Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2024 CanLII 77417 (ON LAT)

Citation: Jamali v. Economical Insurance Company, 2024 ONLAT 18-008443/AABS - R

RECONSIDERATION DECISION

Before:	**Jeremy A. Roberts, Vice-Chair**
Licence Appeal Tribunal File Number:	**18-008443/AABS**
Case Name:	**Rogiar Jamali v. Economical Insurance Company**

Written Submissions by:

For the Applicant:	Ashu Ismail, Counsel
For the Respondent:	Martin Forget, Counsel

OVERVIEW

[1] On May 31, 2024, the applicant requested reconsideration of the Tribunal's decision dated May 15, 2024 ("decision").

[2] In my decision, I found that the applicant was not catastrophically impaired under criterion 8 because I found that she had not met her onus in demonstrating that the impairments would not have been present "but for" the subject motor vehicle accident and that the impairments would not have risen to the level of marked or extreme in any of the four spheres.

[3] 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.

[4] The applicant argues that the Tribunal acted outside its jurisdiction, committed a material breach of procedural fairness, and made an error of law and fact such that the Tribunal would likely have reached a different result had the error not been made. The respondent disagrees and argues that the Tribunal acted properly and within its jurisdiction.

[5] The applicant is seeking for the matter to be returned to be heard by a different adjudicator.

RESULT

[6] The applicant has failed to establish grounds for reconsideration on the basis that the Tribunal acted outside its jurisdiction, committed a material breach of procedural fairness, or made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made.

[7] The request for reconsideration is dismissed.

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ANALYSIS

[8] 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.

The Tribunal did not act outside of its jurisdiction

[9] I find that the applicant has not established grounds for reconsideration on the basis that the Tribunal acted outside of its jurisdiction.

[10] The applicant argues that the Tribunal acted outside its jurisdiction by accepting an argument from the insurer that the applicant was malingering when this was not indicated as a reason for denial in the insurer's denial. She argued that the Tribunal cannot deny benefits for reasons that go beyond those set out by the insurer and for which the applicant has no notice. She relies on ss. 45(5)(b) of the *Schedule,* which states that when denying a catastrophic determination, the insurer is required to provide notice of the medical and "any other reasons" for the insurer's determination. She argues that the respondent never raised the issue of malingering, exaggerating, or lying as a reason for denial, therefore that cannot be the reason for finding the applicant not catastrophically impaired. She argues that the Tribunal goes outside of the bounds of its authority in assigning a diagnosis of malingering.

[11] The respondent argues that the Tribunal acted within its jurisdiction by correctly applying the "but-for" test of causation and determining that the inconsistencies with the applicant's narrative failed to satisfy that test. Moreover, it argues that the applicant is incorrect in asserting that the Tribunal founded its decision solely on the basis of the applicant's malingering.

[12] I find that I did not act outside the jurisdiction of the Tribunal in that I came to a decision based on the law and the evidence before me. In paragraphs 40 and 42, I laid out the law in *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.),* 2009 ONCA 571 and *Sabadash vs. State Farm et al.,* 2019 ONSC 1121 to establish that the test for catastrophic impairment is a legal one and not a medical one and that the test for causation is the "but for" test. I considered evidence from the applicant on the issue of causation at paragraph 44. I made no medical diagnosis of malingering (see wording in paragraph 46) but found in paragraph 48(iv) that the evidence presented failed to convince me that the applicant satisfied the "but for" test.

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[13] Moreover, I do not accept the argument that I could not found my decision on suspicions of malingering or over-exaggeration because it was not included in the denial letters for two reasons. Firstly, this issue was raised in the medical evidence via the psychometric testing results (as I indicated in paragraphs 45(iii) and 48(ii)), meaning that this was a live issue to be considered. Secondly, as I covered in paragraphs 49 to 51, even if I discounted my findings on causation, I still would not have found the applicant to be catastrophically impaired on the basis of her not meeting the threshold for criteria 8.

[14] I find that I did not act outside the Tribunal's jurisdiction in making my finding. My decision was justified in relation to the relevant factual and legal constraints that bore on the decision. I considered the relevant evidence before me, weighed it appropriately, and identified and applied the relevant legal principles.

The Tribunal did not commit a material breach of procedural fairness

[15] I find that the applicant has not established grounds for reconsideration on the basis that the Tribunal committed a material breach of procedural fairness.

