Citation: Al-Nakeeb v. Aviva General Insurance Company, 2023 ONLAT 20-010473/AABS - R

RECONSIDERATION DECISION

Before:	**Ian Maedel**
Licence Appeal Tribunal File Number:	**20-010473/AABS**
Case Name:	**Ayat Al-Nakeeb v. Aviva General Insurance Company**

Written Submissions by:

For the Applicant:	Bambi Santiago, Paralegal
For the Respondent:	Hooman Zadegan, Counsel

BACKGROUND

[1] On January 30, 2023, the respondent requested reconsideration of the Tribunal's Decision that was released to the parties on January 9, 2023 ("Decision"). In that Decision, the Tribunal determined the applicant did not suffer a minor injury and was not bound by the $3,500.00 funding limit for a minor injury. The Tribunal further indicated two treatment plans, both in the amount of $2,600.00 were reasonable and necessary, and the applicant was entitled to the cost of two Disability Certificates ("OCF-3s") in the amount of $200.00 each, plus interest, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* ("*Schedule*").

[2] The grounds for a request for reconsideration are contained in Rule 18.2 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 *Common Rules of Practice and Procedure* ("*Common Rules*"). To grant a request for reconsideration, the Tribunal must be satisfied that 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.

[3] The respondent is seeking a reconsideration of the Decision pursuant to Rule 18.2(a) and (b). The respondent requests that the Decision be varied and a determination made that the applicant sustained a minor injury and is not entitled to the disputed benefits.

RESULT

[4] The respondent's request for reconsideration is granted. The previous Decision shall be cancelled and this matter shall proceed to a rehearing of all the issues in dispute.

PARTIES' SUBMISSIONS

[5] The respondent submits the Tribunal committed a significant error of fact and law by failing to place the requisite weight upon the surveillance evidence tendered. The Tribunal further erred in conflating pain with functionality in interpreting the surveillance evidence in reference to the *Schedule*. Additionally, the Tribunal commented on the withdrawal of the previous issue related to income replacement benefits in weighing the surveillance evidence, which is irrelevant and an error of fact and law.

[6] The respondent submits the Tribunal erred in fact and law by placing weight upon the ultrasound dated September 17, 2018 which identified a tear in the right shoulder tendon. The respondent contends this ultrasound does not accord with the evidence tendered, including the assessments undertaken before and after the ultrasound by Dr. Kruger, who opined the applicant's shoulder was normal.

[7] The respondent submits the Tribunal erred in failing to make any findings related to the applicant's credibility, despite relevant contradictions in the evidence from the Examination Under Oath.

[8] The respondent submits the Tribunal failed to consider the issues of causation related to the clinical notes and records tendered, and to the updated Disability Certificate ("OCF-3") and a "new" sprain and strain of her elbow related to the accident.

[9] The respondent submits the Tribunal erred in fact and law when it misconstrued the legal test for chronic pain and failed to comment on the crystallization of chronic pain symptoms over a period of time.

[10] The respondent submits the Tribunal erred in fact and law when it concluded the applicant was attending treatment regularly. The respondent submits this conclusion is untenable, as no evidence was tendered regarding regular attendance at treatment.

[11] Finally, the respondent submits the Tribunal erred in law and offended the rules of natural justice by failing to address the doctrines of *res judicata* or *issue estoppel*. Specifically, the Tribunal did not consider the previous decision related to the MIG and treatment rendered for file 18-007560/AABS released July 29, 2019. This previous decision involved a weighing of largely the same evidence related to the same applicant and date of loss, and the Tribunal concluded the applicant's injuries were minor and treatable within the MIG limits.

[12] The applicant submits the Tribunal did not err in law or fact, nor was there any violation of natural justice or procedural fairness with regard to the previous decision. The applicant submits the respondent's request for reconsideration should be dismissed, as this is an effort to re-litigate the matter. Otherwise, the Tribunal is not bound by the previous decision in 18-007560/AABS, and the arguments related to *res judicata* and *issue estoppel* were not tendered in the respondent's original hearing submissions, and only in the reconsideration request.

[13] In reply, the respondent asserts that the applicant has failed to address the issue of re-litigation of the MIG issue based on largely the same evidence. There has otherwise been no change in the applicant's circumstances, and this presents an obvious and overriding error related to two sharply conflicting Tribunal decisions.

ANALYSIS

[14] I agree with the respondent that there were several errors of fact or law in the previous decision, such that the Tribunal would likely have reached a different result had these errors not been made.

[15] To be clear, the reconsideration of a decision is not a collateral means to reconsider or reweigh evidence when a party disagrees with the previous decision. Having said that, I have conducted a review of the evidentiary record for this matter, including a review of the submissions and evidence originally tendered.

[16] Although pled in the respondent's submissions in the written hearing, absent in the Tribunal's Decision is any analysis related to causation. Although there is some reference to the "but for" test in the leading case of *State Farm and Sabadash* 2019 ONSC 1121 (Ont. Div. Ct.), the Tribunal did not conduct a causation analysis. This is an error of fact and law such that the Tribunal would likely have reached a different result had the error not been made, pursuant to Rule 18.2(b).

[17] The Tribunal also erred in fact and law when it misconstrued the legal test for chronic pain. Aside from increased use of analgesics, the Tribunal did not provide any conclusions regarding the applicant's impaired level of functionality as a result of pain symptoms over a period of time. The Tribunal also did not identify three of six criteria related to the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition* in identifying chronic pain. Instead, the Tribunal conflated alleged psychological impairments with the identification of chronic pain symptoms in relation to the six criteria.

[18] The Tribunal erred in fact and law when it concluded at paragraph 37 of the Decision that the applicant was attending treatment regularly in relation to the treatment plans in dispute. As there were no treatment records tendered to suggest regular attendance, nor was there a period of treatment identified that correlated to the services in dispute, it remains unclear how the Tribunal reached its conclusion.

[19] I am not prepared to address the doctrines of *res judicata* or *issue estoppel* raised by the respondent. These issues were not raised as part of the previous hearing record, but only upon reconsideration. In my view, the reconsideration process should not be utilized as a means to bolster the previous hearing record or import legal argument not made at first instance.

[20] Given these errors I find it is appropriate for the Tribunal to cancel the previous decision pursuant to Rule 18.4(b)(i) and order a rehearing of this matter pursuant to Rule 18.4(b)(ii) of the *Common Rules*.

CONCLUSION

[21] For the reasons noted above, I grant the respondent's request for reconsideration.

[22] The Decision shall be cancelled.

[23] A rehearing of the issues in the original Decision is ordered.

[24] This matter will proceed to a written hearing on a date to be set by the Licence Appeal Tribunal. The Tribunal will contact the parties to set the date.

[25] The parties will serve their **written submissions** and **evidence** on each other and file with the Tribunal according to the following timetable:

Submissions	**Due Date**	**Page Limit**
Applicant's submissions and evidence:	**30 calendar days prior to scheduled hearing**	**10 pages**
Respondent's submissions and evidence:	**14 calendar days prior to scheduled hearing**	**10 pages**

Applicant's reply submissions or written notice that no reply submissions will be filed:	**7 calendar days prior to scheduled hearing**	**5 pages**

[26] The page limits are exclusive of evidence and case law. The hearing adjudicator may choose not to consider submissions which exceed the page limits.

Ian Maedel
Vice-Chair
Tribunals Ontario – Licence Appeal Tribunal

Released: June 26, 2023