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Ontario

RECONSIDERATION DECISION

Citation: F.C. vs. Aviva Insurance Canada, 2020 ONLAT 18-001359/AABS

Before: Jesse A. Boyce, Adjudicator

Date: August 17, 2020

File: 18-001359/AABS

Case Name: F.C. and Aviva Insurance Canada

Written Submissions by:

For the Applicant: Michael Rotondo

For the Respondent: Suzanne Clarke

OVERVIEW

[1] This request for reconsideration was filed by the respondent, Aviva. It arises out of a decision dated November 15, 2019 in which the Tribunal found that the applicant, F.C., was entitled to non-earner benefits due to Aviva's non-compliance with s. 36(6) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). In addition, the Tribunal determined that F.C. was entitled to payment for a medical benefit in the amount of $2,230.58 due to Aviva's failure to comply with its s. 38 obligations. The Tribunal also levied an award under s. 10 of O. Reg. 664 in the amount of $5,190.57 and interest.

[2] Aviva submits that the Tribunal acted outside of its jurisdiction, violated the rules of natural justice and procedural fairness and made significant errors of law and fact that would have resulted in a different outcome. On reconsideration, Aviva seeks a determination that F.C. is not entitled to any of the benefits awarded.

[3] Pursuant to Rule 18 of the Tribunal's *Common Rules of Practice and Procedure*, I have been delegated responsibility to reconsider this matter.

RESULT

[4] Aviva's request for reconsideration is dismissed.

ANALYSIS

[5] The grounds for a request for reconsideration are contained in Rule 18.2 of the Tribunal's *Common Rules*. 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 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 would have affected the result; or

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

[6] As noted, the basis for Aviva's reconsideration request falls under Rule 18.2(a) and (b). Aviva submits that the Tribunal erred and acted outside of its jurisdiction

when it awarded F.C. non-earner benefits strictly based on Aviva's non-compliance with s. 36 because F.C. did not meet his onus to prove that he met the non-earner benefit test. Specifically, it asserts that procedural errors by an insurer do not automatically result in substantive entitlement, that the Tribunal ignored F.C.'s procedural breaches and lack of medical information to meet the non-earner test and that the Tribunal failed to exercise s. 7 of the *Licence Appeal Tribunal Act*.[1] With regards to the medical benefit, Aviva submits that the Tribunal erred in finding that its reasons for denial were not sufficient to meet its s. 38 obligations because the notice indicated that F.C.'s injuries were predominantly minor injuries and that F.C. would have been able to understand its rationale. Aviva made no specific submissions on the s. 10 award or the interest owing.

[7] For the reasons below, I dismiss Aviva's request for reconsideration under Rule 18.2(a) and (b) and find there were no errors made by the Tribunal in its decision.

Procedural errors under s. 36 do result in benefit entitlement

[8] Aviva relies on the Court of Appeal decision in *Stranges v. Allstate Insurance Company of Canada*[2] to argue that it is "well-established" that procedural deficiencies do not automatically entitle an insured to non-earner benefits, as it is the insured's burden to prove that they meet the test under the *Schedule*. It submits that procedural breaches should not alleviate the onus of proof and that doing so resulted in a "windfall" where F.C. would not otherwise meet the test.

[9] I disagree and find no error was made by the Tribunal. Section 36(6) is a clear shall-pay provision: if the insurer fails to comply with 36(4) or (5) within 10 days, it shall pay the specified benefit for the period starting on the day of non-compliance and ending on the day it gives proper notice. This approach and analysis of *Stranges* has been confirmed on several occasions by the Tribunal, including in two reconsideration decisions where Aviva was a party.[3] I agree that there is no other reasonable interpretation of s. 36(6). It is undisputed that Aviva provided no notice of its denial to F.C. after he complied with its s. 33 requests for more information and since the Tribunal found Aviva's non-compliance entitled F.C. to a non-earner benefit under s. 36(6), I find no error of law. Further, *Stranges* is easily distinguishable because it addressed an older version of the *Schedule*, did not contemplate the shall-pay provision of the current s. 36(6) and concerned ongoing entitlement to income replacement benefits.

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[1] 1999, S.O. 1999, c. 12, Sched. G.

[2] 2010 ONCA 457, at 9 and 10.

[3] See, *T.H. v. Aviva Insurance Company of Canada,* 2019 CanLII 77003 (ON LAT Reconsideration)*; T.A. v. Aviva General Insurance Company*, 2020 CanLII 51296 (ON LAT Reconsideration).

