

Safety, Licensing Appeals and Standards  
Tribunal Ontario  
**Licence Appeal Tribunal**

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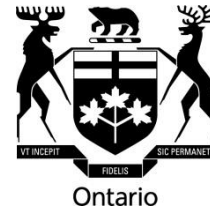
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## RECONSIDERATION DECISION

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**Before:** Heather Trojek, Vice Chair  
**Date:** July 12, 2018  
**File:** 17-002561/AABS  
**Case Name:** S.K. and TTC Insurance

**Written Submissions By:**

**For the Respondent:** Chad Townsend, Toronto Transit Commission

**For the Applicant:** Mireille Dahab, Dahab Law

## OVERVIEW

- [1] The applicant, S.K., was a pedestrian when hit by a Toronto Transit Commission (“TTC”) bus on March 6, 2012. As a result of the accident, she sustained numerous orthopaedic injuries, including fractures in both her knees and in her left ankle.
- [2] Following the accident, the applicant submitted two applications (OCF-19s) for the determination of catastrophic impairment (“CAT”) pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “*Schedule*”) to TTC Insurance. TTC Insurance denied both OCF-19s.
- [3] The applicant disagreed with TTC Insurance’s denials and filed an application with the Licence Appeal Tribunal – Automobile Accident Benefits Service (“the Tribunal”). The Tribunal held a six-day, in-person hearing. Written submissions were filed afterward.
- [4] On February 1, 2018, the Tribunal issued its final decision, now reported at 2018 CanLII 8101. The Tribunal determined that S.K. was catastrophically impaired as of June 2016.
- [5] On February 9, 2018, TTC Insurance requested a reconsideration of the Tribunal’s decision on the basis that it made errors in law and in fact. On March 7, 2018, the applicant provided submissions in response to this request. The applicant submits the Tribunal’s decision is correct and TTC’s Insurance request for reconsideration should be dismissed.
- [6] For the reasons that follow, I deny TTC’s Insurance request for reconsideration and uphold the Tribunal’s decision.

## BACKGROUND

- [7] The *Schedule* sets out several categories of catastrophic impairment under which an applicant can qualify for catastrophic impairment designation and enhanced benefits. Relevant to this case is the WPI category described in s. 3(2)(e) of the *Schedule* (“Criterion 7”) and the mental or behavioural category described in s. 3(2)(f) of the *Schedule* (“Criterion 8”).
- [8] The applicant filed one OCF-19 under Criterion 7 and another under Criterion 8. The OCF-19s were submitted over a year and half apart.
- [9] The applicant submitted her first OCF-19 in November 2014 under Criterion 7. Criterion 7 requires that an insured sustain a 55% or more impairment of the whole person (“WPI”), when rated in accordance with the AMA Guides (the “*Guides*”).<sup>1</sup>

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<sup>1</sup> American Medical Association Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition, 1993.

- [10] The applicant submitted her second OCF-19 in June 2016 under Criterion 8. Criterion 8 requires an insured to have at least one marked or extreme impairment in one of four domains of functioning as a result of a mental or behavioural disorder, to be determined CAT.
- [11] After hearing the matter, the Tribunal made its findings with respect to the first OCF-19 filed under Criterion 7 and the second filed under Criterion 8.
- [12] Under Criterion 7, the Tribunal found that the applicant had a total WPI of 42-46% and, therefore, was not catastrophically impaired. The basis for this finding was a determination that the applicant had a physical impairment rating of 29% and a psychological impairment rating of between 18-24%. TTC Insurance takes no issue with the Tribunal's finding under Criterion 7.
- [13] However, with respect to Criterion 8, the Tribunal determined that the applicant was catastrophically impaired as of June 21, 2016 because she had a marked impairment in two areas: social functioning and adaptation. TTC Insurance filed a request for reconsideration because it disagrees with the Tribunal's determination that the applicant meets the definition of CAT under Criterion 8.
- [14] The requirements for reconsideration requests are set out in Rule 18.2 of the Tribunal's *Common Rules of Practice & Procedure* (October 2017). In this case, the applicant relies on Rule 18.2(b), which provides that the Executive Chair or his or her delegate will not grant a request for reconsideration unless the Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision.
- [15] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Schedule 5, the Executive Chair delegated her responsibility to decide this reconsideration request to me.
- [16] In its request for reconsideration, TTC Insurance argues that the Tribunal's decision should be set aside because the Tribunal:
- (a) did not convert the applicant's impairment ratings under Criterion 8 to a WPI% and, as a result, failed to correctly consider and weigh the totality of the medical evidence;
  - (b) accepted the evidence of Dr. Gerber, the only assessor who found the applicant to be catastrophically impaired, and "completely ignored" the evidence provided by other mental health professionals;
  - (c) it erred in accepting any of the applicant's evidence; and
  - (d) failed to provide sufficient reasons for why it did not accept TTC Insurance's arguments regarding the applicant's lack of credibility.

