



Citation: Lanzon v. Economical Insurance Company, 2023 ONLAT 20-005424/AABS-R

RECONSIDERATION DECISION

Before: Brett Todd

**Licence Appeal Tribunal
File Number:** 20-005424/AABS

Case Name: Ronald Lanzon v. Economical Insurance Company

Written Submissions by:

For the Applicant: Satwant Merwar, Counsel

For the Respondent: Martin P. Forget, Counsel

BACKGROUND

- [1] This request for reconsideration was filed by the applicant on June 6, 2023. It arises out of a decision dated May 16, 2023 (“decision” or “initial decision”) in which the Licence Appeal Tribunal (the “Tribunal”) found that the applicant was not catastrophically impaired and that the applicant was entitled to two treatment plans and interest.
- [2] Grounds for a request for reconsideration are contained in Rule 18.2 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice & Procedure, Version 1, (October 2, 2017)* as amended (the “Rules”). To grant a reconsideration request, 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.
- [3] Reconsideration involves a high threshold. The requestor must show how or why the decision falls into one of the categories in Rule 18.2. Reconsideration is not an opportunity for the requesting party to relitigate its case or to ask the Tribunal to reassess the evidence.
- [4] In this instance, the applicant is seeking reconsideration of the decision that he was not catastrophically impaired. He submits that, pursuant to Rules 18.2(a) and 18.2(b), the Tribunal violated the rules of procedural fairness and that the Tribunal made an error of law or fact such that a different result would likely have been reached had the error not been made.
- [5] The applicant is requesting that the decision be varied to find that the medical evidence presented by Dr. Lisa Becker and Dr. Harold Becker is compliant with the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”).

RESULT

- [6] The applicant's request for reconsideration is granted, in part.
- [7] The Tribunal's decision is varied and the decision with respect to catastrophic impairment is cancelled.
- [8] The Tribunal will rehear issue #1 in the initial decision, namely "Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?" The rehearing will be conducted based on the record and the transcript/recording of the initial hearing, with written submissions from the parties as set out below.

PROCEDURAL ISSUE

- [9] On July 28, 2023, the applicant filed a Notice of Motion ("NOM") requesting an extension to the deadline set for reply submissions in this reconsideration.
- [10] In this NOM, the applicant noted that his reply submissions had been served on opposing counsel on July 21, 2023, three days after the deadline of July 18, 2023 that was set in the Reconsideration Submissions Letter sent to both parties by the Tribunal on June 14, 2023. Further, he explained that this was the result of an error, as office staff had inadvertently noted this deadline to be July 28, 2023.
- [11] The respondent did not comment on these late reply submissions.
- [12] I am allowing the reply submissions into evidence. I find that there is no prejudice to the respondent through this late filing. I note that the submissions were actually filed just one working day late, as the original due date fell on Friday, July 18, 2023 and the reply was filed on Monday, July 21, 2023.

ANALYSIS

Rule 18.2(a): Procedural Fairness

- [13] I find the applicant has established grounds for reconsideration pursuant to Rule 18.2(a).
- [14] The applicant argues that the Tribunal violated the rules of procedural fairness by relying on ss. 45(2)1 and 2 of the *Schedule* in its decision, which require that the determination of catastrophic impairment be conducted by a physician or neuropsychologist. The Tribunal noted these sections of the *Schedule* as the reason for giving no weight to the medical reports of Dr. Lisa Becker, psychiatrist, and Dr. Harold Becker, family physician. The applicant argues that concerns

about whether these expert reports were conducted by a physician, as required by ss. 45(2)1 and 2, were not raised during the hearing, either by the Tribunal or the respondent. As a result, he submits the Tribunal violated the principles of natural justice and procedural fairness when it conducted a legal analysis of these sections of the *Schedule* in the decision, absent submissions from the parties.

- [15] The applicant relies on *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (Div. Ct.), where Justice Gordon opined that the “basic principle underlying the duty of procedural fairness is that parties affected by a decision should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial, and open process.” He also relies on *Lockyear v. Wawanesa Mutual Insurance Company*, 2022 ONSC 94, an Ontario Divisional Court decision where Justice Lederer noted that “the issue of procedural fairness, while an issue of law, stands apart” and is “attached to a foundational right, a principle of natural justice, the right to be heard (*audi alteram partem*).”
- [16] To counter, the respondent argues that the applicant has not established grounds for reconsideration under Rule 18.2(a). While the respondent does not dispute the applicant’s assertion that ss. 45(2)1 and 2 were not raised during the hearing, it argues that the Tribunal is “statutorily obliged” to apply the *Schedule* in decisions. In this case, this obligation necessitated a review in the decision of the “evidentiary requirements for bringing forward an application for determination of catastrophic impairment.” The respondent also takes the position that it is immaterial that it did not raise a question about expert witnesses and evidence during the hearing. And the respondent further submits that the Tribunal’s analysis did not centre on the Beckers’ qualifications as physicians, but rather on the fact that they did not conduct the assessment in accordance with s. 45(2)1.
- [17] Similarly, the respondent argues that the Tribunal should not be viewed as obligated to employ Rule 9.1 and request further evidence or submissions from a party during the hearing. Doing so would establish Rule 9.1 as a way to help an applicant satisfy an evidentiary burden or warn the applicant that such an evidentiary burden had not been satisfied. It relies on *J.R. v. Certas Home and Insurance Company*, 2018 CanLII 13161 (ON LAT) for the principle that applicants are obligated to adduce all evidence upon which they intend to rely, as the Tribunal will not satisfy their evidentiary onus for them.
- [18] I agree with the applicant that the Tribunal breached procedural fairness by relying on ss. 45(2)1 and 2 without notice to the parties that the requirements of

those sections of the *Schedule* were in issue. I find that ss. 45(2)1 and 2 were not raised by the parties or the Tribunal during the hearing. I also find that the respondent did not challenge the applicant's experts during the proceeding, and further, that the initial hearing adjudicator did not raise the issue of whether the catastrophic assessments were conducted by a physician during the hearing. I make these findings on the basis of the respondent's submissions for this reconsideration request, as the respondent does not challenge the applicant's position that ss. 45(2)1 and 2 were not raised during the hearing.

