RECONSIDERATION DECISION

Before: **Sandeep Johal, Vice Chair**

Date: May 4, 2021

File: 18-005986/AABS

Case Name: B.A. vs. Economical Mutual Insurance Company

Written Submissions by:

For the Applicant: Kwaku Bona, Paralegal

For the Respondent: Nathalie V. Rosenthall, Counsel
Nathan M. Fabiano, Counsel

OVERVIEW

[1] The applicant filed a request for reconsideration from a decision dated August 19, 2020 in which I found the respondent was not liable to pay an income replacement benefit ("IRB") as a result of a material misrepresentation in accordance with s. 31(1) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] The applicant requests a reconsideration of the Original Decision dated August 19, 2020,[2] for having erred in law because of:

a. Exceeding jurisdiction or denying procedural fairness;

b. Failing to apply the canon of strict or narrow construction of statutory interpretation; and

c. Declining jurisdiction to apply the equitable principles of waiver and estoppel and the common law.

[3] The applicant requests that the Tribunal set-aside its Original Decision and order that the Tribunal has jurisdiction to address the principles of waiver and estoppel; order that the applicant is entitled to an IRB; or in the alternative, order a new hearing before a different adjudicator; and an order for costs against the respondent.

RESULT

[4] For the following reasons, the applicant's Request for a Reconsideration is **denied**.

ANALYSIS

[5] The grounds for a Request for Reconsideration are contained in Rule 18.2 of the Tribunal's *Common Rules of Practice and Procedure*.[3] A request for reconsideration will not be granted unless one or more of the following criteria are met:

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[1] O. Reg 34/10.
[2] *B.A. vs. Economical Mutual Insurance Company*, 2020 CanLII 91896 (ON LAT) ("Original Decision")
[3] Effective February 7, 2019.

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 or misleading 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 applicant has not specifically pleaded which subsection(s) of Rule 18.2 she is relying on in her request for a reconsideration; however, after a review of the submissions, it would appear the request is based on Rules 18.2 (a) and (b): i.e., pursuant to Rule 18.2 (a), that the Original Decision violated the rules of procedural fairness and, pursuant to Rule 18.2(b), that I made an error of law or fact such that I would have likely reached a different result had the error not been made.

a. The Tribunal did not exceed its jurisdiction or deny procedural fairness

[7] The applicant submits that I ruled on a motion that was not properly before me and that I breached the principle of procedural fairness by failing to seek the consent of the parties to rely on previously submitted evidence. According to the applicant, I failed to provide the applicant with an opportunity to provide additional submissions. Furthermore, the applicant submits that she did not make submissions on *Freedom of Information and Protection of Privacy Act ("FIPPA")*,[4] but rather made submissions on the *Personal Information Protection and Electronic Documents Act.* ("*PIPEDA"*).[5]

[8] I do not agree with the applicant for the following reasons. The applicant filed correspondence with the Tribunal on February 27, 2019 seeking an order from the Tribunal to prohibit the respondent from relying on audio recordings of her

[4] RSO 1990, c F.31
[5] SC 2000, c 5.

conversations obtained without her consent contrary to ss. 38(2) and 39(1)(2) of the *FIPPA.* Adjudicator Maedel ruled as follows:

> *The applicant's motion to exclude shall be heard by the hearing adjudicator.* Exclusion of the audio recordings goes directly to the heart of the preliminary issue raised on the alleged misrepresentation. I am not the hearing adjudicator, I have not had the benefit of canvassing all the evidence at a hearing on the merits. For me to make a ruling striking this key evidence would potentially fetter the discretion of the hearing adjudicator.[6] (Emphasis added)

[9] The applicant requested a motion for the exclusion of evidence and according to Rule 15.1(c) of the *Common Rules of Practice and Procedure* (the "Rules"), a party bringing a motion to the Tribunal shall set out the evidence in support of that motion. There is no right in the Rules to provide further submissions on that motion unless so ordered by the Tribunal.

