Citation: Tsourkan v. Pembridge Insurance Company, 2023 ONLAT 21-001200/AABS - R

RECONSIDERATION DECISION

Before:	**E. Louise Logan**
Licence Appeal Tribunal File Number:	**21-001200/AABS**
Case Name:	**Dimitri Tsourkan v. Pembridge Insurance Company**

Written Submissions by:

For the Applicant:	Vadim Kats, Counsel
For the Respondent:	Kamil Podleszanski, Counsel

OVERVIEW

[1] On July 14, 2023, the applicant requested reconsideration of the Tribunal's decision dated June 22, 2023 ("decision").

[2] In the decision, the Tribunal determined that the applicant was not entitled to an Income Replacement Benefit ("IRB"), a treatment plan for occupational therapy, an award under section 10 of Regulation 664, or interest.

[3] For reconsiderations of decisions issued before August 21, 2023, the grounds 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 criteria in Rule 18.2 are met. The applicant is seeking reconsideration under Rule 18.2(a) and (b):

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.

[4] The applicant is requesting that the Tribunal determine that the applicant be entitled to the benefits in dispute, interest and an award. The respondent argues the request for reconsideration should be dismissed.

RESULT

[5] The applicant's request for reconsideration is dismissed.

ANALYSIS

[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 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.

Rule 18.2(a) – Violation of Procedural Fairness

[7] I find the applicant has not established grounds for reconsideration under Rule 18.2(a) for the following reasons.

[8] The applicant argues that the Tribunal's decision violated the applicant's right to procedural fairness as it was inadequately reasoned and relied on an "impermissible" sur-reply from the respondent. The applicant argues that it is not possible to understand the Tribunal's reasoning from the decision, it does not reflect consideration of all the main relevant factors at issue, and it does not justify and explain the conclusion reached with respect to the applicant's psychological impairment. The applicant cites *HS v. Aviva Insurance Canada,* 2023 CanLII 23627, *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 (CanLII) and *DP v. Chieftan Insurance,* 2019 CanLII 83888 in support of its position. The applicant also identifies six specific aspects of his argument and evidence that he submits were not addressed in the decision, and that would have likely changed the outcome of the decision.

[9] The respondent submits that the Tribunal acted within its jurisdiction and did not materially breach procedural fairness. It argues the decision is well-reasoned and that the applicant has not established grounds for reconsideration.

[10] With respect to the adequacy of reasons, I find the applicant has not established grounds for reconsideration. While the applicant has identified several arguments that he believes should have been included in the decision, it is well established that the Tribunal is not required to respond to every argument or possible line of analysis. I find the decision demonstrates that the Tribunal was alert and sensitive to the matters before it, set out its findings of fact and the principal evidence upon which it based its findings, addressed the major points at issue, and was internally coherent, rational and logical. In other words, it was well reasoned.

[11] The applicant also points specifically to paragraph 12 of the decision and submits that the Tribunal "leaped to its own medical conclusions to infer he was deteriorating to the point of requiring admission to a psychiatric institute without medical evidence" and that the reasons, read in conjunction with the record, did not make it possible to understand the Tribunal's reasoning on this critical aspect.

[12] I disagree. I find that paragraph 12 is part of an internally coherent, rational and logical analysis that is rooted in the evidence. The Tribunal's analysis of whether the applicant sustained psychological impairments from the accident is set out in paragraphs 4 to 17. At paragraphs 4 to 8, the Tribunal reviewed the evidence, including the applicant's account of the accident and the medical evidence. At paragraph 9, it set out its conclusions that, on a balance of probabilities, the applicant did not suffer from a mental health condition or a somatic pain disorder

as a result of the accident. At paragraph 10, it set out the legal test for causation, noting that the leading case is *Sabadash v. State Farm et al*., 2019 ONSC 1121, and that this was the decision relied on by the applicant in his submissions. At paragraph 11, the Tribunal summarized the applicant's arguments on the issue of causation.

[13] At paragraph 12, the Tribunal set out the reasons, with reference to the evidentiary record, for why it found the applicant was not functioning well prior to the accident. At paragraph 13, the Tribunal noted that it also found the applicant was already showing a decline in his mental health status just prior to the accident, again citing the evidentiary record. At paragraph 14, the Tribunal set out its reasons why it gave less weight to the applicant's expert report. At paragraph 15, the Tribunal cited the medical evidence it relied on for its finding that the applicant did not sustain an exacerbation of his pre-accident condition. At paragraph 16, the Tribunal set out the reasons why it gave little weight to the applicant's expert report on this issue, and at paragraph 17 it set out its conclusion that the applicant had not met his burden to demonstrate his impairments were caused by the accident. The reasons are thorough, clear and logical. I find no violation of procedural fairness with respect to the adequacy of the reasons.

[14] The applicant also argues that the Tribunal violated the rules of procedural fairness by relying on the respondent's sur-reply in the decision. The respondent argues that it filed a sur-reply as the applicant's reply raised new arguments not made previously. It argues the sur-reply materials were limited and only advanced arguments in response to those made by the applicant on reply. It submits that the applicant failed to file a notice of motion to strike the sur-reply or send correspondence to the Tribunal objecting to the sur-reply before the initial hearing. It submits the applicant only raised the issue once the decision was issued.

