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Ontario

RECONSIDERATION DECISION

Before: Kimberly Parish, Adjudicator

Date: October 24, 2019

File: 17-006710/AABS

Case Name: A.M.F. v. The Dominion of Canada General Insurance Company

Written Submissions by:

For the Applicant: Nick de Koning, Counsel

For the Respondent: Sharon C. Dagan, Counsel

OVERVIEW

[1] This Request for Reconsideration was filed by the respondent, The Dominion of Canada General Insurance Company in this matter. It arises out of a written decision in which the Tribunal found the applicant's injuries from a 2009 motor vehicle accident resulted in her sustaining a catastrophic impairment as defined within the *Schedule.* The Tribunal also found the applicant was entitled to receive two medical benefits plus interest owed for a chiropractic treatment plan in the amount of $3,855.78 and massage therapy in the amount of $2,183.40.

[2] The respondent submits that the Tribunal made numerous significant errors of fact and law such that the Tribunal would likely have reached a different result had the errors not been made.

[3] The respondent is seeking an order that the Tribunal vary its decision and find the applicant did not sustain a catastrophic impairment as a result of the motor vehicle accident based on both (i) 55% or more whole person impairment; and (ii) Class 4 marked impairment due to a mental or behavioural disorder. Further, the respondent also seeks the order to include that the medical benefits in dispute in the amounts of $3,855.78 and $2,183.40 are not reasonable and necessary and that no interest is payable. In the alternative, the respondent seeks a rehearing on the issues before a different adjudicator.

[4] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*[1], I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

RESULT

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

ANALYSIS

[6] The grounds for a request for reconsideration are contained in Rule 18 of the *Tribunal's Common Rules of Practice and Procedure*. A request for reconsideration will not be granted unless one of the following criteria are met:

a) The Tribunal acted outside its jurisdiction or violated the rules of natural justice or procedural fairness;

b) The Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision;

[1] 2009, S.O. 2009, c. 33, Sched. 5.

c) The Tribunal heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result;

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

[7] The respondent submits that Rule 18.2 b) applies.

[8] In order to interfere with a decision under Rule 18(b), the Tribunal must not only have made an error of fact and law but the errors in fact and law must be significant enough that the Tribunal likely would have come to a different decision. On the evidence, I find it unlikely that the Tribunal would have come to a different conclusion but for the errors alleged by the respondent.

[9] In its submissions, the respondent addresses five separate categories in which the respondent submits the Tribunal made significant errors of fact and law of the such that the Tribunal would likely have reached a different result had the errors not been made. I will address the submissions made by the respondent within each category.

Errors Regarding Extensive Evidence of Applicant's Pre-accident Medical and Employment History

[10] The respondent submitted that the Tribunal made errors of law regarding causation and the determination of catastrophic impairment. This was because the Tribunal omitted, overlooked, mischaracterized, and failed to properly consider relevant evidence relating to the applicant's pre-accident level of functioning and employment history. I disagree. In its decision, the Tribunal accepted and addressed the applicant's lengthy pre-accident medical history which it noted within paragraphs 9 and 10 of its decision. The applicant's pre-accident impairments were summarized by the Tribunal in paragraph 12 which noted the following pre-accident impairments: chronic pain in her neck and back, TMJ, difficulty sleeping, and psychological impairments. Based on the totality of the evidence, the Tribunal found the applicant's level of functioning was better prior to the subject accident which played a significant role in her declining further. Although I agree the Tribunal did not specifically respond to the respondent's arguments relating to all references made to specific clinical notes and records which spanned from the 1990's up to 2008, I do not consider this to be an error in fact or law which requires its decision be overturned. The Tribunal is not required to expressly address every piece of evidence and every argument made by a party.

