LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

RECONSIDERATION DECISION

Citation: M.A. vs. Aviva General Insurance Company, 2021 ONLAT 18-011678/AABS

Before:	Derek Grant
Date of Order:	January 13, 2021
Tribunal File Number:	18-011678/AABS
Case Name:	M.A. vs. Aviva General Insurance Company

Written Submissions by:

For the Applicant:	Aminder Hayher, Counsel
For the Respondent:	Brendan Sheehan, Counsel

OVERVIEW

[1] M.A. asks for a reconsideration of my decision released on April 15, 2020. My decision denied income replacement benefits ("IRBs"). M.A. was also denied entitlement to four chiropractic treatment plans, a chronic pain assessment and a psychological assessment on the basis that M.A.'s injuries were predominantly minor.

[2] M.A makes the request pursuant to 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)* (the "LAT Rules").

[3] Rule 18.2 of the LAT Rules sets out the grounds upon which a party may seek reconsideration of a decision. M.A. relies on Rule 18.2(b) and submits the Tribunal made a significant error in law or fact in finding that he was not entitled to IRBs and that his injuries fall within the MIG limit, and that the Tribunal would likely have reached a different decision had the error not been made.

ISSUE:

What are the alleged errors in law?

[4] The alleged errors of law are set out in Part III, paragraphs a. to h. of M.A.'s reconsideration submissions. M.A.'s argument is summarized as I made an error of law or fact in my review of the evidence and case. In M.A.'s submission, the evidence supports that IRBs should be paid, that there was objective evidence to indicate that M.A.'s injuries were not minor due to chronic pain and my finding in the negative amounts to an error in law.

[5] Aviva submits that it is solely at the discretion of an adjudicator to consider the evidence in a hearing and assign the appropriate weight to which it should be given. That is, an adjudicator may accept some or all of the evidence of any given party, provided that is done on a principled basis. In Aviva's submission, my decision reached an outcome based on the manner in which I properly weighed the relevant evidence.

RESULT

[6] Having reviewed my decision and considered the submissions of the parties, I find the decision contained no error of law or fact. As such, M.A.'s request for reconsideration is dismissed.

EVIDENCE AND ANALYSIS

Requirements of Rule 18.2(d)

[7] In order to grant a request to change my decision from the written hearing based on Rule 18.2(d), I must be satisfied on the balance of probabilities that:

i. There's evidence that was not before me when I made my decision;

ii. The evidence could not have been obtained previously by the applicant; and

iii. That evidence would likely have affected the result.

[8] For the following reasons I find that M.A. is not entitled to rely upon the new evidence in support of the denied treatment plans. M.A. provides no submissions on why the new evidence should be accepted in accordance with Rule 18.2(d).

[9] Aviva argues that M.A. put forward new evidence that he did not rely on at first instance or in reply and that this new evidence should be excluded. I will address each issue including the ones of alleged new evidence.

Are M.A. injuries predominantly minor?

[10] M.A. submits I made a significant error of law and fact in determining that his injuries are within the MIG. M.A. relies on the findings of his family physician, Dr. Dulku, who note decreased range of motion with limitations of bending and lifting on several visits in 2017 and 2018. M.A.'s position is that decreased range of motion for 14 months post-accident reflects the severity of his limitations.

[11] M.A. argues that I should not have preferred Aviva's evidence over his, regarding the severity of the decrease in range of motion in his lower back. Aviva raised the issue in its responding submissions; however, M.A. did not address the decreased range of motion in reply submissions.

[12] Aviva argues that M.A. raised a new issue regarding the severity of the decrease in the range of motion in his lower back that was not put before me in the first instance. Further, Aviva argues that my decision properly found that M.A.'s injuries fall within the MIG.

[13] I agree with Aviva on both points. M.A. did not address the issue of the severity of decrease in the range of motion, and the reconsideration process is not the

forum to do so. At paragraphs 13 and 15 of my decision, I discussed the evidence of physical testing conducted by Dr. Dulku, which determined full range of motion in the neck, upper and lower extremities and full strength in all four extremities. Based on this evidence, M.A. did not persuade me that his injuries were not predominantly minor. On reconsideration, M.A. has not pointed me to evidence that an error of law or fact was made which would result in a finding that he should be removed from the MIG.

Adverse inference – prescription summary

[14] M.A. submits my finding of an adverse inference is an error of law because a prescription summary was not provided. M.A.'s position is that the Tribunal Order did not contain an order to produce the prescription summary, Aviva did not request production of the prescription summary; therefore there are no grounds to draw an adverse inference on the basis that the prescription summary was not provided.

[15] It is a well-established fact that the onus is on an applicant in an accident benefits proceeding to persuade the trier of fact to decide in their favour. This includes a duty to bring forward all evidence to support their claim, and a failure to do so may imply that such evidence would have a negative impact on their case. This is especially true, when that evidence was available at first instance. Aviva submits that M.A. could have produced the prescription summary before doing so for reconsideration.

[16] M.A. did not direct me to any prescription summary as evidence he was relying on in his initial submissions. On reconsideration, M.A. did not put forth any argument or evidence that the prescription summary was not available in first instance. The opportunity to provide the prescription summary was in the initial submissions. This was not done therefore an adverse inference was drawn. I find no error was made in reaching this conclusion. Even if M.A. had provided the prescription summary, the evidence at the time of the initial hearing was that he discontinued his pain medications.

