Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2023 CanLII 98393 (ON LAT)

Citation: Weber v. Allstate Insurance, 2023 ONLAT 20-010802/AABS-R

RECONSIDERATION DECISION

Before:	**Brian Norris**
Licence Appeal Tribunal File Number:	**20-010802/AABS**
Case Name:	**Jocelyn Weber v. Allstate Insurance**

Written Submissions by:

For the Applicant:	Gordon W. Harris, Counsel
For the Respondent:	Ryan Kirshenblatt, Counsel

OVERVIEW

[1] This request for reconsideration was filed by the Applicant. It arises out of a decision dated June 20, 2023 in which I found that she was entitled to a psychological assessment plan, plus interest and an award relating to the denial of the plan. I also found that the Applicant was not entitled to non-earner benefits ("NEBs"), driving rehabilitation treatment, and assessments related to plastic surgery, orthopaedic injuries, and driving rehabilitation.

[2] The Applicant submits that I acted outside my jurisdiction or violated the rules of procedural fairness and made an error of law or fact such that it would likely have reached a different result had the error not been made.

[3] The Applicant seeks an order varying the decision with a finding that she is entitled to the benefits in dispute, plus interest.

RESULT

[4] The Applicant's request for reconsideration is dismissed.

ANALYSIS

[5] The grounds for a request for reconsideration are found 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 ("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.

[6] The test for reconsideration under Rule 18.2 involves a high threshold. The reconsideration process is not an opportunity for a party to re-litigate its position

2023 CanLII 98393 (ON LAT)

where it disagrees with the Tribunal's decision, or with the weight assigned to the evidence. The requestor must show how or why the decision falls into one of the categories in Rule 18.2.

Non-Earner Benefits

[7] In the initial decision, I found that the Applicant was not entitled to NEBs because she never submitted a disability certificate during the period she claims entitlement to the benefit. I find no violation of procedural fairness or error of fact or law with respect to my analysis of whether the Applicant is entitled to NEBs.

[8] The Applicant submits that I violated the rules of procedural fairness and made an error of fact and/or law regarding her claim for NEBs. She submits the following:

a. The Respondent knew or ought to have known about the Applicant's accident and suggests that she did not know she could make a claim and was never contacted by the Respondent, nor given the requisite assistance with the claim.

b. The "clock" does not start ticking until the insurer provides an insured with an OCF-1 and a failure to provide the OCF-1 means that the "clock" does not start.

c. I failed to consider section 34 of the *Schedule* and whether she has a reasonable excuse for late notices and applications.

[9] In response, the Respondent submits that the Applicant is attempting to relitigate the issue, that section 34 of the *Schedule* does not apply, and that the cases drawn on by the Applicant are distinguishable from the Applicant's case. I agree with the Respondent and will address the Applicant's arguments in turn.

[10] The Applicant is relitigating whether the Respondent knew or ought to have known about the accident. At paragraph [13] of the decision, I found that the Applicant had provided no evidence demonstrating that the Respondent was aware of the accident, prior to when she submitted an incomplete OCF-1 on August 29, 2018. For reconsideration, the Applicant acknowledges that there is no evidence demonstrating that the Respondent knew or ought to have known about the accident and, instead, directs me to contradictions in the Respondent's submissions at the hearing as evidence to support her position. However, submissions are not evidence, and it is the Applicant who holds the evidentiary burden to demonstrate entitlement to the benefits claimed. There remains no

2023 CanLII 98393 (ON LAT)

evidence demonstrating that the Respondent was aware of the Applicant's accident. I see no error of fact or law occurred that a different result would have occurred had the error not been made.

2023 CanLII 98393 (ON LAT)

[11] Turning my attention to the Applicant's other arguments regarding the timing of her application for NEBs and section 34 of the *Schedule*, I find no violation of procedural fairness of error of law or fact occurred such that the Tribunal would likely have reached a different result had the error not been made. I further find that the Applicant raises new arguments at reconsideration, which is not a permissible ground for reconsideration.

[12] The Applicant never mentioned section 34 of the *Schedule* in her submissions at the initial hearing but submits now that it was an error of law for not considering the argument. I am not required to consider arguments that are not before me and failing to do so is not a valid ground for reconsideration This alone is enough to dismiss her request on this point.

[13] Accordingly, I find no error of law or fact occurred such that a different result would be reached had it not occurred.