## ANALYSIS AND REASONS

### a. Failure to Convert Impairments under Criterion 8 to a WPI%

- [17] I find that the Tribunal correctly applied and interpreted the *Schedule* and related case law in making its decision. Contrary to TTC Insurance’s submissions, I find nothing in the *Schedule*, case law or *Guides* requiring the Tribunal to have converted an impairment rating for a mental or behavioral disorder to a WPI% in order to assess catastrophic impairment under Criterion 8.
- [18] TTC Insurance argues that the Tribunal should have converted the 2016 impairment ratings of Dr. Gerber and Dr. Eisen under Criterion 8 to a WPI%. It argues that, had this conversion been done, the Tribunal would have rejected Dr. Gerber’s findings because they were “radically” different from the other medical practitioners who assessed or treated the applicant.
- [19] TTC Insurance argues that by not doing the conversion, the Tribunal misapplied the methodology used in the adjudication of CAT determinations which is well defined in the case law.<sup>2</sup> TTC Insurance refers to the case of *Applicant v. Peel Mutual Insurance Company (Peel Mutual)*,<sup>3</sup> in which the Adjudicator lays out a three-step methodology which concludes or ends with the conversion of a mental-behavioural impairment rating to a WPI%.<sup>4</sup>
- [20] In response, the applicant submits that the Tribunal did not err in law by not converting Dr. Gerber’s and Dr. Eisen’s findings to a WPI% when assessing her 2016 CAT application under Criterion 8. I agree. In the cases cited by TTC Insurance, the adjudicators and judge converted the mental-behavioral impairment ratings under Criterion 8 to a WPI% in order to make a determination under Criterion 7, not to make a determination, as the Tribunal did here, under Criterion 8.
- [21] Criterion 7 determinations are based on a combined impairment rating of the whole person which may include physical, as well as psychological impairments.
- [22] Unlike Criterion 7 determinations, the severity of mental or behavioral disorders under Criterion 8 are not measured as a WPI%. Instead, they are classified according to how seriously they affect a person’s useful daily functioning in four broad and overlapping activity categories, or “domains.” The four domains include activities of daily living, social functioning, concentration and adaption. An applicant only has to prove that he or she has a mental or behavioural disorder which results in a marked (class 4) or severe (class 5) impairment in one of the four the domains. The *Schedule* does not require the existence of a physical

<sup>2</sup> *Jaggernauth v. Economical Mutual Insurance Co*, [2010] O.F.S.C.D. No 14; *Taylor V. Pembridge Co. of Canada*, 2014 CarswellOnt 9339, FSCO A12-004886; *Desbiens v. Morini*, [2004] OJ No 4735; *Applicant and Unica*, 2017 CanLII 93459 (ON LAT); *Applicant and Jevco*, 2017 CanLII 636 (ON LAT).

<sup>3</sup> *16-000013 v. Peel Mutual Insurance Company*, 2017 CanLII 33649 (ON LAT).

<sup>4</sup> *Ibid.* at para. 63.

component or the type of rating suggested in Criterion 7 when qualifying for CAT impairment under Criterion 8.

