



Citation: Acamovic v. Cayuga Mutual Insurance Company, 2021 ONLAT /20-005445AABS - R

RECONSIDERATION DECISION

Before: Theresa McGee, Vice-Chair
Date of Order: October 18, 2021
Tribunal File Number: 20-005445/AABS
Case Name: Radomir Acamovic v. Cayuga Mutual Insurance Company

Written Submissions by:

For the Respondent: Gerald S. George, Counsel

For the Applicant: Samia M. Alam, Counsel

OVERVIEW

- [1] The respondent requests reconsideration of a preliminary issue decision dated August 6, 2021 (“preliminary issue decision”). In the preliminary issue decision, the Licence Appeal Tribunal (“Tribunal”) found that the respondent had requested Insurer’s Examinations more often than was reasonably necessary, and that because the respondent’s requests did not comply with s. 44 of the *Schedule*, s. 55 does not bar the applicant from proceeding with his claim for an income replacement benefit before the Tribunal.

RESULT

- [2] The respondent’s request for reconsideration is denied.

ANALYSIS

- [3] Under Rule 18.1 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017)*, as amended (the “*Common Rules*”), a party may request reconsideration of any decision of the Tribunal that finally disposes of an appeal.
- [4] The grounds for a request for reconsideration are contained in Rule 18.2 of the *Common Rules*. A request for reconsideration will not be granted unless one of the following criteria are met:
- i. The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness;
 - ii. 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;
 - iii. The Tribunal heard false evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or
 - iv. 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.
- [5] The respondent submits that the Tribunal erred in law and violated the rules of procedural fairness. It submits that the Tribunal issued incomplete reasons that failed to address its argument on the prejudice it suffered due to the applicant’s non-attendance at the Insurer’s Examinations. It submits that the preliminary issue decision should be subject to reconsideration because it finally disposes of

the issue of the s. 55 bar on the applicant's income replacement benefit claim. For the following reasons, I reject those submissions.

The request for reconsideration is non-compliant with Rule 18.1

- [6] The respondent submits that the applicant raised concerns with the reasonableness and necessity of the Insurer's Examinations for the first time in his preliminary issue hearing submissions. The respondent submits that the applicant's failure to raise these concerns sooner deprived it of the ability to clarify its requests. The respondent submits that this amounted to prejudice, and that the Tribunal's failure to address this issue is "an exceptional circumstance that merits reconsideration at this time."
- [7] In support of its position that the preliminary issue decision should be subject to reconsideration under Rule 18.1 of the *Common Rules*, the respondent relies on three reconsideration decisions from this Tribunal: *R.L. v. Intact Insurance Company* [*R.L.*]; *M.Y. v Wawanesa Mutual Insurance Company* [*M.Y.*]; and *L.D. v Gore Mutual Insurance Company* [*L.D.*].¹ These three decisions apply an expansive interpretation of Rule 18.1 that encompasses decisions that finally dispose of certain preliminary issues and partial claims. In *R.L.*, Vice-Chair Johal determined that a preliminary issue decision fell within the scope of Rule 18.1 because it determined s. 56 of the *Schedule* barred the applicant from proceeding with a non-earner benefit claim, finally disposing of that part of her appeal. In *M.Y.*, Vice-Chair Farlam determined that a decision barring an applicant from proceeding with her income replacement benefit claim under s. 55 finally disposed of part of her appeal and could therefore be reconsidered. In *L.D.*, Associate Chair Jovanovic held that a procedural order directing a written hearing on a preliminary issue fell outside the scope of Rule 18.1, even interpreted expansively, and could therefore not be reconsidered.
- [8] Even if I adopt the expansive interpretation of Rule 18.1 applied in *R.L.*, *M.Y.* and *L.D.*, I find the preliminary issue decision falls outside the scope of the rule and cannot be reconsidered. The preliminary issue decision disposes of no part of the applicant's appeal. It simply determines as meritless one possible defence to the applicant's income replacement benefit claim. The claim for the income replacement benefit is very much live; the Tribunal has ordered a hearing on its merits.
- [9] The respondent has articulated no legal basis for its assertion that "exceptional circumstances" should warrant reconsideration. Even so, the circumstances of

¹ 2019 CanLII 146561 (ON LAT); 2020 CanLII 61454 (ON LAT); and 2020 CanLII 35471 (ON LAT).

this case are not exceptional. It remains open to the respondent to raise other defences to the applicant's income replacement benefit claim. The respondent had the benefit of three in-person examinations by the very same assessors it sought to re-examine the applicant a mere two months before the duplicative and unreasonable requests were issued. If the respondent has lost any evidentiary advantage due to the applicant's non-attendance at the improperly requested Insurer's Examinations, that loss is neither the fault of the applicant nor the result of any procedural impropriety by this Tribunal. I find that the request for reconsideration is not subject to reconsideration under Rule 18.1.

- [10] Even if I am wrong about the application of Rule 18.1 to this reconsideration request, I would deny the request on other grounds. I discuss the reasons for this conclusion below.

The respondent has failed to establish procedural unfairness or error

- [11] The respondent has failed to establish any of the criteria for reconsideration found in Rule 18.2. It has not identified a violation of the rules of procedural fairness or an error of law or fact that would have led the Tribunal to a different outcome had that error not been made. In fact, it has identified no factual or legal error in the preliminary issue decision at all.
- [12] The respondent's main submission is that the preliminary issue decision was deficient for failing to engage with its arguments on the issue of prejudice. It submits that it was improper for the applicant to wait until its submissions at the preliminary issue hearing to raise concerns about the reasonable necessity of the requested Insurer's Examinations. This failure, the respondent submits, prejudiced it by depriving it of the opportunity to clarify its requests.
- [13] The respondent has failed to present any basis in law for its position that the applicant owed it a duty to explain his non-attendance at the second round of Insurer's Examinations. As the Tribunal found in at para. 8 of the preliminary issue decision, the second round of Insurer's Examinations, requested just two months after in-person examinations were held with the same three assessors, were "duplicative, redundant, unnecessary and unreasonable." They did not comply with s. 44(1) of the *Schedule*.
- [14] The respondent directs me to consider case law where the failure of an insured person to reasonably explain their non-attendance at Insurer's Examinations was relevant to the analysis. Those cases are distinguishable from this one in a fundamental way: they all involved Insurer's Examinations properly requested in accordance with s. 44. The duty to request Insurer's Examinations "no more

often than is reasonably necessary” rests with the insurer. The *Schedule* imposes no duty on an insured person to raise concerns about the propriety of a s. 44 request. Certainly, the insured person undertakes a risk that if the request is ultimately held to be in accordance with s. 44, they may be statute-barred from proceeding with their claims before the Tribunal. But the respondent has referred me to no authority establishing a positive duty on the part of an insured to alert an insurer to improprieties in a request under s. 44.

- [15] The respondent submits that the Tribunal’s failure to engage in an analysis of the prejudice it suffered as a result of the applicant’s non-attendance violated the rules of procedural fairness. I see no procedural unfairness in the Tribunal’s decision not to engage in a prejudice analysis. No analysis of prejudice was necessary because, again, the Insurer’s Examinations in question were found to contravene s. 44. The Tribunal found that the respondent’s requests were made more often than was reasonably necessary and disposed of the preliminary issue. The requests were improper; the applicant had no corresponding obligations in respect of the requests; the bar in s. 55 was not engaged; and the analysis of the preliminary issue was complete.

CONCLUSION

- [16] The respondent’s request for reconsideration is denied.

Theresa McGee
Vice Chair
Tribunals Ontario – Licence Appeal Tribunal

Released: October 18, 2021