[11] The respondent further submitted the Tribunal failed to identify key findings and opinions noted within the June 21, 2008 report[2] of Dr. Gouws, psychologist. These

[2] Dr. Gouws report, dated June 21, 2008, Vol. 2, Tab 18R

were the respondent's concerns. The Tribunal considered what was noted within the 2008 and 2017 reports of Dr. Gouws and made its findings based on the evidence pre and post accident. It is the Tribunal's decision to weigh the evidence and subsequently make findings based upon the totality of the evidence. I find this is what the Tribunal did. The respondent submitted the Tribunal did not acknowledge that Dr. Gouws' 2008 report noted the applicant's score on the Pain Patient Profile indicated she may be feeling worthless, helpless, and hopeless as the Tribunal noted at paragraph (iv) on page 13 of its decision that the applicant does not appear to feel hopeless and her self-esteem seems largely intact. The respondent also addressed that paragraphs (i) and (vii) of the Tribunal's decision referenced "no evidence of lapses in memory" and "average performance on processing speed abilities." The respondent further submitted that Dr. Gouws had also noted that all her other assessed cognitive abilities including verbal and visual problem solving, and attention concentration were in the low average range and demonstrated significantly diminished immediate, delayed and recognition visual memory. I do not find these details equate to errors in fact as the Tribunal correctly noted on page 13-14 of its decision the details referenced within Dr. Gouws 2008 and 2017 reports and accepted this evidence based on the totality of the information contained within both reports which address the applicant's condition pre and post accident.

[12] The respondent submitted that the Tribunal did not acknowledge further aspects of the Applicant's testing as noted within Dr. Gouws 2008 report as as paragraph (iii) on page 13 of the Tribunal's decision referenced Dr. Gouws 2008 report noting: "numerous psychometric clinical measures were completed without any expressed difficulties of an emotional nature." The respondent also submitted the Tribunal did not acknowledge that Dr. Gouws 2008 report had noted the applicant's concern about her functioning and health matters, severe level of depressive symptomatology, was chronically distressed, overwhelmed by intrusive symptoms indicating classic PTSD, her prognosis was extremely guarded, and her chances of returning the workforce were bleak. While I accept that the Tribunal did not specifically address all aspects of the applicant's testing, the Tribunal is not required to address every piece of evidence in reaching its findings. I do not find the Tribunal mischaracterized the evidence as a result. The Tribunal noted in its decision on page 13 in paragraph (vi) that Dr. Gouws' report noted the applicant "*Expressed interest in vocational retraining. Future vocational exploration would provide therapeutic rehabilitation, but her employability is considered doubtful."* The Tribunal noted on page 6 in paragraph (iii) that *"the applicant had not worked on a consistent basis since 2006."* I find this confirms the Tribunal accepted the the applicant was not employed on a regular basis for three years prior to the subject accident. Further the Tribunal noted in paragraph (viii) on page 13 that Dr. Gouws noted the applicant was suffering from *"Recurrent Depressive Disorder, current episode moderate to severe."* Therefore, I find the Tribunal reviewed and weighed the totality of the evidence and acknowledged the level of the applicant's depressive symptomatology and that her employability in future vocations was

unlikely likely according to Dr. Gouws 2008 report.

[13] It was further submitted by the respondent that the Tribunal did not acknowledge that Dr. Gouws diagnosed the applicant prior to the subject accident with Chronic Pain Disorder of a permanent nature; PTSD with features of Specific Phobia; and Limitation of Activity Due to Disability. Further, Dr. Gouws noted the applicant's chances of returning to the workforce was bleak and the applicant's prognosis was extremely guarded which was not acknowledged by the Tribunal. I disagree as the Tribunal noted on page 14, paragraph 29: *"Although she had a prior diagnosis of depression, Chronic Pain, and posttraumatic stress disorder ("PTSD")* ***which was addressed by Dr. Gouws in his June 2008 report [emphasis mine]****, Dr. Gouws testified that the level at which the applicant was reporting her depression and the severity of her presentation, led to a diagnosis noting severe depression and somatic symptom disorder which are as a result of the subject accident."* I find this confirms the Tribunal acknowledged Dr. Gouws diagnosis of Chronic Pain, and PTSD. Further, the Tribunal accepted Dr. Gouws evidence that the applicant deteriorated further as a result of the subject accident

[14] It was submitted by the respondent that the Tribunal made a significant error of fact when it noted in its decision under paragraph 15 (vi) that the applicant underwent training to become a private investigator when there was no evidence of the same. I find the Tribunal did err in this regard. The applicant underwent testing to become a private investigator but did not specifically undergo training to become a private investigator. The respondent has failed to persuade me that this fact of testing versus training amounts to an error in fact such that it would likely have reached a different decision.