[16] The applicant argues that the Tribunal committed a material breach of procedural fairness by: (1) proffering a medical diagnosis of malingering without conducting a proper medical examination as required in the *AMA Guides*; and (2) limiting and terminating the testimony of the applicant.

a. The applicant argued that if the Tribunal was going to provide a medical diagnosis of malingering it would have had to follow the *AMA Guides*, which states that a "careful investigation that includes multidisciplinary evaluation and psychological testing, as appropriate" would be required. She argues that the Tribunal did not do this and therefore cannot rest on a finding of malingering.

b. The applicant also argued that the ending of the applicant's testimony was done at the expense of the natural justice rights of a disabled client and that the Tribunal failed to provide accommodations in accordance with the *Human Rights Code*. She pointed to the fact that at several times she begged the opposing counsel to slow down and to be less aggressive, but that this was ignored.

[17] The respondent argued that the Tribunal never made a medical diagnosis of malingering and properly considered the evidence in this regard. As it relates to the examination of the applicant, it argues that the applicant was accorded proper accommodations and that there was no breach of procedural fairness.

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[18] I find that the Tribunal has not committed a material breach of procedural fairness because: (1) as noted above, I did not offer a medical diagnosis but rather conducted a legal analysis of the evidence; and (2) proper accommodations were offered to the applicant during her testimony.

a. When considering the argument of whether the Tribunal breached procedural fairness by offering an unsupported diagnosis of malingering, I reiterate that, as noted above, I did not diagnose malingering, but rather made a factual and legal determination based on the medical evidence presented by the parties. I find that this is not a material breach of procedural fairness because I acted within the Tribunal's jurisdiction in making that legal determination.

b. When considering the argument of whether the Tribunal breached procedural fairness by ending the applicant's testimony early, I point to paragraphs 21 to 24 of my decision, where I dealt with this matter. As noted in paragraph 21, I split the applicant's testimony into two days in order to give her a break. In paragraph 22, I outline the further accommodations I offered on the second day of her testimony after concerns were raised. These accommodations were rejected by the applicant. Given that the applicant wasn't initially prepared to proceed under what in my view are reasonable accommodations, I exercised my authority under the s. 23 of the *Statutory Powers Procedure Act* to reasonably limit the cross examination. While the applicant then changed her mind and offered to proceed under the accommodations I offered, I did not alter my decision because she continued to maintain that the accommodations were insufficient. I find that this was not a material breach of procedural fairness because I offered reasonable accommodations and allowed the testimony to stand despite an incomplete cross-examination. I then invited both parties to make submissions as to what weight should be given to the testimony of the applicant. I find that these steps were procedurally fair and allowed the hearing to continue without unreasonable delay.

[19] I find that in neither instance alleged by the applicant did the Tribunal commit a material breach of procedural fairness because it followed the law, considered evidence, and provided reasonable accommodations where necessary.

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The Tribunal did not make an error of law or fact that would have led to a different result

[20] I find that the applicant has not established grounds for reconsideration on the basis that the Tribunal made an error of fact or law such that the Tribunal would likely have reached a different result had the error not been made.

[21] The applicant argued that the Tribunal failed to follow the three-step process laid out in *Pastore vs. Aviva Canada Inc.,* 2012 ONCA 642 which requires the Tribunal in catastrophic impairment criterion 8 cases to first look at any diagnosis of mental disorders, then look at the impact on daily life, and then assess the severity of limitations. She argues that the Tribunal skipped steps 1 and 2 and went straight to step 3, thereby not satisfying the legal requirements.

[22] The respondent argued that the Tribunal correctly followed the process laid out in *Pastore* and properly based its decision in guidelines established by the *AMA Guides.*

[23] I find that the Tribunal did not make an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made because I followed the appropriate legal tests. The applicant failed to demonstrate how such an error would have led to a different result. I set out the appropriate legal tests in paragraphs 40 to 42 of my decision. I considered the applicant's evidence of mental disorder diagnoses, the impact of those disorders on her daily life, and the severity of those impacts in paragraph 43. I determined that I was not satisfied that the applicant met her onus in demonstrating that her mental disorders would have been present but for the accident in paragraph 48. I then took the additional step of weighing whether the applicant had significant impairments on their daily living as a result of her alleged diagnosis and whether the impairments rose to the required level of severity in paragraph 49. I concluded that she would not rise to the level of catastrophically impaired under criterion 8 in paragraph 51. Added to this, the applicant failed in her submissions to demonstrate how the error of law or fact would have changed the outcome of the hearing given my conclusions in paragraph 49.

[24] As such, I find that the Tribunal did not make an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made.

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CONCLUSION & ORDER

[25] I dismiss the applicant's request for reconsideration. I find that the applicant failed to establish that the Tribunal acted outside its jurisdiction, committed a material breach of procedural fairness, or made an error of law or fact such that the result would have differed.

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Jeremy A. Roberts
Vice-Chair
Tribunals Ontario – Licence Appeal Tribunal

Released: August 15, 2024

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