Dr. Naumetz s. 44 report

[17] M.A. submits that Aviva did not produce any evidence that supports that his injuries fall within the MIG. M.A. is reminded that the onus is on him to prove that his injuries fall outside the MIG.[1] Aviva does not have the onus to prove that the injuries are inside the MIG. M.A. takes issue with the s. 44 orthopaedic report of

[1] Scarlett *v. Belair,* 2015 ONSC 3635 para.24

Dr. Naumetz, in that the report does not make a finding that his injuries fall within the MIG. M.A. did not raise this issue on reply. Further, Dr. Naumetz diagnosed M.A. with a WAD-II sprain/strain of the cervical spine, a sprain/strain of the lumbar spine, and a chest contusion. These are all injuries that would be categorized as predominantly 'minor'.

Section 38(8) non-compliance

[18] M.A. argues that the psychological assessment treatment plan was submitted on March 12, 2018 was not denied until May 7, 2018. Aviva does not contend this evidence, and I have no evidence that refutes the non-compliance with s. 38(8). Despite this, M.A. did not raise this issue in his initial submissions, therefore, I am not able to make an order on the issue.

Did M.A. suffer from a psychological impairment that would remove him from the MIG?

[19] M.A. submits that the decision contained an error where I found that M.A. did not suffer from a psychological impairment that would remove him from the MIG. At paragraphs 19 to 24, I discuss the psychological reports of Dr. Bhardwaj on behalf of M.A., and Aviva's assessor, Dr. Mor. Although M.A. submits that Dr. Mor's report corroborates Dr. Bhardwaj's finding, I disagree. Specifically, at paragraph 25, I note that the reports are contradictory, and I considered M.A.'s self-reporting to Dr. Mor. M.A. reported to Dr. Mor on the issue of anxiety, that he denied panic attacks, he had resumed driving and denied any residual in-vehicular anxiety. At paragraph 26 of the decision, I stated why I preferred Dr. Mor's report, which was consistent with M.A.'s self-reporting that he did not suffer from any psychological impairment.

[20] Assessments, by nature, are speculative. As well as having to establish that the assessment is reasonable and necessary, an applicant must also show that there are objective grounds that support the existence of a condition for which they claim entitlement to the assessment. On reconsideration, M.A. has not pointed me to persuasive evidence of an error of law or fact that the decision wrongly found that a psychological condition exists that would warrant approval of a psychological assessment.

Does M.A. suffer from chronic pain as a result of the accident?

[21] M.A. submits that the decision erred in finding that he does not suffer from chronic pain as a result of the accident. Further, that based on the medical evidence and case law, that a diagnosis of chronic pain is not required to remove him from the MIG. M.A.'s position is that 14 months post-accident, he still has

pain symptomatology and that he was diagnosed with chronic pain by Dr. Dulku, Dr. R. Sharma and Dr. H. Sharma and the chronic pain specialist Dr. Siddiqui. As the chronic pain specialist, the decision focused on the report of Dr. Siddiqui in considering whether there was evidence to support M.A. suffered from chronic pain as a result of the accident.

[22] At paragraph 30, I note that Dr. Siddiqui concluded that M.A. exhibited normal range of motion throughout his neck, shoulders and thoracolumbar spine. I found that this was not indicative that M.A. suffered from chronic pain.

[23] The decision also discussed the criteria to which chronic pain should be assessed against, as established by the *American Medical Association ("AMA") Guides*. At paragraphs 33 and 34, I considered M.A.'s medical evidence against the AMA Guides and found that M.A.'s evidence did not meet at least three of the criteria. Based on Dr. Siddiqui's report and the other relevant medical evidence, I concluded that M.A. did not suffer from chronic pain as a result of the accident. Further, that because of my finding that M.A.'s injuries were predominantly minor, it was not necessary to consider whether the chronic pain assessment was reasonable and necessary.

Is M.A. entitled to IRBs?

[24] M.A. submits that the decision erred in law by deciding that he is not entitled to IRBs. M.A. argues that due to limitations with lifting and bending, he was not able to meet the demands of his job as an order picker. Post-accident, M.A. engaged in modified work as a fork-lift driver and was let go as he was unable to meet the demands of the position. M.A.'s position is that as he has not resumed his position as an order picker within 104 weeks of the accident supports that he is entitled to IRBs.

[25] Aviva contends M.A.'s position, submitting that his submission ignores the reports its assessors, Dr. Naumetz, Dr. Desai and Dr. Mor. Dr. Naumetz found no evidence of musculoskeletal impairment, Dr. Desai did not find any neurological impairment and Dr. Mor, found no clinically diagnosable psychological impairment. All three of Aviva's assessors concluded that M.A. did not suffer a substantial inability to perform the tasks of his employment.

[26] Aviva further submits that M.A.'s submission that he lost his job as a result of not being able to keep up with the physical demands of the position was not corroborated by any evidence. Pursuant to s. 5(1) of the *Schedule*, in order to answer whether M.A. is entitled to IRBs, I must determine first whether M.A., was employed at the time of the accident, and then, as a result of and within 104

weeks after the accident, suffered a substantial inability to perform the essential tasks of that employment. At paragraphs 37 to 40, I considered the evidence regarding IRBs and found that M.A. did not satisfy the test of entitlement.

[27] Consequently, I found that M.A. was not entitled to IRBs. M.A. has not pointed me to any evidence on reconsideration that establishes my finding regarding entitlement to IRBs is based on an error of law or fact.

CONCLUSION

[28] Having considered the parties' submissions, I uphold my decision at first instance. M.A. has not pointed to any significant error of law or fact that might have impacted my initial weighing of the evidence and, ultimately, my decision to deny him the requested benefits. Thus, he has failed to meet the test set out in Rule 18. For these reasons, his reconsideration request is denied.

Derek Grant
Adjudicator
Tribunals Ontario- Safety, Licensing Appeals and Standards Division

Released: January 13, 2021