Errors Regarding Evidence of Pre and Post-Accident Functioning, Causation and Catastrophic Impairment

[15] The respondent submitted the Tribunal made significant errors of fact and law in failing to accurately characterize, consider, analyze and apply relevant evidence when comparing the applicant's pre and post-accident functioning. The respondent further submitted that the Tribunal erred in its finding on causation and catastrophic impairment. I disagree with the respondent on both points.

[16] The respondent submitted that the Tribunal erred in the conclusions it reached on pages 7-9 of its decision where the Tribunal disagreed with the respondent's position that the applicant was in a better position following the subject accident. The respondent through its submissions referenced activities the applicant was able to perform pre and post-accident and referenced other evidence including: the records of her treating psychologist, Dr. Jett, and aspects of her husband's testimony. The respondent also submitted the Tribunal erred when it failed to acknowledge that the applicant's attendance at the gym and church activity are examples of positive functioning. I disagree with the respondent's

submissions. The respondent has not identified any true factual errors made by the Tribunal in arriving at its conclusion that the applicant is **not [emphasis mine]** in a better position following the subject accident. Reconsideration is not an opportunity to reargue positions which failed at the hearing and I find rather than point me to an error in fact that the Tribunal made, what the respondent essentially attempts to do is re-argue its case.

[17] It was submitted by the respondent that the Tribunal erred in its interpretation and analysis of the surveillance evidence. Specifically, the respondent has submitted the Tribunal made select references to the surveillance in its decision but provided no context relating to the sequence of events. For example, the respondent submitted the Tribunal did not address all aspects of the applicant's activities on one of the dates that surveillance was conducted; August 27, 2015. I disagree with the submissions made by the respondent. The surveillance was viewed at the hearing. The respondent is attempting to reargue the same position it put forward at the hearing. The Tribunal concluded the surveillance was supported by the testimony of the applicant and her spouse and further corroborated by the medical records.

[18] The respondent has submitted that the Tribunal erred in fact and law in reaching its conclusion on causation that the applicant would not be suffering from the current level of impairment but for the subject accident. The respondent submits the applicant is in the same or better position since the subject accident with regards to her level of impairment/functioning. It was put forth by the respondent through its submissions that the Tribunal would likely have reached a different conclusion on causation and catastrophic impairment determination if the Tribunal had not made the noted errors above. As noted above, I disagree that the Tribunal made any errors of fact, with the exception that the Tribunal incorrectly noted the applicant underwent training to become a private investigator, when the applicant underwent testing only. Regarding causation, on page 5 of the Tribunal's decision, paragraph (ii) notes that Dr. Jett (applicant's treating psychologist) testified *"that treatment stopped when the respondent would no longer fund treatment as the policy limits were exhausted."* This was not refuted by the respondent at the hearing, or through its reconsideration submissions. Further, the respondent's IE Assessor, Dr. Rosenblat, psychiatrist provided the same diagnosis as Dr. Gouws; Major Depressive Disorder and the presence of the of Somatic Symptom Disorder with Predominant Pain and Dr. Rosenblat's report noted the index accident played a material role in the psychiatric diagnosis, which was noted by the Tribunal in paragraph 36 of its decision.

[19] Although there have been changes in the applicant's life which have occurred following the subject accident, these changes do not negate the impact it has had on her level of functioning which the Tribunal finds have declined following the subject accident. Therefore, it is the Tribunal's finding on a balance of probabilities that "but for" the accident the applicant would not be suffering from

the current level of impairment. Contrary to the argument made by the respondent, I find that the Tribunal carefully weighed the totality of the evidence before it and correctly applied the "But For" test in following with the Supreme Court of Canada in the case of *Clements v. Clements*[3] and thus established the applicant met for the test for causation.