[10] The Order of Adjudicator Maedel is clear: the applicant's motion to exclude the audio recording was to be heard by the hearing adjudicator. The matter was properly before me with motion submissions from the applicant and responding motion submissions by the respondent insurer. There was nothing to indicate the applicant was abandoning her exclusion motion. As a result, a ruling on that motion was made as part of the written hearing on the preliminary issue. I see no error in law and I am not persuaded by the applicant's submission that the Tribunal exceeded its jurisdiction.

[11] Lastly, the applicant submits that she did not make submissions on *FIPPA* but rather relied upon *PIPEDA.* The materials in support of the applicant's motion to exclude evidence specifically pleaded *FIPPA* and the Order of Adjudicator Maedel listed the issue as that of a breach of sections 38 and 39 of *FIPPA.*

[12] The applicant's submissions with respect to *PIPEDA* were contained in the submissions with respect to the preliminary issue hearing on whether the applicant made a material misrepresentation. However, the Original Decision did not refer to *PIPEDA* because it was not relevant in the analysis to determine the preliminary issue decision.

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[6] Motion Order of Adjudicator Maedel dated April 4, 2019 at para. 7. (Reconsideration Submissions of the Respondent at Tab E).

[13] It is trite law that not every piece of evidence or every submission being relied upon by a party needs to be addressed in rendering a decision. Even if *PIPEDA* was referenced in the Original Decision, it would not have changed the result. The Tribunal does not have jurisdiction to decide that *PIPEDA* was not complied with.[7] Furthermore, the Tribunal cannot provide any remedy in a situation where there was a breach. The remedies for any potential contravention are contained within Division 2 of *PIPEDA* which sets out the complaints and remedies for a *PIPEDA* breach. In short, the aggrieved individual can file a complaint with the federal Privacy Commissioner who either provides a report or notifies the aggrieved individual that they will discontinue the investigation. At that point, (report or discontinuance) the aggrieved individual can apply to the Federal Court. Remedies are in s. 16 of *PIPEDA*, in short, if there is a *PIPEDA* breach, then it is a matter for the federal Privacy Commissioner and/or the Federal Court to determine, not the Tribunal.

[14] As a result, I see no error of law or fact such that I would likely have reached a different result had such error not been made

No breach of procedural fairness

[15] The applicant further submits that s. 15(1) of the *Statutory Powers Procedure Act ("*SPPA*")*[8] prohibits the Tribunal or Adjudicators from using previously admitted evidence in another proceeding without the consent of the parties. According to the applicant, she did not file new motion materials and did not make any new submissions on the motion and therefore I should have sought the applicant's consent before making a ruling on the motion. As a result, the applicant submits, her procedural rights were violated.

[16] I do not agree with the applicant. S. 15.1(2) defines the phrase "previously admitted evidence" for the purposes of s. 15.1(1) -- it refers to evidence that was admitted, before the hearing of the proceeding, *in any other proceeding* before a court or tribunal. (emphasis added).

[17] There is no other proceeding in this matter. The applicant's motion to exclude the audio recording was for this current proceeding, bearing the same file number and involving the same parties.

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[7] *E.L. v. Wawanesa Mutual Insurance Company*, 2020, CanLII 42668 at para. 62.
[8] RSO 1990, c S.22

[18] As a result, I see no error in law such that I would have likely reached a different result had such error not been made.

b. No failure to apply the canon of strict or narrow construction of statutory interpretation

[19] The applicant submits that the Original Decision failed to apply the modern principle of statutory interpretation to this case and thereby erred in law by failing to do so.

[20] According to the applicant, the use of the modern principle based on a narrow or strict construction would mean that the evidentiary burden on the respondent is to prove, on clear and cogent evidence, the applicant's *mens rea*, i.e. that the applicant had the intention or foreknowledge to commit the offence of misrepresentation.

[21] Furthermore, the applicant submits that I haphazardly rejected the applicant's reliance on the Court of Appeal case of *Curtis*,[9] and that I did not explain why the case of *Chilton*[10] was not followed. The *Curtis* case was discussed, and reasons were provided on why it was found to be distinguishable at paragraph 37 of the Original Decision. *Chilton* was not discussed in the Original Decision as it was not found to be relevant for the analysis in arriving at the decision. For the sake of completeness, the *Chilton* case discussed the general rule that clauses in an insurance policy providing coverage are interpreted liberally or broadly in favour of the insured and clauses excluding coverage are construed strictly against the insurer. While I agree with this principle and that it is binding, it was not relevant or necessary to the analysis in the Original Decision and was therefore not referenced.