- [23] Under Criterion 8, applicants either have a marked or severe impairment under one the four domains or they do not. I agree with the applicant that TTC Insurance misinterprets *Peel Mutual* because it fails to acknowledge that the Adjudicator also states a person with a marked psychological impairment in one domain would “independently qualify as catastrophic” [emphasis mine].<sup>5</sup> I agree and, accordingly, find that TTC Insurance is incorrect in asserting the Tribunal erred in law by not converting Dr. Gerber’s and Dr. Eisen’s findings into a WPI% in order to correctly determine if the applicant qualifies as CAT under Criterion 8.

**b. Failure to Consider the Totality of the Medical Evidence**

- [24] TTC Insurance also argues that the Tribunal “completely failed” to consider and adjudicate on the findings of Drs. Becker, Watson, Eisen as well as on the evidence of social worker Ms. Amy O’Reilly. I do not agree. In determining whether the applicant is catastrophically impaired under Criterion 8, the Tribunal states in paragraph 50 that the assessors all found the applicant suffered psychological issues. Contrary to the TTC Insurance’s allegation, I find that the Tribunal did not limit its assessment of the evidence to one assessor but, instead, appropriately considered the totality of the medical evidence before it.

**Dr. Becker**

- [25] The Tribunal objectively and thoroughly assessed the evidence of Dr. Becker. The fact that the Tribunal did not accept all of Dr. Becker’s findings confirms this. In 2014, under Criterion 8, Dr. Becker found that the applicant did not have a marked or severe impairment in any domains of functioning. Dr. Becker also assigned the applicant a Generalized Assessment of Global Functioning (“GAF”) score. The GAF represents an assessment process that clinicians may use to determine an individual’s level of psychosocial functioning.
- [26] In paragraphs 43 and 44 of its decision, the Tribunal rejected Dr. Becker’s GAF score. In light of Dr. Becker’s other findings, the Tribunal determined that the GAF score Dr. Becker assigned to the applicant should have reflected a higher level of functioning<sup>6</sup>. After converting the GAF score into a WPI%, the Tribunal found that the applicant had a combined WPI that was less than 55%, and therefore did not meet the definition of CAT under Criterion 7.
- [27] TTC Insurance argues that the Tribunal’s findings regarding Dr. Becker and Dr. Gerber are contradictory. More specifically, TTC Insurance argues that the Tribunal’s finding regarding the applicant’s GAF score does not support its

<sup>5</sup> *ibid* at para. 77.

<sup>6</sup> Dr. Becker assigned a GAF score of 50-54 to the applicant. The Tribunal found the appropriate GAF score to be been between 54 and 58. The California conversation method was used to translate both GAF scores into a WPI%.

acceptance of Dr. Gerber's finding that the applicant is CAT. It also points out that the Tribunal accepted Dr. Becker's evidence under Criterion 7 that the applicant was not CAT but then accepted that contrary opinion of Dr. Gerber. I do not agree with this argument. Dr. Becker's evidence speaks to the applicant's condition in 2014 only. What TTC Insurance fails to take into consideration in its submissions is the passage of time.

- [28] Contrary to TTC Insurance's submissions<sup>7</sup>, the Tribunal's decision demonstrates that it considered all of the evidence and found that the applicant's psychological condition deteriorated over time.<sup>8</sup> The Tribunal, for instance, found in paragraph 54 that the applicant attempted to commit suicide by taking an overdose of anti-depressant medication in June 2015. This event occurred after Dr. Becker's 2014 assessment and prior to Dr. Gerber's 2016 assessment. TTC Insurance has failed to persuade me that the Tribunal did not properly consider Dr. Becker's evidence and/or that the Tribunal's findings are contradictory with regards to Dr. Becker and Dr. Gerber. In fact I find that the Tribunal's analysis of the evidence to be completely reasonable and logical.