Errors Regarding Analysis of Deterioration or Decompensation in Work or Work-like Setting (Adaptation) and Moderate Impairment in AMA Guides in Determination of Catastrophic Impairment

[20] It was submitted by the respondent that the Tribunal erred in fact and law by not correctly applying the correct definition as set out in the AMA Guides for Deterioration or Decompensation in Work or Work Like Settings (Adaptation) and the definition is broader than whether an individual can function in the workplace. Further, the respondent's submissions noted the Tribunal failed to properly "interpret, consider, and analyze and apply the criteria" for this area as set out in the AMA Guides" and did not properly consider the definition of Class 3 moderate impairment as defined within the AMA Guides. As a result, the respondent submitted the Tribunal failed to arrive at a correct determination of catastrophic impairment under s. 2 (1.2) (g) of the *Schedule*. The respondent also submitted the Tribunal ignored, did not consider, or misstated components of the evidence of Ms. Munir, the insurance examination ("IE") occupational therapy ("O.T.") assessor.

[21] Contrary to the submissions made by the respondent, I find that the Tribunal's decision was factually correct and legally sound. I find the Tribunal correctly identified and applied the definition of Deterioration or Decompensation in Work or Work Like Settings (Adaptation) and in its decision and provided explicit examples in which the applicant repeatedly failed to respond to stressful situations in situations beyond the workplace. The Tribunal in its decision noted in paragraph 32 that the applicant could not complete day two of the occupational therapy ("O.T.") assessment with Jennifer Berg-Carnegie. The Tribunal noted: *"The assessment could not be completed on the second day as the applicant was hysterical and crying before the assessment commenced. She was preoccupied with her pain and adamant that she needed to go to the hospital. The applicant's presentation was described as genuine by the O.T. but she characterized the applicant's behaviour as "emotional flooding" as the applicant's heightened emotional response rose instantly."* The applicant also could not complete the second day of the assessment of daily living activity with Ms. Munir. The Tribunal noted in paragraph 40 of its decision that Ms. Munir terminated the assessment because "*the applicant's behaviour was aggressive and socially inappropriate."* In its consideration of reaching the conclusion that the applicant sustained a marked (class 4) impairment in the area of Deterioration or

[3] *Clements v. Clements,* 2012 SCC 32

Decompensation in Work or Work Like Settings (Adaptation), I find the Tribunal provided detailed reasons for its decision which were based on the totality of the evidence before it.

[22] The Tribunal disagrees with the respondent's submission that it failed to acknowledge Dr. Rosenblatt's evidence which is critical to provide a detailed analysis of the activities of daily living an individual can and cannot do when looking at the area of adaptation. The Tribunal in its decision reviewed the activities the applicant performs which included; exercising, riding her bicycle, volunteer work, attending church and participating in church activities, and spending time with her husband and parents. These were all activities that the respondent submitted support that the applicant does not decompensate as supported by the evidence of Dr. Rosenblat. The Tribunal is not required to refer in its decision to every piece of evidence that it considers in making a factual finding. The Tribunal's findings were based upon the totality of the evidence and I find the evidence was appropriately weighed and considered. The Tribunal reviewed and considered the evidence of Dr. Rosenblatt which was discussed on pages 16 and 17 of the Tribunal's decision. I find the Tribunal provided an in-depth analysis within its decision on pages 19-21 and provided the reasons why it preferred the evidence of Dr. Gouws and the evidence contained within the O.T. assessment reports of Ms. Berg-Carnegie and Ms. Munir. Therefore, I do not find the Tribunal erred because it did not reference within its decision, specific activities which Dr. Rosenblat and Ms. Munir noted the applicant could do, along with her reported or observed limitations.

[23] I do not find the Tribunal erred in paragraph 46 of its decision when it noted that the information contained within both reports of Dr. Rosenblat and Ms. Munir warranted communication or correspondence between them to assist with gaining further insight before ruling-out a marked (class 4) impairment in the area of *Decompensation in Work or Work-like settings*. The Tribunal weighed the testimony of Dr. Rosenblatt and his hand-written notes which confirmed he was contemplating the applicant may have a marked (class 4 impairment). The Tribunal noted that while these assessments formed part of a multi-disciplinary assessment, they were done completely independently without any collaboration between the assessors. The Tribunal preferred the 2017 report of Dr. Gouws who conducted collateral interviews with the applicant's husband, Ms. Berg-Carnegie, and Dr. Jett, the applicant's treating psychologist. While the respondent submits, the Tribunal did not acknowledge all the evidence proffered by Ms. Berg-Carnegie, Dr. Gouws, and Dr. Jett, I do not find the Tribunal is required to address all the information before it in order to establish how it reached its conclusion.