[22] The applicant also relies upon the Supreme Court of Canada Case of *Canada (*Minister *of Citizenship and Immigration) v. Vavilov* ,[11] in support of her position that I did not apply the proper principles of statutory interpretation.

[23] I do not agree with the applicant. The rules of statutory interpretation only arise when a statutory provision is ambiguous or capable of differing views on the meaning of that provision. There is no ambiguity of the provision in dispute. After considering the applicant's submissions, the argument was not accepted, see paragraphs 32 and 35 of the Original Decision. I am not convinced that

[9] *Workplace Safety and Insurance Board v. Curtis,* 2018 ONCA, 441 (CanLII) ("*Curtis*")
[10] *Chilton v. Co-operators General Insurance Co*., 1997 CanLII 765 (ON CA).
[11] 2019 SCC 65 (CanLII) ("*Vavilov*")

there was an error of law such that I would likely have reached a different result had the error not been made.

[24] In the Original Decision, the applicant submits that the *mens rea* or the mental element is required to show a material misrepresentation. The applicant relied upon the *Curtis* case, which I found to be distinguishable. In the present case, the applicant submits the onus or burden of proof on the respondent should be on the criminal standard of proving *mens rea*. That is not the case. *Mens rea* is not a standard of proof, it is a thing to be proven, the guilty mind. "Beyond a reasonable doubt" is the standard of proof for a criminal or quasi-criminal offence, whereas the "balance of probabilities" is the civil standard which applies in this case. The Original Decision found, at paragraphs 39-45, that the respondent satisfied its onus, on a balance of probabilities standard, that the applicant made a material misrepresentation under s. 31 of the *Schedule*.

[25] The issue of statutory interpretation was considered at paragraph 32 of the Original Decision; however, the applicant's submissions were not accepted when considering all the evidence. The reconsideration process is not an opportunity to ask for the Tribunal to re-weigh the evidence or reconsider the same submissions that were not accepted at the hearing.

[26] With the onus on the party alleging the error, I find that the applicant has not satisfied her burden and as a result, I find that there was no error of law or fact such that I likely would have reached a different result.

c. The Tribunal did not err in law when declining jurisdiction to apply the equitable principles of waiver, estoppel and the common law.

[27] The applicant submits that the Tribunal has jurisdiction to determine all questions of fact or law that arise in matters before it,[12] and the issue of waiver and estoppel are questions of fact and law. Furthermore, the applicant submits that the Original Decision did not follow binding precedent decisions including *Vavilov*; *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*;[13] *Gill v. Zurich Insurance Co.*;[14] *Motors Insurance Corporation v. Old Republic*

[12] Section 5(4) of the *Licence Appeal Tribunal Act, 1999*, SO 1999, c 12, Sch G.
[13] 1994 CanLII 100 (SCC) ("*Saskatchewan River*")
[14] 2002 CanLII 20772 (ON CA) ("*Gill*")

Insurance Company;[15] and *Snair v. Halifax Insurance Nationale-Nederlanden North America Corporation*.[16]

[28] In the Original Decision, paragraphs 46-57 provided an analysis on why the equitable remedies of waiver and estoppel were not applied in this case. I am not persuaded by the applicant's submissions. Contrary to the applicant's submissions, I find that the Original Decision provided careful and detailed reasons for the decision, and I find no basis on which to interfere with it.

[29] For the sake of completeness, I will address the applicant's submissions on this point for the purposes of the reconsideration. Dispute resolution with respect to statutory accident benefits is found under s. 280(1) of the *Insurance Act.*[17] The authority to the Tribunal to resolve statutory accident benefit disputes is found under subsections (4) and (5). Subsection (4) states that the dispute shall be resolved in accordance with the *Statutory Accident Benefits Schedule;* while subsection (5) states that *the regulations* may *provide for and govern the orders* and interim orders *that Tribunal may make* and may provide for *and govern the powers and duties that the Tribunal shall have for the purposes of conducting a hearing.* (emphasis added).

