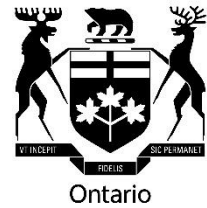


Tribunals Ontario
Safety, Licensing Appeals and
Standards Division

Box 250
Toronto ON M7A 1N3
Tel: 1-844-242-0608
Fax: 416-327-6379
Website: www.slsto-tsapno.gov.on.ca

Tribunaux décisionnels Ontario
Division de la sécurité des appels en matière
de permis et des normes

Boîte no 250
Toronto ON M7A 1N3
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RECONSIDERATION DECISION

Before: Deborah Neilson, Adjudicator

Date: August 21, 2019

File: 17-006056/AABS

Case Name: [D. L.] vs. Aviva Insurance

Written Submissions by:

For the Applicant: Domenic Pellegrino, Counsel
Arthur Semko, Paralegal

For the Respondent: Monica Pathak, Counsel
Pamela J. Quesnel, Counsel

I. OVERVIEW

- [1] This request for reconsideration, filed by the insured applicant, arises out of a decision dated August 7, 2018 in which the Tribunal found that the applicant sustained minor injuries and is subject to the Minor Injury Guideline (the “MIG”). The Tribunal also denied the applicant’s request for payment of medical benefits for nine treatment plans recommending chiropractic and psychological treatment and payment for cost of examinations for two treatment plans recommending a psychological assessment and a neurological assessment. The applicant submits that the Tribunal made significant errors of law and fact. He seeks an order that his injuries are not within the MIG and that the denied treatment plans be reconsidered or for a rehearing. The respondent has since accepted that the applicant does not have a minor injury and has approved all of the treatment plans except for the neurological assessment. The applicant has since filed a request for costs and a reconsideration of the award under Ont. Reg. 664/10 (“special award”) and still seeks reconsideration of the Tribunal’s initial decision.
- [2] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sched. 5, I have been delegated responsibility to decide this matter in accordance with the *LAT Rules*.¹

II. RESULT

- [3] The applicant’s request for reconsideration is accepted. In light of the respondent’s acceptance that the applicant is out of the MIG and has approved all but one of the treatment plans, the matter is remitted back to the hearing adjudicator to determine whether the applicant is entitled to the neurological assessment.

III. BACKGROUND

- [4] The applicant was involved in an automobile accident on June 13, 2015. He sought and received benefits from the respondent pursuant to the “*Schedule*”.² After the respondent denied his request for further medical benefits and payment for cost of examinations, he applied to the Tribunal.³ The respondent denied the applicant’s claims because it determined that all of the applicant’s injuries fit the definition of “minor injury” under s.3 of the *Schedule*.

¹ *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* [“*LAT Rules*”]

² *Statutory Accident Benefits Schedule – Effective September 1, 2010, O. Reg. 34/10*.

³ Tribunals Ontario, Safety, Licensing Appeals and Standards Division, Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”)

- [5] The Tribunal determined that the applicant's injuries were minor. This means that the policy limits available to the applicant for medical benefits and cost of examinations is \$3,500.00. The applicant had already exhausted \$3,497.00 of the policy limits. Once the Tribunal determined that the applicant sustained a minor injury and the MIG applied, the Tribunal dismissed the applicant's claims for chiropractic treatment, psychological treatment, a psychological assessment and a neurological assessment. The Tribunal did not need to consider whether treatment and assessments were necessary because the Tribunal determined the applicant had already reached the maximum policy limits available to him of \$3,500.00 for a minor injury. If the Tribunal had determined the applicant did not sustain a minor injury, the policy limits available to the applicant would increase to \$50,000 for payments for cost of examinations, medical and rehabilitation benefits.
- [6] The applicant submitted two treatment plans to the respondent a day after the Tribunal's decision was released. The applicant filed a request for reconsideration on September 6, 2018 claiming that the Tribunal erred in finding that he did not, among other things, sustain a psychological impairment as a result of the accident. The respondent scheduled two insurer's examinations ("IEs") to address the treatment plans, one of which was to be conducted by a psychologist, Dr. Zakzanis. The applicant's counsel submits that he did not receive notice of the psychological IE assessment and had asked that the other IE assessment be rescheduled because the applicant was unavailable for it. The applicant attended at the psychological IE on September 24, 2018.
- [7] Dr. Zakzanis prepared a report dated October 10, 2018. His opinion was that the applicant sustained a psychological impairment as a result of the accident. Dr. Zakzanis' opinion supports the applicant's allegation that, because he sustained a psychological impairment in the accident, he did not sustain a minor injury. Dr. Zakzanis' report was not provided to the applicant until June 6, 2019.
- [8] The respondent filed its responding submissions to the applicant's request for reconsideration on November 30, 2018, after Dr. Zakzanis' IE report was prepared. It was misfiled electronically and eventually deleted from the respondent's system when no-one from Aviva retrieved the misfiled report. Aviva did not follow up on the whereabouts of the report until the applicant's counsel's third March 16, 2019 inquiry into the status of the IE assessment. On July 5, 2019, the respondent advised the applicant that he is not subject to the MIG and that all of the treatment plans in dispute (except one) were approved.