Plastic Surgery Assessment

[14] I find no error of law with my analysis of whether the Applicant is entitled to a plastic surgery assessment. In the decision, I found that the Applicant had not met her onus to demonstrate that the plastic surgery assessment is reasonable and necessary. At paragraph [27] I found that the plastic surgery assessment report she submitted held no weight because it failed to acknowledge that she sustained a compound left tibia fracture following the accident, which required the insertion of a stabilizing rod and, instead, attributed her entire presentation to the subject accident. At paragraph [28] I noted that counsel is permitted to refer the Applicant to a specialist, but I nevertheless found it remarkable that none of the many medical practitioners that the Applicant met with following the accident recommended that she engage in a plastic surgery assessment.

[15] The Applicant submits that I erred in law by failing to apply to correct legal test as to whether the plastic surgery assessment was reasonable and necessary as a result of the accident. She submits that I erred, at least in part, by basing my decision on the fact that her counsel made the referral for the assessment. She further submits that the correct test is whether, on a balance of probabilities, further investigation is warranted into the condition and appropriate treatment based on her injuries. To her, plastic surgery is not regularly covered by the OHIP system, and she requires coverage from the Respondent for this

assessment. Lastly, the Applicant acknowledges that she experienced a subsequent traumatic event that may have contributed to her current presentation but submits that she requires the assessment as a result of the accident.

[16] The Respondent submits that the Applicant never addressed the test for entitlement in her initial submissions. From this I infer that it believes this is a new argument that should not be considered. I disagree with the Respondent on this point. The Respondent provided no authority indicating that the Applicant ought to outline the test for entitlement in her submissions. Further, as a subject matter expert, it is incumbent on the adjudicator to apply the correct legal test. Thus, I find that applying the correct legal test is a relevant ground to consider at the reconsideration stage that would constitute an error of law.

[17] The Respondent further submits that no error of law occurred and no additional requirement was imported to the legal test. To the Respondent, the decision considered the absence of a recommendation from a medical practitioner in the context of the totality of the evidence relevant to the issue and it was within the purview of the adjudicator to weigh the evidence and that the amount of weight is not reviewable on reconsideration. Lastly, the Respondent submits that this is an attempt to relitigate the issue.

[18] I find no error of law in requiring medical evidence to support a finding that a treatment and assessment plan is reasonable and necessary as a result of the accident and that the Applicant is also attempting to relitigate the issue. It is settled law that the Applicant holds the burden of demonstrating that she is entitled to the benefits claimed. To satisfy her burden, she must present evidence to support her claims. Having concluded that the plastic surgery assessment report held no weight due to the glaring error of attributing all of the Applicant's current presentation to the subject accident, it left the Applicant without any medical evidence to suggest that a plastic surgery assessment is reasonable and necessary. I agree with the Applicant that she is not required to demonstrate that a medical professional recommended the plastic surgery assessment, but this does not discharge the Applicant from the responsibility of presenting evidence to support her claim. Having failed to submit evidence demonstrating that a plastic surgery assessment is reasonable and necessary, it follows that she has not met her onus to demonstrate she is entitled to the assessment. As a result, I find that no error of law occurred such that a different result would be reached has it not occurred.

2023 CanLII 98393 (ON LAT)

Orthopaedic Assessment

[19] I find no error of law in my analysis of whether the Applicant is entitled to the orthopaedic assessment. At paragraph [32] of the decision, I found no evidence demonstrating that the Applicant requires further orthopaedic examination or that her consultations with an OHIP-funded orthopaedic surgeon were insufficient, as she submitted.

[20] The Applicant submits that I erred in law and shifted her onus by requiring her to show that she requires an orthopaedic assessment in the present, rather than at the time she submitted the plan. She submits that she submitted the plan at a time when she suffered constant and significant pain-related impairments that were greatly impacting her daily activities. She further submits that the Respondent must provide evidence, not a general assertion, that OHIP would cover the cost and it is not a persuasive argument to suggest that a treating physician, such as a family doctor, could have made the referral. She also submits that the tribunal must also give consideration for the practical challenges imposed on an insured by a generalized application of section 47(2) of the *Schedule*.

[21] The Respondent submits that this claim was dismissed for failure to satisfy the onus of proof. It further submits that the Applicant's submissions at first instance never addressed the merits of the orthopaedic assessment and provided unsubstantiated generalizations about the level of care received in the OHIP system. Lastly, it submits that even if section 47(2) is not applicable, it would only deny the Respondent from an affirmative defence, and it does not automatically discharge the Applicant from her onus to prove that the assessment was reasonable and necessary.

