by the LAT. In that request, the Appellant set out basically the same arguments that he raised on appeal. In its reconsideration decision dated January 23, 2023, the LAT set out all of the Appellant's concerns with its original decision, gave further reasons designed to meet those concerns and dismissed the request for reconsideration.

[6] With respect to the Appellant's submission that the LAT failed to set out his diagnoses, the LAT explained that it did not do so because the parties were largely agreed on his diagnoses. The Appellant's assessors diagnosed him with major depressive disorder and somatic pain disorder and Pafco's assessor diagnosed him with an adjustment disorder with mixed anxiety and depressed mood and a somatic pain disorder. Thus, according to the LAT, it was not necessary for it to rule on the diagnoses, but only on the degree of impairment caused by the diagnosed disorders.

[7] With respect to the LAT's alleged failure to deal with Dr. Harnick's report, the LAT stated at para. 10 of its reconsideration decision:

> Dr. Harnick's report was not mentioned in my decision because other than diagnosing the [Appellant] with a mental health disorder, it was not very persuasive. Dr. Harnick did not comment on how the psychological impairments affects the [Appellant's] ability to adapt. Thus, while I considered Dr. Harnick's diagnosis of somatic pain disorder, it did not assist me in deciding the ultimate issue in dispute.

[8] The LAT also dealt with the Appellant's argument that it excluded his reports of pain in its analysis of whether he met the threshold for a catastrophic designation. In doing so it acknowledged that its original decision "may have left the [Appellant] with the impression that his reports of pain were not fully considered in my analysis of whether he met a level of marked impairment in adaptation." As a result, it decided to focus on the "reports of pain" and to outline why, even if these reports of pain were taken into account, the

Appellant "did not reach the threshold for a catastrophic designation." Further, the LAT stated at para. 14:

> I also wholly agree that in accordance with the decision in *Pastore v. Aviva*, reports of pain should be considered with respect to the [Appellant's] impairments on account of his pain disorder. I find in this case, they were considered.

[9] In the balance of the reconsideration decision the LAT reviewed the evidence regarding the effect of the Appellant's mental and pain disorders and found as follows, at para. 31:

> To summarize the [Appellant] is claiming I failed to take into consideration all the mental and pain disorders affecting his ability to function in adaptation. Even if I were to accept all the difficulties reported by the [Appellant] as an inability to adapt to stressful circumstances, the evidence still demonstrated that he is quite functional and at most moderately impaired. The Decision provides additional reasons why I preferred the respondent's assessment over the [Appellant's] in this regard. I find that even if I had made an error in how I considered the [Appellant's] reports of pain in the Decision, having reviewed the evidence again through the lens of pain, it would not lead to a different result as required by Rule 18.2(b).

[10] Thus, the LAT both found that it had considered the evidence regarding pain and its effect on the Appellant's ability to function in adaptation in its original decision and that if it had erred in not doing so, a review of the evidence through that lens did not change its conclusion about the level of the Appellant's impairment.

[11] Both parties accept that on this appeal our jurisdiction is limited to reviewing errors of law. Further, the Appellant does not submit that there was no evidence in the record that would justify the LAT's conclusion regarding the effect of the Appellant's pain disorders on his ability to function in adaptation. In fact, the Appellant conceded that if both the original decision and the reconsideration decision are taken into account, he cannot demonstrate an error of law.

[12] The essence of the Appellant's argument is that the LAT overstepped the bounds of what it is entitled to do in a reconsideration decision, thereby causing an unfairness to the Appellant. As put by the Appellant's counsel in oral submissions, the unfairness consisted of using the reconsideration decision to deprive the Appellant of an appeal on a question of law by reviewing the facts again in light of the correct legal principles, thereby leaving the Appellant with, at best, an appeal on a question of mixed fact and law. As acknowledged by the Appellant, the Divisional Court has no jurisdiction to deal with appeals on questions of mixed fact and law.

[13] Section 21.2(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, gives a tribunal the power to make rules giving it the power to reconsider its own decision. Rule 18.1 of the LAT's *Common Rules of Practice and Procedure* provides that the LAT may reconsider "any decision of the Tribunal that finally disposes of an appeal." Further, a request for reconsideration may be heard by the same member whose decision is the subject of the request (see: *Gore v. Rusk*, 2022 ONSC 2893 (Div. Ct.) at para, 49), or by another member of the LAT.

[14] One of the bases for requesting reconsideration of a decision is that "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": Rule 18.2 (b). After considering the request for reconsideration the LAT may dismiss the request, confirm, vary or cancel its original decision or order, or order a rehearing on all or any part of the matter: Rule 18.4.

[15] In order to grant a reconsideration request on the basis of Rule 18.2(b), the LAT must be satisfied both that there was an error of law in the original decision and that it would have likely reached a different result had the error not been made. In the reconsideration decision at issue in this case, the LAT asked itself whether it made any errors of law in the original decision, and then asked whether, if it did, that error have changed the result. In order to answer the second question, the LAT reviewed the evidence again with a view to focusing on the alleged error that the Appellant said it had made the first time. Having done so, it found that even if it had erred in the original decision (something it did not concede), the error would not have changed the result. This approach was a logical and necessary one for the LAT to take given the ground upon which the reconsideration request was made. In other words, what the LAT did in its reconsideration decision is contemplated by the Rules regarding reconsideration.

[16] The same is true of the result reached by the LAT. If it concluded that the error alleged would not have changed the result (even if was made), then the LAT had the jurisdiction to dismiss the request for reconsideration and confirm the original decision. This is what the LAT did in the impugned decision, and it is a result that logically flows from its findings in that decision.

[17] In other words, rather than acting outside its jurisdiction under the Rules governing reconsideration, the LAT acted entirely within that jurisdiction. Those rules contemplate that the LAT can reconsider the evidence in light of the legal errors it is alleged to have made in the original decision and still come to the same decision. One inevitable result of the Rules is that a party may be deprived of an appeal based on an error of law that it would have had if the reconsideration process did not exist. This is not an unfairness; it is a legislative choice designed to reinforce the fact that the Court's role in making decisions concerning entitlement under the *Statutory Accident Benefits Schedule* is a limited one.

[18] The Appellant referred us to the Divisional Court's decision in *Fordjour v. Royal and Sun Alliance Ins. of Canada*, 2019 ONSC 6268, to support its arguments. In that case, the Divisional Court found that the adjudicator did not assess the causation issue properly. On reconsideration the LAT found that the causation analysis was "implied". The Divisional

Court found that this conclusion was unreasonable because crucial findings of fact were not made on the causation issue. In the case at bar, the LAT in its reconsideration decision did more than just assert that the effects of the diagnosed pain disorder on impairment was considered in its original decision. It went on to review the evidence again on that issue and to make "crucial" findings of fact on that issue. It also explained why it did not find the Appellant's main expert's report helpful and it explained why it did not find it necessary to set out the specific diagnoses in its original decision. Having done so, the Divisional Court was not left with the same concern as it had in the *Fordjour* case. The LAT's reasoning on all the issues of concern was not implied, it was express. Further, where crucial findings of fact were necessary to determine the issues, the LAT made them.

[19] For these reasons the appeal is dismissed. The parties agree that the successful party is entitled to costs fixed in the amount of $7500.00 and that no costs should be ordered in favour of or against the LAT. The Appellant is to pay the Respondent, Pafco, its costs fixed in the amount of $7500.00.

Sachs J.

I agree

Stewart J.

I agree

Newton J.

Released: April 28, 2023

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Respondents

REASONS FOR JUDGMENT

Sachs J.

Released: April 28, 2023