Citation: Bailey v. Allstate Insurance Company of Canada, 2023 ONLAT 20-003424/AABS - R

RECONSIDERATION DECISION

Before:	**Kate Grieves**
Licence Appeal Tribunal File Number:	**20-003424/AABS**
Case Name:	**Bailey v. Allstate Insurance Company of Canada**

Written Submissions by:

For the Applicant:	Sherilyn Pickering, Counsel
For the Respondent:	Sonya Katrycz, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the applicant in this matter. It arises out of a June 9, 2023 decision ("decision") in which I found that the applicant was subject to the Minor Injury Guideline ("MIG"), that she was not entitled to treatment plans in dispute that proposed treatment outside the MIG, and that she was not entitled to interest or an award.

[2] 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*"). A request for reconsideration will not be granted unless 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] Reconsideration requires a high threshold.

[4] The applicant advances her request for reconsideration pursuant to criteria 18.2(b). The applicant submits that I made errors of fact or law such that I would have reached a different result in my decision if the errors had not been made.

[5] The applicant seeks an order to vary the decision and find in her favour an all of the issues in dispute.

RESULT

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

ANALYSIS

The MIG determination

[7] I find that I made no error of law or fact with respect to my finding that the applicant sustained impairments treatable within the MIG. The applicant has not established grounds for the reconsideration under Rule 18.2(b).

[8] The applicant advances her request for reconsideration pursuant to criteria 18.2(b). Specifically, she submits that I erred as follows:

a) I erred in law in failing to adequately address post-traumatic headaches;

b) I erred in law by failing to adequately address the traumatic brain injury;

c) I erred in law in deciding the issue of chronic pain; and,

d) I erred in law and fact in deciding that the applicant did not suffer a psychological impairment.

[9] The applicant submits that I failed to consider the submissions or provide reasons addressing post-traumatic headaches. She submits that if the evidence had been considered it would have changed the outcome.

[10] I find that there was no error. The headaches were considered and this is an attempt to relitigate her case. I addressed the applicant's headaches at paragraphs 11 to 18 of the decision. I reviewed and considered the evidence concerning her headaches and concluded that I was not persuaded that the applicant sustained a physical impairment that would remove her from the MIG. My decision was based on the totality of the evidence and an application of the test as I described at paragraphs 7 and 8 of the decision.

[11] The applicant submits that I failed to adequately address the submissions and consider evidence of a traumatic brain injury. The applicant submits that it was an error for me to conclude that it was beyond the scope of a chiropractor to diagnose a concussion and restates the evidence that she believes ought to have resulted in a finding in her favour.

[12] I find no error. I acknowledged the possibility of a mild traumatic brain injury in my decision. The applicant's issue appears to be with the weight I ascribed to certain evidence, which does not meet the threshold for reconsideration. At paragraph 11, I summarized the applicant's contention that she suffered a traumatic brain injury, post-traumatic headaches, and chronic pain, and in the

same paragraph, found that the applicant had not established that her physical accident-related impairments feel beyond the definition of the MIG. I considered the evidence, including the family physician's records, the expert reports, and the OHIP-funded neurologist examinations, and which reports I attributed more weight. This Tribunal has repeatedly concluded that it is beyond the scope of a chiropractor to diagnose concussions.(See for example: *Sampson -Samuel v. Wawanesa Mutual Insurance* 2023 CanLII 26924; *Ratnarajah v. BelairDirect* 2023 CanLII 72604 (ON LAT); *Deveaux v. Aviva General Insurance*, 2021 CanLII 18935 (ONLAT); *Wadood v. Economical Insurance* 2023 CanLII 9251 (ON LAT)) The applicant points to the chiropractic association in support of her position, but the scope of practice is not established by the association, it is established by legislation and governed by the regulatory college.

[13] The applicant submits that I erred in law by ignoring case law on the issue of chronic pain. She submits that it was an error for me to rely on the six criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment, 6th Edition, 2008*, because there was already a diagnosis of chronic pain. I find no error. I noted at paragraph 19 that the criteria were not binding but were a useful analytical tool for assessing functional capacity. I referenced the criteria because Dr. Friedlander in his chronic pain assessment opined that she met the criteria, but failed to explain how she met the criteria. In her original submissions, the applicant also argued that she met the six criteria. I do not agree therefore, in these circumstances, that it was an error for me to consider the criteria that were put before me. The applicant reiterates in her submissions on reconsideration the evidence on chronic pain and function. Reconsideration is not an opportunity to re-argue her case or for me to re-weigh the evidence.

[14] The applicant submits that I failed to apply the legal test for psychological impairment. The applicant doesn't identify the legal test I allegedly failed to apply. At paragraphs 7 and 8 I set out the MIG definition and that the applicant could escape the MIG if they can provide evidence of an injury that is not included in the minor injury definition. I considered the evidence regarding psychological impairments, gave less weight to the psychovocational assessment, and explained why I found it inconsistent with the bulk of the medical evidence. I was not persuaded that there were psychological impairments that affected her functional ability, and on a balance of probabilities, found that the applicant had not met her burden of proof to establish psychological impairment as a result of the accident. I considered the test, weighed the evidence, and reached a conclusion.

[15] I find this is an attempt to re-litigate the original hearing. Much of the applicant's argument focuses on the evidence presented at the hearing and requesting that I re-weigh the evidence and come to a new result.

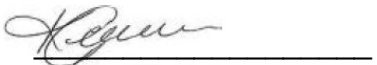
Reasonableness and Necessity of Treatment Plans

[16] The applicant also submits that I made an error of law in failing to consider whether the treatment plans were reasonable or necessary because I concluded that her injuries fell within the MIG. She submits that the issue of MIG does not dispose of whether the treatment plans are reasonable or necessary.

[17] To date, neither party has advised whether there are any limits remaining under the MIG. In any event, if there are any amounts remaining within the $3,500.00 limit it is not necessary for me to determine whether the treatment plans are reasonable or necessary. Section 40(8) of the *Schedule* states that if it is determined that the MIG applies to an insured person following a dispute before the Tribunal, the benefits and/or assessments incurred under the MIG are deemed reasonable and necessary. Therefore, I made no error in failing to determine whether the treatment plans are reasonable or necessary.

CONCLUSION

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



Kate Grieves
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: November 23, 2023