[22] I find no error of law in my analysis of whether the Applicant is entitled to the orthopaedic assessment. While I considered the application of section 47(2) of the *Schedule*, it was not the sole basis for my conclusion that the orthopaedic assessment is not reasonable and necessary.

[23] My analysis was based on the totality of the evidence presented and considered whether the assessment was reasonable and necessary at a time contemporaneous with the submission of the plan. At paragraph [32] of the decision, I noted that the Applicant received orthopaedic care through OHIP, which she does not dispute at this hearing, and that the Applicant led no evidence indicating that her OHIP-funding care was insufficient or needed to be supplemented in any way. Indeed, as submitted by the Respondent, the Applicant never addressed the merits of the orthopaedic assessment and,

2023 CanLII 98393 (ON LAT)

instead, provided unsubstantiated generalizations about the level of care received through the OHIP system. To-date, there remains no contemporaneous evidence to suggest that the Applicant requires an orthopaedic assessment in addition to her orthopaedic care through the OHIP system. As a result, I find no error of law occurred such that a different outcome would be reached had the error not been made.

Driving Rehabilitation Assessment

[24] The Applicant submits that I erred in law by misapplying the legal test to determine whether the driving assessment is reasonable and necessary. She submits that I required her to demonstrate that she does suffer from driver and passenger anxiety, rather than whether there is a reasonable possibility that she suffers from driving anxiety. She also submits that it was an error of law to discount the value of a driving anxiety assessment in light of the approval of other psychological treatment and the fact that the Applicant did not hold a valid driver's licence at that time.

[25] The Respondent submits that the Applicant is again leaving her arguments on the merits of her claims for the reconsideration stage, rather than at first instance. It highlights that the Applicant's submissions on the issue were limited to having "good reason" to be anxious about driving due to the severity of the accident and her injuries, rather than directing me to the evidence to support her claim. It further submits that the reasons in the decision were clear that the evidence was insufficient for the Applicant to discharge her onus and that even if an error of law occurred, which it believes didn't, that it would not result in a different outcome. I agree with the Respondent.

[26] I find no error of law in my analysis of whether the Applicant is entitled to a driving anxiety assessment. The onus is on the Applicant to demonstrate that the assessment is reasonable and necessary as a result of the accident. She is also required to put her best foot forward at first instance. Indeed, the Applicant made no compelling submissions on the issue at the hearing and never directed me to any evidence to support her submissions on why she is entitled to this assessment. At paragraph [37] of the decision I found that the driving anxiety assessment report held no weight, mostly because the content in it contradicted the other evidence. I then reviewed the Applicant's other evidence, despite not being directed to it, and at paragraph [38] noted that I found only one instance that may suggest that Applicant suffers from driver or passenger anxiety but concluded that the single complaint was insufficient to warrant the driving rehabilitation assessment to be reasonable and necessary. I concluded that the

2023 CanLII 98393 (ON LAT)

single complaint of driving anxiety is not compelling evidence demonstrating that the Applicant suffers from driver and passenger anxiety to the extent that it requires an assessment and treatment.

[27] It is not an error of law to highlight that the Applicant was approved for other psychological treatment and that she did not hold a driver's licence. These factors were not the primary basis for finding that the driving anxiety assessment is not reasonable and necessary, but rather other factors that contributed to the decision. At paragraph [36] of the decision, I suggested that the Applicant engage in the approved, but unconsumed psychological treatment prior to engaging in the driver's anxiety assessment. However, as found in paragraph [37] of the decision, she presented no medical evidence demonstrating that a driving anxiety assessment is reasonable and necessary. Engaging in the approved, but unconsumed treatment would provide valuable insight into whether additional assessments, such as a driving anxiety assessment, are reasonable and necessary. Despite all this, the Applicant never provided an authority to suggest that I am unable to consider that she never consumed other, approved, psychological treatment as a factor when determining whether additional psychological assessments are reasonable and necessary. It is not an error of law to require the Applicant to meet her onus to demonstrate through the evidence that the driving anxiety assessment is reasonable and necessary.

CONCLUSION & ORDER

[28] For the reasons above, I dismiss the Applicant's request for reconsideration.

____

Brian Norris
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: October 27, 2023

2023 CanLII 98393 (ON LAT)