[24] The respondent submitted the Tribunal did not provide a factual summary or a legal analysis of two jurisprudence decisions relied on by the respondent, *Applicant and*

Allstate Insurance[4] and *Leduc-Moreau and Echelon General Insurance Company.*[5] Both these decisions are not binding on the Tribunal and the Tribunal noted in its reasons why it found both of these cases distinguishable. Further, the Tribunal was persuaded by the applicant's testimony which was corroborated by the evidence of Dr. Gouws and Dr. Jett.

Failing to Properly Interpret the Global Assessment of Functioning Scale and Arrive at a Correct Determination of Whole Person Impairment under the AMA Guides

[25] The respondent submitted the Tribunal incorrectly interpreted the ratings of the Global Assessment of Functioning ("GAF") Scale and erred on accepting Dr. Gouws' GAF rating of 38 instead of Dr. Rosenblat's GAF rating of 51 to 53. It was further submitted by the respondent that the Tribunal erred in fact and law when it concluded the applicant's GAF score of 38 translates to a whole person impairment rating ("WPI") of 55%. In paragraph 51 of its decision, the Tribunal accepted the GAF score provided by Dr. Gouws and provided its reasons for preferring it over the GAF score suggested by Dr. Rosenblat. The Tribunal then provided its analysis of how the GAF score of 38 translates into a WPI of 55%. The Tribunal relied on the testimony of Dr. Gouws which it found to be supported by the reference to the table produced at the hearing converting the California GAF score to a WPI from the Schedule for Rating Permanent Disabilities, January 2009: Psychiatric Impairment GAF to WPI Conversion (footnote 42 in the Tribunal's decision). Although the respondent is disappointed with the Tribunal's decision which accepted the applicant has a GAF score of 38, the purpose of the reconsideration process is not to give an unsuccessful party a second opportunity to have its case heard. I find that the respondent has failed to establish that the Tribunal made any error in law or in fact such that its decision should be reconsidered.

Errors on Medical Benefits

Medical Benefit in the Amount of $3,855.78 for chiropractic services

[26] In its submissions, the respondent argues the Tribunal erred in its finding that this treatment plan was reasonable and necessary. The respondent argues that the Tribunal did not reference the MRI report of the lumbar spine dated January 28, 2017 in its entirety and erred in accepting the diagnosis made by Dr. Prutis following this MRI. The respondent submitted that based on this MRI there was no basis for Dr. Prutis to conclude disc herniation or radiculopathy as a result of the subject accident. I do not find the Tribunal has erred in its finding that this treatment

[4] *Applicant and Allstate,* Licence Appeal Tribunal, 16-003415, 2018 CanLII 8071, January 5, 2018
[5] *Jonathan Leduc Moreau and Echelon General Insurance Company,* FSCO A13-004919, June 30, 2016

plan is reasonable and necessary. The evidence of Dr. Prutis was preferred over the respondent's IE assessors, Dr. Balsky and Dr. Muhlstock. The Tribunal referenced the jurisprudence cases of *General Accident Assurance Co. of Canada and Dominic Violi*[6] and *E.S. and Unifund Assurance Company.*[7] The Tribunal noted within its decision that both these cases were persuasive in recognizing that pain relief is a valid treatment goal and ongoing chiropractic treatment can provide pain relief and enhance functional ability.