- [19] Despite the above, the Tribunal's analysis of ss. 45(2)1 and 2 of the *Schedule* was central to its determination that the applicant is not catastrophically impaired. Specifically, paragraphs 12 to 17 of the initial decision set out the requirements of ss. 45(2)1 and 2 of the *Schedule* and provided a review of the expert reports of the Beckers. The Tribunal then stated in paragraph 18 that it was not persuaded that the applicant's catastrophic impairment assessment was conducted by a physician as required by the *Schedule*. Correspondingly, the Tribunal "put no weight on the July 2019 catastrophic impairment determination offered in the assessment and reports of Omega Medical Associates."
- [20] As set out in *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (Div. Ct.), procedural fairness requires that the parties have notice of the case to be met and the opportunity to present their case fully and fairly. While procedural fairness does not require that the Tribunal request further submissions from the parties every time it wishes to reference a statutory provision or authority that had not been raised by the parties, the Tribunal must provide notice and an opportunity to respond before it bases its decision on a new issue not raised or addressed by the parties. (See: *Canada Post Corporation v. Public Service Alliance of Canada*, 2019 ONSC 3676 at para. 19 (Div. Ct.).)
- [21] In this case, the applicant was not afforded an opportunity to respond to the central factor of whether the catastrophic impairment was determined by a physician, as this issue was not raised at the hearing by the parties or the adjudicator. As a result, the applicant did not have an opportunity to address it and speak to any possible concerns regarding the Beckers' reports and s. 45 of the *Schedule*.
- [22] I do not agree with the respondent. While it is correct in that the Tribunal is "statutorily obliged" to apply the *Schedule* in its decision, this does not override the obligation to provide procedural fairness. As both *Scarlett* and *Lockyear* emphasize, procedural fairness is both an issue of law and a principle of natural justice. It is therefore paramount that an applicant be afforded the ability to fully

present their case and be able to speak to all matters as part of an open process, especially those that directly affect the decision rendered.

- [23] Here, concerns regarding s. 45 and the Beckers' reports were not raised during the hearing but were a significant factor in the resulting decision. As the Beckers' medical evidence was a fundamental part of the applicant's case, it was crucial that the applicant be allowed to be heard regarding any finding impacting upon it—particularly a finding of such import as the one made by the Tribunal here, that essentially discarded the Beckers' evidence. Yet the applicant was denied this opportunity by the Tribunal, which precluded his access to natural justice and his ability to fully present his case.
- [24] Accordingly, I find that the applicant has established grounds for reconsideration pursuant to Rule 18.2(a).

Rule 18.2(b): Error in Fact or Law

- [25] As I have found the applicant has established grounds for reconsideration pursuant to Rule 18.2(a), I find it is not necessary for me to address the applicant's arguments under Rule 18.2(b).

CONCLUSION & ORDER

- [26] For the above reasons, the applicant's request for reconsideration is granted, in part.
- [27] Pursuant to Rule 18.4, I am varying the Tribunal's decision of May 16, 2023.
- [28] The Tribunal's decision with respect to catastrophic impairment is cancelled.
- [29] The Tribunal will rehear issue #1 in the initial decision, namely "Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?"
- [30] The rehearing will be conducted based on the record and the transcript/recording of the initial hearing.
- [31] Within 15 days of the release of this decision, the respondent shall file with the Tribunal and serve on the applicant:
- i. a copy of the recording of the hearing, and
 - ii. if a hearing transcript has been made, a copy of the hearing transcript.

- [32] The parties are invited to make submissions on the requirements of s. 45 of the *Schedule* and their application to the expert reports of Dr. Lisa Becker and Dr. Harold Becker.
- [33] Submissions shall be made in accordance with the following timetable:
- i. The applicant may file submissions no later than 45 calendar days after the release of this reconsideration decision. Submissions shall be limited to six (6) double-spaced pages, exclusive of evidence and authorities, and shall be provided to the respondent.
 - ii. The respondent may file responding submissions by no later than 60 calendar days after the release of this reconsideration decision. Submissions shall be limited to six (6) double-spaced pages, exclusive of evidence and authorities, and shall be provided to the applicant.
 - iii. The applicant may file reply submissions, or file notice that no reply submissions will be filed, no later than seven (7) calendar days after the respondent has filed its responding submissions. Reply submissions shall be limited to three (3) double-spaced pages, exclusive of evidence and authorities, and shall be provided to the respondent.
 - iv. All written submissions and/or authorities shall be in 12-point Arial or Times New Roman font, indexed, bookmarked/tabbed, and consecutively page-numbered. Submissions shall make specific references by page and tab number. The hearing adjudicator may not consider submissions that do not follow this format and/or exceed the page limits set forth above.
- [34] Unless specifically stated, all previous orders of the Tribunal remain in full force and effect. If the parties resolve the issue in the interim, the applicant shall immediately advise the Tribunal in writing.

Brett Todd
Vice-Chair
Tribunals Ontario – Licence Appeal Tribunal

Released: August 8, 2023