Citation: Iravani-Fard v. Economical Insurance, 2022 ONLAT 19-010239/AABS - R

RECONSIDERATION DECISION

Before:	**Derek Grant**
Licence Appeal Tribunal File Number:	**19-010239/AABS**
Case Name:	**Ghiti Iravani-Fard v. Economical Insurance**

Written Submissions by:

For the Applicant:	Joshua A. Lindzon, Counsel
For the Respondent:	Ryan Kirshenblatt, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the applicant, Ghiti Iravani-Fard ("GIF"). It arises out of a decision dated February 9, 2022, in which I found that GIF was statute barred from proceeding with her application under s. 55 of the *Schedule* due to her failure to attend several properly scheduled (and subsequently rescheduled) s. 44 Insurer's Examinations ("IEs").

[2] GIF submits that I erred in law and fact by "barring the Applicant from proceeding with her LAT Application based on the Respondent not getting a chance to conduct any IEs." GIF requests that the decision be varied to allow her to proceed with her application and permit Economical to conduct IEs, so as to determine her condition at various times throughout the claim.

RESULT

[3] GIF's request for reconsideration is dismissed.

BACKGROUND

Income Replacement Benefit Claim

[4] In order to determine GIFs ongoing eligibility for income replacement benefits, Economical scheduled four IEs. At paragraph 16 of the decision, I found that Economical's notices complied with the requirements set out in s. 44 of the *Schedule*, however, GIF did not attend. Economical provided another opportunity to attend rescheduled IEs, however, she failed to attend the rescheduled IEs.

Attendant Care Benefit Claim

[5] Similar to the requirement to determine ongoing IRB entitlement, Economical required GIF to attend IEs to determine her ongoing eligibility to attendant care benefits ("ACBs"). Having accepted that Economical's notices were in compliance, I noted that GIF did not attend any of the requested IEs; further, her counsel notified Economical that she would not attend. Economical provided GIF with notice of rescheduled IEs, and counsel again notified Economical that she would not attend the IEs. No reasons were provided for the non-attendance at any of the IEs.

ANALYSIS

[6] The grounds for a request for reconsideration are contained in Rule 18.2 of the Tribunal's *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017) (as amended*) ("*Common Rules")*. GIF relies on the grounds found in Rules 18.2(a), (b), and (d), submitting that the Tribunal violated rules of procedural fairness, made several errors of fact and law in rendering its decision, and that there is now evidence before the Tribunal that could not have been obtained previously and would likely have affected the result.

[7] The test for reconsideration under Rule 18.2 involves a high threshold. Reconsideration is only warranted in cases where an adjudicator has made a significant legal or evidentiary mistake preventing a just outcome, where false evidence has been admitted, or where genuinely new and undiscoverable evidence comes to light after a hearing. The reconsideration process is not an invitation for the Tribunal to reweigh evidence, or an opportunity for a party to re-litigate its position where it disagrees with the decision, or the weight assigned to the evidence. I find GIF's request to be just that.

No error of law or fact

[8] GIF directs me to paragraphs 35 and 36 of my decision to argue that Economical was not provided with the reasonable opportunity to fully assess her claim due to her failure to attend any IEs, precluding it from properly adjusting her file. She submits that was an error as Economical conducted a job site evaluation without informing the applicant until after the evaluation was complete. She argues that Economical had information regarding the tasks required as a Personal Support Worker, and the impact of her accident-related injuries. To this end, she submits that despite having information about her accident-related injuries, including a TBI and shoulder surgery, the respondent somehow did not have sufficient information to determine whether she suffered an inability to complete the tasks of her employment. Her position that I determined that Economical was not provided the reasonable opportunity to assess her claim, when it had conducted a job site evaluation, amounts to an error of fact.

[9] Upon review of the decision and evidence presented at first instance, I find that GIF has not presented any valid arguments in support of her request for reconsideration that would change the outcome of my decision.

[10] At paragraphs 22-33 of my decision, I perform an analysis of whether Economical's notices for GIF to attend at certain IEs complied with the

requirements under s. 44. Finding that they did, i.e., both the initial and rescheduled notices, I went on to determine that the requests were reasonably necessary (paragraph 33).

[11] What GIF fails to address in both her submissions at first instance and on reconsideration is the fact that she failed to comply with reasonably necessary IEs that had *Schedule*-compliant notices. She does not dispute that she did not attend, nor does she dispute that she provided no reasons for her non-attendance. Short of relying on her evidence of having shoulder surgery, which Economical rescheduled its IEs to accommodate, I found there is no reasonable explanation for her non-attendance.