#### **Dr. Watson**

- [29] I also disagree with TTC Insurance's submission that the Tribunal disregarded the evidence of Dr. Mark Watson, neuropsychologist. Dr. Watson offered no opinion in terms of the applicant's mental or behavioural impairments in his 2014 report. Dr. Watson offered no opinion because he had some concerns regarding the validity of the applicant's psychological test results. The Tribunal therefore had little evidence that it could consider from Dr. Watson under Criterion 8.
- [30] When considering the validity of the applicant's self-reports to Dr. Gerber, the Tribunal, however, pointed out in paragraph 55, that Dr. Watson and Dr. Eisen, both testified that they found no indication that the applicant was malingering or magnified her symptoms during their respective assessments. This does not support TTC Insurance's contention that the Tribunal relied exclusively on the evidence of Dr. Gerber and did not consider the evidence of other mental health practitioners.<sup>9</sup>

#### **Ms. Amy O'Reilly**

- [31] TTC Insurance also argues that the Tribunal failed to consider the evidence of social worker, Amy O'Reilly, who treated the applicant from August 2015 to February 2016. TTC Insurance argues that Ms. O'Reilly's evidence does not

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<sup>7</sup> TTC Insurance argued that contrary to the *Guides* the Tribunal did not look at the applicant's mental-behavioral condition over a period of time or number of years but limited to a specific period of time, that being 2016.

<sup>8</sup> In para. 51 the Tribunal finds based on a review of two insurer examinations that the applicant began to exhibit mental or behavioral issues as early as October 2012.

<sup>9</sup> This confirms the Tribunal responded to TTC Insurance's argument that Dr. Gerber's opinion is flawed because he relied on self-reports from the applicant and therefore misunderstood the facts.

support the findings of Dr. Gerber and, if the Tribunal considered this evidence, it likely would have come to a different conclusion.

- [32] Although I agree with TTC Insurance that the Tribunal does not specifically refer to the evidence of Ms. O'Reilly in its decision, this does not mean that the Tribunal did not consider and weigh it. The Tribunal's role is to assess and weigh evidence. Adjudicators and judges are not required to refer to every piece of evidence or argument before them. In this case, the analytical path the Tribunal took to arrive at its decision is evident in its reasons; it is not realistic to expect the Tribunal to describe every stone or pebble it observed on the path along the way.<sup>10</sup> The fact that the Tribunal did not specifically mention the evidence of Ms. O'Reilly is not a sufficient reason for me to set aside a clear, concise and well-reasoned decision.

### **Drs. Eisen and Gerber**

- [33] I find that the Tribunal clearly assessed and weighed the evidence of Drs. Gerber and Eisen. It did not, as TTC Insurance alleges, rely solely on the opinion of Dr. Gerber without conducting its own analysis of the evidence.
- [34] In its decision, the Tribunal provides a number of reasons why it preferred the evidence of Dr. Gerber over that of Dr. Eisen. It notes that Dr. Gerber's findings were based on the interviews he conducted with the applicant as well as with her two daughters. The Tribunal also found that Dr. Gerber's opinions were supported by the testimony and behaviour the applicant exhibited at the hearing. At paragraph 48, the Tribunal confirms it afforded less weight on Dr. Eisen's opinion because he testified that his analysis "takes place in his brain."<sup>11</sup> The Tribunal did not find this useful in terms of evaluating or understanding Dr. Eisen's conclusions.
- [35] Ultimately, based on its review of the medical evidence, the surveillance and the applicant's testimony, the Tribunal rejected Dr. Gerber's opinion that the applicant has a marked impairment in three areas of function. Instead, it finds the applicant's marked impairments are limited to social functioning and adaptation and not in her activities of daily living, as opined by Dr. Gerber. This finding does not support TTC Insurance's allegation that the Tribunal relied exclusively and without question on the findings of Dr. Gerber. In my opinion, however, the Tribunal appropriately dealt with the medical evidence in coming to its determination.
- [36] Although TTC Insurance disagrees with the Tribunal's assessment of the evidence, I find that the Tribunal provided sound reasons for accepting the

<sup>10</sup> *Avery v. Pointes Protection Association*, 2016 ONSC 6463 (CanLII), 2016 ONSC 6463 (Div. Ct.) at para 94; *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA (CanLII) at para. 29 and *Applicant v. TD General Insurance Company*, 2017 CanLII 19187 (ON LAT) at para 19 and 27.

