



Citation: Goncalves v. Wawanesa Insurance, 2024 ONLAT 20-013261/AABS - R

RECONSIDERATION DECISION

Before: Jennifer Mendelsohn

Licence Appeal Tribunal File Number: 20-013261/AABS

Case Name: Alexandrinha Goncalves v. Wawanesa Insurance

Written Submissions by:

For the Applicant: Dominik Gora, Counsel

For the Respondent: Elisabeth van Rensburg, Counsel

OVERVIEW

- [1] On April 25, 2024, the applicant requested reconsideration of the Tribunal's decision dated April 4, 2024 ("decision") in which I found that the applicant had not demonstrated that her accident-related impairments warranted removal from the Minor Injury Guideline and that she was not entitled to three treatment plans in dispute or interest.
- [2] The grounds for a request for reconsideration are found in Rule 18.2 of the *Licence Appeal Tribunal Rules, 2023 ("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 committed a material breach 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; or
 - c) 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.
- [3] The applicant makes her request for reconsideration based upon Rule 18.2(b) and requests that the Tribunal:
- i. vary the decision such that the applicant is removed from the minor injury guideline; and
 - ii. order a rehearing of the three treatment plans in dispute.
- [4] The respondent argues that the request for reconsideration should be dismissed.

RESULT

- [5] For the reasons provided below, 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.

- [7] The applicant submits that the Tribunal made three errors of fact in the decision, specifically in paragraphs 19 and 21 of the April 4, 2024 decision.
- [8] The respondent argues that the applicant has not shown that any of the Rule 18.2 criteria for reconsideration have been met. It submits that even if an error of fact had been made, the errors are inconsequential and would not change the outcome of the decision.
- [9] For the reasons that follow, I find that the applicant has not established grounds for reconsideration pursuant to Rule 18.2(b).

Rule 18.2(b) – Error of Fact: Applicant’s Evidence of Lower Back Injury and Treatment of Lower Back Injury

- [10] For the reasons set out below, I find the applicant has not established grounds for reconsideration with respect to her lower back injury, nor with respect to treatment of her lower back.
- [11] In her reconsideration submissions, the applicant submits that the Tribunal should have found that the applicant sustained a low back injury as a result of the accident. The applicant further submits that the Tribunal should have found that the applicant received treatment for her low back injury.
- [12] The applicant points to paragraph 19 of the decision wherein the Tribunal states:

There is no evidence before me that the applicant injured her lower back in the accident or received treatment for lower back pain or sciatica-related complaints as a result of the accident.

Evidence of Lower Back Injury

- [13] The evidence before me at the hearing included the clinical notes and records of Dr. Almasi, family physician. These records indicate that the applicant attended at Dr. Almasi’s office three days post-accident and his clinical notes and records from that visit state that the applicant was complaining of back pain in both the thoracic and lumbar region and that he recommended physiotherapy.

- [14] The applicant submits that there were two other notations in Dr. Almasi's clinical notes and records that discuss pain in the applicant's lumbar back, namely, July 30, 2018 (approximately two weeks post-accident), and August 13, 2020. Therefore, she submits that I erred when I said there was no evidence of a lower back injury.
- [15] The applicant further submits that the two references to lumbar back pain found throughout Dr. Almasi's clinical notes and records, are sufficient evidence to warrant removal from the Minor Injury Guideline as there was some evidence that the applicant suffered from pre-existing lumbar back pain.
- [16] However, I find that only the July 30, 2018 clinical note references the lumbar back, while the August 13, 2020 clinical note states that the applicant was experiencing "pain in right neck to the right shoulder and all the way into her back". While I agree there is a mention of the back in the August 13, 2020 notes, it does not specify the lumbar back region.
- [17] The applicant further submits that the Tribunal relied upon the OCF-18s in dispute as evidence of whether or not the applicant sustained a lower back injury. The applicant posits that a chiropractor cannot diagnose the applicant.
- [18] However, I find that it is a logical conclusion that a treatment provider such as a chiropractor would complete a treatment plan based on the treatment an applicant needs. If the treatment plans did not address the lumbar region of the applicant's back, it follows that the applicant was not complaining to the chiropractor of lumbar back pain. I see no error with respect to my findings in the decision on this point.
- [19] I agree with the applicant that because of those two mentions of lumbar back pain, there is evidence of an injury to the applicant's lumbar region of her back. Therefore, it was an error of fact to indicate that there was no evidence of a lower back injury.
- [20] Turning to the second half of the test in Rule 18.2(b), I find that this error of fact would likely not have caused the Tribunal to reach a different decision. Evidence of a pre-existing condition is not sufficient to remove the applicant from the MIG. The applicant must provide compelling medical evidence proving on a balance of probabilities that her pre-existing lower back injury precluded recovery if kept within the confines of the MIG. This is a high threshold for an applicant to overcome and I find that two references to lumbar back pain in the clinical notes and records of Dr. Almasi pain are not sufficiently compelling evidence that the applicant would be precluded from achieving maximal recovery from her

accident-related minor injuries if she is subject to the \$3,500.00 cap on treatment even though the applicant did have a history of pre-existing lower back pain. I find the applicant has not established grounds for reconsideration with respect to her lumbar back pain.