[12] I find there is no error of fact. I found that Economical properly notified GIF of the types of IEs required the details of the assessors and their specialities. GIF was required to attend, she refused, she did not provide any reasonable explanation for her non-attendance. None of GIF's submissions on reconsideration disturb these factual findings that I made at first instance concerning those IEs. The consequence of same, at my discretion, is to find that she is statute barred from proceeding with her claim. Further, due to the repeated refusals to attend, the message sent to Economical is that she has no intention of attending IEs, and Economical has no evidence on which to assume otherwise.

[13] Further, despite her claim that the job site evaluation was conducted without her consent, as I note at paragraph 32 of my decision, "scheduling IEs under s. 44, the *Schedule* does not provide that any input or consent is required from the insured person." Therefore, there is no defence that Economical "usurped the right of this Tribunal and proceeded with an IE to evaluate the Applicant's job site." Economical was within its right to conduct the job site evaluation.

No violation of procedural fairness

[14] GIF submits that I violated the rules of procedural fairness as I barred her from proceeding with her application altogether. She asserts that I failed to strike a balance between her interests and that of Economical, knowing that she suffered a shoulder injury and had not yet returned to work.

[15] GIF's argument fails to persuade me that this amounts to a violation of procedural fairness. In the decision, I explain in detail of GIF's undisputed non-compliance with the IEs, for which I found Economical's notices to be *Schedule*-compliant. GIF essentially argues that procedural fairness *requires* the Tribunal to exercise its discretion in a certain way; however, I must firmly disagree with that, since her argument results in a fettering of discretion. That is antithetical to

the principle of discretion. While I agree that discretion must not be exercised arbitrarily or capriciously, I cannot agree that an adjudicator who provides cogent reasons to explain their choice is deciding arbitrarily or capriciously. The decision provides clear reasons why GIF was barred from proceeding with her application to this Tribunal: her refusal to attend any IEs has significantly prejudiced Economical and prevented it from being able to properly assess her in order to make informed determinations on her well-being.

There is no new evidence

[16] GIF submits that new evidence became available at the time of her initial submissions that would change the decision. She points to a determination by Omega Medical that she is catastrophically impaired ("CAT") and will be attending Economical's IEs. The CAT IEs will assess her ability to complete the tasks of her employment, her need for attendant care and other medical rehabilitation benefits. Her position is that had I known this information, I would have come to a different conclusion.

[17] In response, Economical submits that engaging in the CAT determination process is not new evidence that has any bearing on the decision at first instance. It submits that the s. 55 defence was based on previous non-attendances at several IEs and, further, the IEs were intended to address entitlement to IRBs and ACBs, as a CAT determination was not at issue at the time the preliminary issue was raised.

[18] I agree with Economical.

[19] I consistently found that GIF had not complied with her required attendance. To now, on reconsideration, raise the issue that she is CAT, is not new evidence that has any bearing on her non-compliance for the IEs that were the subject of the decision. What would have been helpful for her is if she had attended the subject IEs, particularly since the pre-104 and post-104 IRB tests are different, and she has prevented Economical from having sufficient or any evidence to compare her pre-and post-104 level of function. To now agree to attend CAT IEs is disingenuous and amounts to a disregard of the required steps in a claim that she is making.

[20] There is no remedy for non-compliance in attending IEs, except attendance at IEs. At the time of the decision at first instance, GIF was approximately two years beyond the last rescheduled request to attend IEs. Such a significant passage of time does not allow Economical to properly obtain accurate

information on the impact of GIF's accident-related impairments on her functionality.

[21] Economical has a right to conduct a reasonable number of IEs given the benefits sought. This was made clear at paragraph 29a-c, wherein I consider the nature of each IE that Economical requested and conclude that each is reasonably necessary to address the IRB and ACB claims.

[22] While GIF touts the "consumer protection" nature of the *Schedule*, the *Schedule* also provides the right of insurers to be able to make informed determinations on claims for benefits by requesting an insured person attend at an IE. In short, each of the insured and the insurer have corresponding obligations to each other as part of the accident benefits claim. The *Schedule* is also consumer "direction and instruction", and where the consumer has failed to follow the direction and instruction of the *Schedule*, an insurer has a right to seek out the appropriate remedy to protect its interests with a claim for benefits. The protective nature of the *Schedule* is for both parties, where a party has failed to comply as required.

[23] GIF has failed to persuade me that there were any errors of fact or law, violations of procedural fairness or new evidence which would have led to a different outcome, had any of her allegations been found to be the case. I see no reason to interfere with my original decision. I deny the request for reconsideration.

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Derek Grant
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: November 17, 2022