Medical Benefit in the Amount of $2,183.40 for massage therapy

[27] I do not agree with the respondent that the Tribunal erred in rejecting the opinion provided in April 2016 of the IE assessors; Dr. Waters and Mr. Spoz which concluded the treatment plan was not reasonable and necessary. They noted there was no therapeutic value to ongoing massage therapy and that the applicant reached maximum medical recovery. The Tribunal weighed the evidence and preferred the evidence of the applicant's family doctor, Dr. D'urzo and the applicant's treating massage therapist, Tina Franchetto, which both supported that massage therapy provided ongoing pain relief. The respondent submitted they relied on a prior Tribunal decision, *16-000691 and Unifund Assurance Company*[8] in which the adjudicator found that passive treatment including chiropractic manipulation would assist in recovery more than the home exercise program the applicant was engaged in which consisted or working out on a treadmill weekly for 150 minutes. As prior Tribunal decisions are not binding, the Tribunal was not persuaded by this decision and therefore did not rely on it when reaching its finding that this treatment plan is reasonable and necessary.

[28] In support of its position, the respondent has relied on the Tribunal's reconsideration decision, *A.S. v. Pafco Insurance*[9] in which the Associate Chair found the Tribunal had erred in law by not considering the applicant's submissions and evidence relating to the applicant's ongoing pain and weight, which were critical to his case. Further, the Associate Chair found the Tribunal made a significant error of fact when it mischaracterized the evidence of the doctors who assessed the applicant. The Associate Chair found that the Tribunal had mischaracterized a medical report and failed to consider relevant contradictory evidence when assessing the applicant's credibility. I find the case referenced by the respondent is distinguishable from this case. In the current case, the Tribunal did consider and weigh the respondent's evidence and through its analysis

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6 *General Accident Assurance Co. of Canada and Dominic Violi* (FSCO P99-00047, September 27, 2000)

7 *E.S. and Unifund Assurance Company* (Licence Appeal Tribunal, 16000691/AABS, January 13, 2017), 2017 CanLII 5853 ONLAT

8 *16-000691 and Unifund Assurance Company*, 2017 CanLII 5853 (ONLAT)

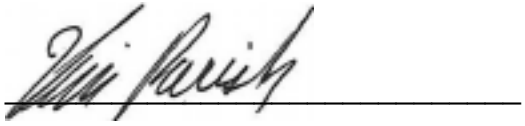
9 *A.S. v. Pafco Insurance,* 2018 CANLII 83507, (ONLAT)

addressed the discrepancies in the evidence and provided its reasons why the applicant's evidence was preferred. For example, the Tribunal addressed this in paragraph 33 of its decision where it was noted that the applicant reported to Ms. Berg-Carnegie that she had made a full recovery following her three prior motor vehicle accidents. The Tribunal found this was not a deliberate omission on the applicant's part and that the applicant's testimony and the documentary evidence support that the subject accident made her impairments worse and that the applicant perceives her ongoing pain as a barrier to her recovery. Further, the Tribunal accepted that Ms. Berg-Carnegie noted in her report that she had reviewed the applicant's hospital records from 1995, clinical notes and records from 2003, and other documents/medical reports up to 2015. This confirms Ms. Berg-Carnegie was provided with information supporting the applicant had not made a full recovery following each of her prior motor vehicle accidents. The Tribunal further addressed that Ms. Berg-Carnegie was not aware at the time of her assessment that the applicant had participated in a political campaign and was actively involved with her church. The Tribunal accepted Ms. Berg-Carnegie's testimony that this information would not change what was originally noted within her report. The Tribunal considered and appropriately weighed the evidence of Dr. Rosenblat who found validity concerns regarding his assessment of the applicant. The Tribunal addressed the validity concerns raised by Dr. Rosenblat and ultimately preferred and provided its reasons for preferring the opinion of Dr. Gouws, and the evidence of her treating psychologist, Dr. Jett. Therefore, I do not find the tribunal has mischaracterized the evidence as submitted by the respondent.

[29] Throughout its submissions for reconsideration, the respondent has put forth the same arguments it made at the hearing. The purpose of the reconsideration is not for the evidence to be weighed differently. I find that the Tribunal did not make an error in law or in fact in rendering its decision.

CONCLUSION

[30] The respondent has failed to establish any grounds upon which the Tribunal's decision should be overturned, the respondent's Request for Reconsideration is therefore dismissed.



Kimberly Parish, Adjudicator
Tribunals Ontario - Safety, Licensing Appeals and Standards Division

Released: October 24, 2019