[30] As a result, the *Schedule* is the complete code for resolving disputes between insurers and insureds and the *Schedule* provides for the orders that may be made and for the powers and duties that the Tribunal shall have for the hearing.

[31] The applicant has not directed me to any section of the *Schedule* that would empower the Tribunal to make an order to apply the equitable remedy of waiver and estoppel.

[32] Furthermore, the case law the applicant relies upon are distinguishable and are not, in my view, binding precedent cases that would apply to the Tribunal to invoke equitable remedies. *Vavilov* does not stand for the proposition that the Tribunal has jurisdiction to apply equitable doctrines. In *Saskatchewan River, Gill* and *Snair*, the application of waiver and estoppel was made by the court and not by an administrative decision maker. Courts have inherent jurisdiction to apply equitable remedies. In *Motors Insurance*, that case was with respect to a loss transfer claim between the parties in the action. That is not the situation

[15] 2009 CanLII 37707 (ON SC) ("*Motors Insurance*")
[16] 1995 CanLII 4400 (NS SC) ("*Snair*")
[17] RSO 1990, c I.8

here and it is not a binding precedent case that applies to the Tribunal as it did not interpret a provision with respect to the *Schedule* that would make it binding.

[33] I agree with the following passage from *Vavilov*:

> That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.[18]

[34] In order to apply a common-law or equitable doctrine such as waiver and estoppel it must be relevant in the administrative context. In the present case, the power to do so must be explicit. As discussed in the Original Decision in paragraphs 51-53, the Tribunal has addressed the issue of whether it has the jurisdiction to order equitable remedies and the reasoning in *Y.D.,*[19] and *J.T.,*[20] was adopted for the purposes of this case.

[35] The applicant also seeks to rely upon the Financial Services Commission of Ontario ("FSCO") cases in support of her position that waiver and estoppel can be applied by the Tribunal. Reasons are not required on why non-binding case law is not being followed. The Tribunal is not bound by FSCO jurisprudence and the reasons for finding that the Tribunal did not have jurisdiction were clearly explained in the Original Decision.

[36] In order to satisfy its requirement to provide clear and comprehensive reasons, all that is required is a clear line of reasoning on why the Tribunal has decided the way it has. In the present case, the Original Decision addressed the issue of

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[18] *Vavilov* at para 113.
[19] *16-001810 v Aviva Insurance*, 2017 CanLII 43883 (ON LAT) ("*Y.D.*")
[20] *16-003674 v Aviva Canada Inc*., 2017 CanLII 46350 (ON LAT) ("*J.T.*")

equitable remedies and it was found that the *Y.D.* and *J.T.* cases were persuasive on why the Tribunal did not have jurisdiction to apply equitable remedies and they were adopted for this hearing. I see no error in law in doing so. As a result, I find that there was no error in law in arriving at the conclusion that the Tribunal does not have jurisdiction to order an equitable remedy and the case law the applicant relies upon were not binding authority on the Tribunal.

Costs

[37] The applicant, in her reconsideration submissions makes a request for costs against the respondent; however, no submissions or evidence are provided in support.

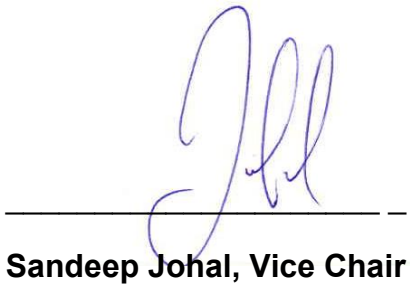
[38] The applicant's request for costs is dismissed. The onus is on the applicant to provide submissions on her request for costs in accordance with Rule 19 on why she believes a party in a proceeding acted unreasonably, frivolously, vexatiously, or in bad faith.

[39] Without any submissions on this point, the applicant has not met her onus and the request is dismissed.

CONCLUSION

[40] For the reasons noted above, I **dismiss** the applicant's Request for Reconsideration.

Released: May 4, 2021



Sandeep Johal, Vice Chair