[15] I agree with the respondent. The applicant had an opportunity to object to the sur-reply before the hearing, but he chose not to. The time for filing an objection was before the hearing, not after the decision has been issued. Furthermore, the applicant has not pointed to anywhere in the decision that the Tribunal referred to or referenced the respondent's sur-reply. Accordingly, I find the applicant has not established grounds for reconsideration with respect to the respondent's sur-reply.

[16] I will address the applicant's submissions on arguments and evidence he believes were not addressed in the decision and which would likely have

changed the outcome of the decision below. Although they are argued by the applicant under Rule 18.2(a), I find that they actually address the test in Rule 18.2(b).

Rule 18.2(b) – Error of Fact or Law

[17] I find the applicant has not established grounds for reconsideration under Rule 18.2(b) for the following reasons.

[18] The applicant makes several arguments under Rule 18.2(b). Namely, that the Tribunal erred in law with respect to its application of the causation test; erred in fact in finding the applicant's psychological impairments were not because of the accident; and erred in fact by misapprehending the evidence. As noted above, the applicant also made arguments under Rule 18.2(a) that reference the Rule 18.2(b) criteria. He argues the Tribunal failed to address several key issues and aspects of his arguments and evidence in the initial hearing that, if they had been considered, would likely have changed the outcome of the decision.

[19] With respect to the causation test, the applicant argues the Tribunal misapplied the test and therefore made an error of law. He argues that the Tribunal failed to consider *Thiruchelvam v. RBC General Insurance Company,* 2022 ONSC 554. He also cites the decisions in *CG v. the Guarantee Company of North America,* 2020 CanLII 40333 and *NM v. Aviva Insurance Canada,* 2021 CanLII 13191, although it is not clear from his submissions how these relate to an alleged error of law in the decision. It would appear the applicant is referring to these decisions in furtherance of his argument that the Tribunal erred in not applying a material contribution test.

[20] I have reviewed the applicant's initial submissions and find he did not cite or make any arguments with respect to *Thiruchelvam*. His initial submissions cited the legal test for causation in *Sabadash* which, as noted above, the Tribunal also referenced in paragraph 10 of the decision. In the same paragraph, the Tribunal also noted that *Sabadash* was relied on by the applicant. This is correct, and I see no error in this analysis. In his initial submissions the applicant stated:

> The law is clear that where, <u>but for</u> the subject accident, the post-accident impairments would not exist, even where Dimitri had a history of pre-existing medical conditions (i.e. multiple causes are possible), causation is established. [emphasis added]

[21] It is not an error of law to cite the applicant's submissions in support of the applicable legal test, or to not refer to a decision that the applicant did not cite. I

find the applicant has not established grounds for reconsideration with respect to the legal test for causation.

[22] I will now turn to the applicant's arguments that the Tribunal erred in fact. Specifically, the applicant submits that the Tribunal erred at paragraph 9 where it found no causal link in the treating records that the applicant's psychiatric issues are related to the accident. In his reconsideration submission, the applicant cites "multiple indications" of a causal link, which I find are references in the medical records to the fact that the applicant was in a motor vehicle accident. They do not refer to or establish a causal link. Accordingly, I find the applicant has not identified an error in the decision.

[23] The applicant also submits that the Tribunal did not consider the occupational therapy treatment plan at issue. I disagree. At paragraph 32 of the decision the Tribunal stated that:

> The applicant provided no submissions on the occupational therapy treatment plan and why it should be considered reasonable or necessary for his treatment-related injuries. As it is the applicant's burden to demonstrate that the treatment plan is reasonable and necessary, and where he provided no submissions on the same, I find the applicant is not entitled to the treatment plan.

[24] The applicant argues on reconsideration that he made submissions on the treatment plan which the Tribunal failed to consider. I have reviewed his initial submissions and find that while his arguments challenged the basis for the respondent's denial of the treatment plan, they did not address the question of how or why the treatment plan is reasonable and necessary. In his reconsideration submissions the applicant cites the October 10, 2022 OT In-home Assessment Report in support of the treatment plan. However, this report was not referred to in his initial submissions.

[25] I see no error in the decision. It is the applicant's burden to meet at first instance. Reconsideration is not an opportunity to make arguments that were not made at the initial hearing.

[26] The applicant also makes a series of submissions with respect to the Tribunal's causation analysis. He argues the Tribunal misapprehended the evidence, failed to properly assess the evidence, was "silent" on key evidentiary matters and arguments, and arrived at "conjectures" without supporting evidence. I have already discussed the causation analysis above with respect to the criteria under Rule 18.2(a). I also find the applicant's arguments do not establish an error of

fact or law under Rule 18.2(b). Rather, they are an attempt to re-argue his position. It is the Tribunal's role to weigh and assess evidence, and it is well established that the Tribunal is not required to refer to every argument or piece of evidence before it. While the applicant does not agree with the weight the Tribunal afforded the evidence before it, or the conclusions it reached based on the evidence, this is not grounds for reconsideration.

[27] I find the applicant has not established grounds for reconsideration under Rule 18.2(b).

CONCLUSION

[28] For the reasons set out above, the applicant's request for reconsideration is dismissed.

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E. Louise Logan
Vice-Chair
Tribunals Ontario – Licence Appeal Tribunal

Released: October 6, 2023