IV. ANALYSIS

- [9] The applicant asked that the Tribunal reconsider its decision that the applicant is in the MIG. The grounds for a request for reconsideration are contained in *LAT Rule* 18. The ground that the applicant argues applies to this case is LAT Rule 18.2(d):

There is new evidence that could not have reasonably been obtained earlier and would have affected the result.

- [10] The applicant also asks that the Tribunal reconsider its decision that he is not entitled to a special award. The applicant also seeks his costs of the request for reconsideration.

Minor Injury and the MIG

- [11] Because of Dr. Zakzanis' report and his opinion that the applicant sustained a psychological impairment as a result of the accident, the respondent has accepted the applicant is out of the MIG and did not sustain a minor injury. The respondent also approved and agreed to pay for all of the treatment plans that were in issue, except for the neurological assessment. The Tribunal could not have had Dr. Zakzanis' report or the letter from the respondent accepting the applicant is not in the MIG at the time of the hearing because the assessment did not take place until after the Tribunal's decision was released, but before the reconsideration was completed. Dr. Zakzanis' report and the respondent's acceptance that the applicant is non-MIG clearly would have affected the result of the hearing. Accordingly, based on this new evidence that could not have reasonably been obtained earlier, the Tribunal's order is set aside.

- [12] The Hearing Adjudicator heard testimony from witnesses. She did not decide whether the neurological assessment was reasonable and necessary because she found the applicant was in the MIG. Therefore, the matter is referred back to the Hearing Adjudicator to determine the applicant's entitlement to the neurological assessment.

Special Award

- [13] The applicant did not seek a reconsideration of the special award in his request filed with the Tribunal on August 20, 2018, nor in his additional submissions filed on September 6, 2018. He filed a motion seeking costs on June 10, 2019 and, in his

submissions on the motion, has asked for a special award. If the applicant is seeking a reconsideration of his claim for a special award, he has not asked for an extension of the time to file his request for a reconsideration of the special award. It is well past the 21-day limitation period for filing the reconsideration request. However, s.7 of the *LAT Act*⁴ allows me to extend the 21-day time limit for the applicant to seek a reconsideration of the special award without receiving a request from a party. The factors that are considered in granting an extension are as follows:

- (1) The existence of a bona fide intention to appeal within the appeal period;
- (2) The length of the delay;
- (3) Prejudice to the other party; and,
- (4) The merits of the appeal.

[14] There is no evidence of a bona fide intention appeal. However, an inference can be drawn that there was no intention initially to seek a reconsideration of the special award until the applicant filed his submissions on costs on June 27, 2019. There is some prejudice to the respondent as it was initially successful on the hearing. The length of the delay is almost a year from when the Tribunal's decision was issued. However, the request was made only 21 days after the applicant received Dr. Zakzanis' report. There are merits to the appeal given that the respondent has provided no explanation for why it took more than half a year to follow up on the whereabouts of Dr. Zakzanis report and to respond to the applicant's counsel's request about the IE. Given the circumstances, I find that it would be just in this case to allow the applicant the opportunity to have his claim for a special award reheard by the hearing adjudicator. To that end, the respondent expressed concern that the applicant be allowed to make submissions on a special award in reply because the respondent is entitled to know the purported basis for the claim for a special award. For both the neurological assessment and the special award, the Hearing Adjudicator shall have all of the evidence she had before her at the hearing in addition to the parties' reconsideration and motions submissions. Accordingly, the parties shall serve and file with the Tribunal any further evidence and submissions they wish to rely on with respect to a special award only as follows:

⁴ *Licence Appeal Tribunal Act, 1999*, c. 12, Sched. G

Applicant's submissions and evidence due: within 30 days of the release date of this reconsideration decision.

Respondent's submissions and evidence due: within 50 days of the release date of this reconsideration decision.

Applicant's reply submissions due: within 57 days of the release date of this reconsideration decision.

Costs

[15] Under LAT Rule 19.3, a submission on costs is required to include the amount of costs being sought. I have the applicant's submissions on costs and they do not include, at any point, the amount of costs being sought. I have no information on the amount of time the applicant's counsel spent on the applicant's reply submissions or on reviewing the respondent's submissions. Accordingly, the applicant's request for costs is dismissed. This does not preclude either party from seeking costs at the rehearing.

V. CONCLUSION

[19] For the reasons noted above, the applicant's request for reconsideration is granted. The applicant is not subject to the MIG.

[20] The matter shall go back to the Hearing Adjudicator to determine whether the applicant is entitled to payment for the costs of the neurological assessment.

[21] The matter shall go back to the Hearing Adjudicator to determine whether the applicant is entitled to a special award.

[22] The applicant's request for costs is dismissed.

Released: August 21, 2019

Deborah Neilson
Adjudicator