<sup>11</sup> para 48 of the Tribunal's decision.

evidence of Dr. Gerber over that of Dr. Eisen and for why it found the applicant to be catastrophically impaired under Criterion 8.

**c. Credibility**

- [37] TTC Insurance also submits that the Tribunal erred by failing to correctly assess the reliability of the applicant's evidence. I find no merit to this claim.
- [38] The Tribunal's decision did not avoid but, in fact, responded directly to questions that TTC Insurance raised about the applicant's credibility. It devoted a full section at the beginning of its reasons to the applicant's involvement in allegedly fraudulent claims for attendant care benefits.
- [39] The Tribunal confirmed the applicant's admission that she lied to various assessors when she said that she received care from service providers at times when she actually did not. The Tribunal addressed TTC Insurance's concerns regarding the reliability of the applicant's evidence when it states, in paragraph 14 that:
- Credibility is not [a] static or an all or nothing situation. A person may tell the truth on one day but not on another. A person may be truthful about one subject while being untruthful or mistaken on another.
- [40] Further, the Tribunal acknowledged the case law on credibility submitted by both parties and confirmed that it was required to look at the totality of evidence from all sources when making a determination. I have no reason to believe the Tribunal failed to do this. The Tribunal provided reasons why it gave weight to some of the applicant's evidence and not to other parts of it. What it did not do is accept TTC Insurance's request to disregard all of the applicant's evidence because of her admission regarding attendant care benefits. I find that this was not an error in fact or law.
- [41] The Tribunal also commented extensively on the video surveillance shown at the hearing and found that this evidence did not impeach the applicant's credibility. It accepted that the applicant has a marked impairment in social functioning because the surveillance shows that she left her apartment once, for no more than one hour, over a ten-day period. Based on surveillance of the applicant crossing the street and her ability to travel independently by plane to Toronto, the Tribunal found that the applicant has a moderate, instead of a marked, impairment in her activities of daily living. In my opinion, the Tribunal dealt with this evidence appropriately.
- [42] The hearing adjudicator is in the best position to make findings on credibility. The hearing of this matter took place over a period of six days. The Tribunal heard direct evidence from the applicant, her daughter and five medical experts. It viewed the surveillance, read and assessed the medical reports, and considered



the parties' submissions. The Tribunal acted within its discretion and expertise to assess and make findings on credibility based on the evidence before it, and this is reflected in its reasons.<sup>12</sup>

### **Sufficiency of Reasons**

- [43] Lastly, TTC Insurance argues that the Tribunal did not provide sufficient reasons why it did not accept TTC's arguments regarding the applicant's lack of credibility. I do not agree. As explained above, the Tribunal addressed TTC Insurance's concerns regarding the applicant's credibility at the beginning of its decision and continued to do so at various points throughout. It also provided more than adequate reasons for each of its findings.
- [44] The Tribunal is not required to respond to each and every argument made before it or to each and every piece of evidence referenced by the parties.<sup>13</sup> Having reviewed the Tribunal's decision, I find its reasons balanced, reasonable, sufficient and responsive to the parties' arguments. As a result, I do not accept that the Tribunal erred by providing insufficient reasons for how and why it made its findings.

### **CONCLUSION**

- [45] I am not persuaded by any of the arguments made by TTC Insurance in its request for reconsideration. I find that the Tribunal correctly interpreted the law, properly considered and weighed all of the evidence, and provided clear and sufficient reasons for its decision.
- [46] For the above reasons, I deny TTC Insurance's request for reconsideration.

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**Heather Trojek**  
**Vice Chair**  
**Safety, Licensing Appeals and Standards Tribunals Ontario**

**Released: July 12, 2018**

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<sup>12</sup> TTC Insurance also argued that Dr. Gerber's opinion are flawed because he relied on self-reports from the applicant who is unreliable. For the reason noted in this as well as paragraph 30, I do not accept argument.

<sup>13</sup> *D.D.D. vs. RBC Insurance Company*, 2017 CanLII 63631 (ON LAT).