The Tribunal did not "selectively ignore" F.C.'s "intentional procedural breaches" or the evidence that "signaled" that he was not entitled to a non-earner benefit and s. 7 is not applicable

[10] Next, Aviva submits that the Tribunal chose to ignore F.C.'s "intentional procedural breaches" in responding to Aviva's s. 33 requests. As I understand it, Aviva asserts that F.C. violated s. 33 when he did not provide it with the documentation it requested within 10 days and did not provide Aviva with a reasonable explanation for the delay. Aviva argues that the Tribunal's decision was silent on this non-compliance and that it "paid no attention to the fact that [F.C.] came to the Tribunal without clean hands." I find no error.

[11] On review of the evidence on reconsideration, I find no indication that Aviva attempted to rely on s. 33 in its response, during the hearing or in its closing submissions (as it provided F.C.'s, but not its own) or sought a reasonable explanation for F.C.'s delay in procuring the documentation under s. 33(8)(b) or under s. 34. It appears that Aviva never responded at all, a fact echoed in the Tribunal's decision that literally formed the basis of F.C.'s entire case. Further, I find no evidence to suggest that F.C. "came to the Tribunal without clean hands" or intentionally breached s. 33. Indeed, on the facts, Aviva triggered s. 33 and then did not follow through with its own obligations when F.C. eventually complied. These facts are outlined in the Tribunal's decision at paras. 22-28.

[12] With regards to Aviva's alternative submission that the Tribunal ignored the evidence that "signaled" that F.C. was not entitled to a non-earner benefit, I again see no error. The foundation of F.C.'s case was that he was entitled to the non-earner benefit due to Aviva's procedural breach and not because he met the substantive test under s. 12(1). Even though F.C. did obtain an OCF-3 dated January 16, 2017 indicating that he may be eligible for the non-earner benefit, I find it clear that it was no secret that his appeal was based on s. 36(6). Indeed, the very first sentence of the Tribunal's analysis under the Non-Earner Benefit header at para. 14 is: "The applicant made it clear that the basis on which his application will be argued is on technical grounds."

[13] Aviva's third argument relies on s. 7 of the *Licence Appeal Tribunal Act*, which allows the Tribunal to extend the time for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under s. 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief. If I understand correctly, Aviva seems to assert that the Tribunal should have exercised its discretion under s. 7, on its own initiative, to excuse Aviva's breach under s. 33 to

focus instead on F.C.'s s. 33 delay and the "high-handed manner" with which F.C. "chose to change the scope of the [Tribunal] dispute."

[14] I do not find this argument persuasive. Putting aside the fact that Aviva misconstrues the Tribunal's discretion under s. 7, on the evidence, it does not appear that this issue was even raised at the hearing but raised on reconsideration. In any case, it remains unclear how the Tribunal would have even applied s. 7 to the facts, let alone how it was an error to not do so.

There was no error in finding the medical benefit payable

[15] Here, Aviva asserts that the Tribunal erred in finding that the medical benefit for chiropractic treatment was payable due to insufficient reasons because it provided a "principled rationale" for the denial based on the medical evidence it had available and where F.C.'s accident-related impairments appeared to be predominantly minor injuries. Aviva submits that its denial notice met its obligations under s. 38(8) of the *Schedule* and that it was error to find otherwise.

[16] It is well-settled that there is no comprehensive approach to the analysis of whether reasons supporting a denial are proper, however, at minimum, there should be clear and sufficient information for an unsophisticated person to make an informed decision to either accept or dispute the denial.[4] The Tribunal found at paras. 47-49 that Aviva's reason for denial—that F.C.'s injuries were minor and that his health practitioner had not provide compelling evidence—was "simply too vague." At paras. 52 and 56, the Tribunal found that, as an unsophisticated person, F.C. would not have understood the rationale for the denial or why Aviva believed he remained in the Minor Injury Guideline. While Aviva may disagree with the Tribunal's analysis of what constitutes proper "medical and other reasons" for a denial under the *Schedule*, I find that the Tribunal was entitled to make the determinations that it did based on the evidence before it. On making this determination, the Tribunal then correctly applied s. 38(11) to find the medical benefit payable. I find no error.

F.C.'s request for costs is denied

[17] In his responding submissions on reconsideration, F.C. requested his costs in the amount of $2,599.00, pursuant to Rule 19.2 of the Tribunal's *Common Rules of Practice and Procedure* due to Aviva acting frivolously, unreasonably and in bad faith in seeking this reconsideration. While I agree that the majority of Aviva's submissions fall well-short of meeting the standard to warrant reconsideration or

[4] *M.B. v. Aviva Insurance Canada*, 2017 CanLII 87160 (ON LAT Reconsideration).

to overturn the Tribunal's initial decision, I do not find its request to be frivolous or unreasonable and I decline to award costs.

CONCLUSION

[18] Aviva's request for reconsideration is dismissed.

Released: August 17, 2020

Jesse A. Boyce, Adjudicator