Citation: Whilby v. The Personal Insurance Company, 2023 ONLAT 21-003382/AABS -R

RECONSIDERATION DECISION

Before:	**Nishant Nayak, Adjudicator**
Licence Appeal Tribunal File Number:	**21-003382/AABS**
Case Name:	**Richardo Whilby v. The Personal Insurance Company**

Written Submissions by:

For the Applicant:	Ryan Bowes, Counsel
For the Respondent:	Nathan Fabiano, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the applicant. It arises out of the Tribunal's decision dated March 6, 2023 ("decision") in which I determined that the applicant had not met his onus of proving that his accident-related impairments warrant removal from the Minor Injury Guideline (the "MIG"). I also determined that he was not entitled to treatment plans, costs of assessments, interest, or an award.

[2] The applicant has requested a reconsideration of my decision and submits that I made errors of law and fact in my determination of the issues before me. He requests an order varying my decision. He seeks a determination that his injuries are not subject to the MIG, and that the denied treatment and assessment plans be paid, with interest.

[3] The respondent submits that I should deny the applicant's request for reconsideration. The respondent's position is that the applicant is improperly trying to relitigate the matter through the reconsideration process and that my decision contained no errors of fact or law.

RESULT

[4] The applicant's request for reconsideration is denied.

RECONSIDERATION CRITERIA

[5] The grounds for a request for reconsideration to be allowed are contained in Rule 18 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 ("Rules").

[6] Under Rule 18.2, a request for reconsideration will not be granted unless one 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.

[7] The applicant requests a reconsideration of my decision under Rule 18.2(b).

ANALYSIS

Did I err in fact or law in determining that the applicant's accident-related impairments fell within the MIG?

[8] The applicant submits that in finding that the applicant's injuries are predominantly minor and subject to the treatment limits of the MIG, and denying medical and rehabilitation benefits, I made an error of fact and law such that the Tribunal would likely have reached a different decision had the error not been made.

[9] The applicant submits that I erred in law and fact by not considering or assigning appropriate weight to three pieces of evidence in my original decision, as follows:

a. The cervical spine x-ray performed at Heartlake X-Ray and Ultrasound on October 23, 2019, which found: "Mild severity lower cervical degenerative disc disease. Mild cervical bilateral facet arthritis of mild severity with no evidence of significant foraminal stenosis";

b. The Occupational Therapy In-Home Assessment Report by occupational therapist Estelle Tulman dated March 4, 2019;

c. The OCF-18 submitted by Preety Somal, chiropractor at Mackenzie Medical Rehabilitation Centre, dated September 5, 2019.

[10] The respondent submits that this request for reconsideration is frivolous and is an improper attempt to re-try the case that was clearly and definitively rejected based on a fulsome review of the evidence and submissions. Moreover, the respondent submits the applicant's submissions on reconsideration are based on mere conjecture, not fact or law, and do not satisfy the criteria for granting reconsideration under Rule 18.2. Furthermore, it submits that I conducted a thorough analysis and arrived at a reasonable conclusion after weighing all of the evidence before me.

[11] I find that the applicant's reconsideration request is an attempt to relitigate his position that failed at the hearing. In the initial hearing, the onus was on the applicant to prove on a balance of probabilities that his accident-related

impairments were not minor and did not fit within the MIG. Based on the evidence before me, I determined that the applicant did not meet his onus and that his accident-related impairments fit within the MIG.

[12] With respect to the x-ray dated October 23, 2019, I did not expressly refer to the x-ray in rendering my decision. However, I note that I am not required to identify all of the evidence submitted, weighed, and contemplated in making my decision. I did review and consider the x-ray in the course of making my determination but did not find it persuasive. It is the applicant's burden to demonstrate that their impairments were caused by the accident. The applicant did not make any arguments about the relevance of this x-ray in the initial submissions. The x-ray simply notes that the applicant had mild degenerative disc disease and arthritis with no evidence of significant foraminal stenosis after the accident, which are age-related conditions. The x-ray does not state what was the cause of this or what any impairments may be as a result or when it originated.

[13] With respect to the report by occupational therapist Estelle Tulman, I find no error in not referring to this report in my decision. The applicant did not advance this argument in his initial submissions, so it was not an error for the Tribunal not to include it in its analysis. In fact, the applicant did not mention Ms. Tulman's report or direct the Tribunal to the report at all in the body of his initial submissions, so this argument cannot succeed under Rule 18(b). Where the applicant did not value the evidence enough to address it in submissions, it follows that it was not an error for the Tribunal to assign it limited or no weight. The applicant is seemingly using this reconsideration request as an avenue to advance new arguments that he could have, but did not, make before the Tribunal at first instance. While not specifically argued by the applicant, Rule 18(d) clearly states that reconsideration is only appropriate when there is new evidence that could not have reasonably been obtained earlier and would have affected the result. Where the applicant failed to raise available evidence at first instance, it cannot be said that the Tribunal erred in failing to consider it.

[14] With respect to the OCF-18 submitted by Preety Somal, chiropractor at Mackenzie Medical Rehabilitation Centre, dated September 5, 2019, I find no error in not specifically referring to this OCF-18 in my decision. Again, the applicant did not advance this argument in his initial submissions. Furthermore, and in any event, it is well-established that an OCF-18 is not medical evidence and that it is beyond the scope of a chiropractor's expertise to diagnose chronic pain. Accordingly, even if I were to have referred to the OCF-18, it would not have affected the outcome of my decision that the applicant's impairments fall

within the MIG. I see no error of law or fact in the Tribunal's decision with respect to the treatment of evidence.

Did I err in determining that the applicant was not entitled to medical and rehabilitation benefits?

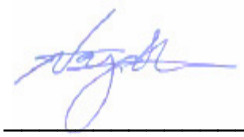
[15] Next, the applicant contends that I erred in determining that he was not entitled to the treatment plans in dispute because he had reached the limit under the MIG. The applicant submits that these treatment plans are reasonable and necessary and as such the respondent is liable to pay for them pursuant to sections 15 and 16 of the *Schedule*.

[16] I find that I did not make an error. The *Schedule* is clear that payment for medical and rehabilitation benefits pursuant to sections 15 and 16 of the *Schedule* is subject to the monetary limits of section 18(1), namely, the $3,500.00 treatment limit for injuries found to be within the MIG. Given my finding that the applicant sustained predominantly minor injuries subject to the MIG, and the fact that the MIG limit had been reached, it was not necessary to undertake the analysis of the reasonableness and necessity of the disputed treatment plans in my decision.

[17] For these reasons, I find the applicant has not established grounds for reconsideration under Rule 18.2(b).

ORDER

[18] The applicant's reconsideration request is dismissed.



Nishant Nayak
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: June 21, 2023