Evidence of Treatment of Lower Back Injury

- [21] The applicant submits that I erred when I found that there was no evidence of treatment of her lower back. I disagree.
- [22] The applicant began attending therapy shortly after the accident. The applicant submits that the three treatment plans in dispute are evidence of the applicant receiving treatment for her lower back injury.
- [23] Specifically, the applicant submits that the July 17, 2019 treatment plan which lists pain in the cervical spine is evidence of treatment of the lower back. The applicant submits that the November 15, 2019 treatment plan which lists pain in the thoracic spine is evidence of treatment of the lower back. The applicant finally submits that the March 11, 2020 treatment plan which mentions the cervical spine and thoracic spine is evidence of treatment of the lower back. The applicant's reconsideration submissions state as follows: "Ms. Goncalves had noted improvements in range of motion of the cervical spine, which is part of the back, and that Ms. Gonsalves had also noted improvements in the thoracic spine, which is part of the lower back."
- [24] I find that I did not err. The applicant's submissions misapprehend the basic anatomy of the spine and posits that treatment of her cervical and thoracic spine equates to a diagnosis of a lumbar back injury; however, this is not correct. It is not anatomically correct to call the thoracic spine part of the lower back.
- [25] I find that the three treatment plans in dispute proposed treatment for the applicant's cervical and thoracic spine, and not her lumbar spine. While the applicant may have advised Dr. Almasi that her lower back was hurting her immediately after the accident, all of the treatment plans in dispute were to address injuries to her cervical and thoracic spine and make no mention of an injury to, or treatment for, a lumbar back injury.
- [26] The applicant also submits that the Tribunal did not consider evidence of treatment of the applicant's lower back injury found in Dr. Almasi's clinical notes and records. The applicant specifically mentions records from July 24, 2018, July 30, 2018 and August 10, 2018. She submits I erred because these are evidence of lower back treatment.

- [27] Specifically, the record from July 24, 2018 states as follows: “pain right arm, she is doing physiotherapy, physiotherapist will do the form OSF, pain is better”.
- [28] The record from July 30, 2018 states “doing physiotherapy, back thoracic and lumbar, shoulder and arm pain continues”.
- [29] The record from August 10, 2018 states “continues with PT, some days helps more, today neck and upper back even the head is effected”.
- [30] Once again, I find I did not err. The July 24, 2018 and August 10, 2018 records do not provide any evidence that the applicant was receiving treatment for her lumbar back region. The July 30, 2018 record is slightly distinguishable in that it mentions both the applicant receiving treatment and the applicant complaining of lumbar back pain. However, this notation can be interpreted in multiple ways. It is unclear if the applicant was receiving physiotherapy for her thoracic and lumbar back pain or if she was receiving physiotherapy for some other body part and is experiencing pain in her thoracic and lumbar back. This is not compelling enough evidence proving that the applicant received treatment for her lower back pain.
- [31] In considering the lack of treatment being administered or proposed in relation to the applicant’s lumbar spine, I disagree with the applicant that an error of fact was made in relation to the treatment the applicant received.
- [32] As such, I find that the applicant’s grounds for reconsideration as it relates to treatment of a low back injury have not been established pursuant to Rule 18.2(b).

Rule 18.2(b) – Error of Fact – Tribunal misinterpreted Dr. Almasi’s April 5, 2023 letter

- [33] I find the Tribunal’s decision contains an error of fact in relation to the interpretation of Dr. Almasi’s April 5, 2023 letter for the following reasons.
- [34] The applicant argues the Tribunal made an error of fact because there was no contradiction in Dr. Almasi’s April 5, 2023 letter when the Tribunal stated that there was a contradiction.
- [35] Dr. Almasi’s letter stated that the applicant had a few occasions of complaints about her *right* shoulder prior to her accident. Dr. Almasi’s letter then goes on to state that he does not have records investigating her *left* shoulder for injuries prior to her accident.

[36] The problematic portion of paragraph 21 of the decision states the following:

Dr. Almasi begins the letter by stating that the applicant “had complaints about her right shoulder and also her leg pain which was a sciatic presentation” prior to her motor vehicle accident. However, there is a contradiction in his letter as he then goes on to state that he does not have any records related to shoulder complaints prior to this MVA.

[37] The relevant portions of Dr. Almasi’s April 5, 2023 letter states the following:

“Prior to her MVA on July/13/2918, she had few occasions where she had complaints about her right shoulder...I have not[sic] records of investigating her left shoulder for any injuries prior to this MVA.”

[38] The applicant is correct that there is no contradiction in this note and that I omitted the word “left” from my decision. I find, however, that while there was an error of fact in paragraph 21 of the decision related to the interpretation of Dr. Almasi’s letter, the Tribunal would not likely have reached a different result had the error not been made.

[39] The focus of paragraph 21 is that Dr. Almasi’s note is not sufficiently compelling evidence to satisfy the applicant’s burden of proof on a balance of probabilities that these injuries are attributable to the accident or cannot be resolved within the minor injury guideline limits. The comment about a contradiction in Dr. Almasi’s note did not impact the decision and therefore, the applicant has not established grounds for reconsideration in relation to Dr. Almasi’s letter.

[40] In summary, I find that the applicant has not established grounds for reconsideration pursuant to Rule 18.2(b).

ORDER

[41] The applicant’s request for reconsideration is dismissed.

Jennifer Mendelsohn
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: June 14, 2024