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Ontario

RECONSIDERATION DECISION

Before: Christopher A. Ferguson, Adjudicator

Date: October 1, 2019

File: 18-004783/AABS

Case Name: R[redacted] T[redacted] v. COSECO Insurance Company

Written Submissions by:

For the Applicant: Imtiaz Hosein, Counsel

For the Respondent: Shirline Apiou, Counsel

OVERVIEW

[1] This request for reconsideration was filed by the applicant, R.T. R.T. was injured in a motor vehicle accident on November 24, 2015. R.T. made an application to the Tribunal after the respondent, Coseco, denied various claims.

[2] In a decision released June 24, 2019, I determined that R.T.'s appeal of Coseco's denial of his claims was statute-barred (the "Decision"). R.T. had sought a catastrophic impairment determination, along with a number of medical benefits, non-earner benefits and attendant care benefits.

[3] In response to my decision, R.T.'s legal counsel wrote a letter dated June 26, 2019 directly to me, expressing serious concerns about my decision and specifically requesting that:

1. I declare my decision invalid because I either did not review his responding submissions dated June 4, 2019 ("Responding Submissions") or failed to consider those submissions in reaching my decision, which is characterized as "a gross miscarriage of justice"; and,

2. I recuse myself from this case due to a reasonable apprehension of bias arising from my (alleged) mischaracterization of evidence and errors in law. He attributes this to my professional history, namely "a policy background in government." According to R.T.'s counsel, it appears that my original decision was "guided by such an approach, foregoing justice to implement a policy of roughshod justice, requiring no evidence from insurers."

[4] R.T.'s letter was sent by e-mail. There is nothing in the evidence to indicate that it was copied to or shared with Coseco.

[5] On July 3, 2019, the Tribunal's Associate Chair ("AC") responded to R.T.'s letter and advised that the letter would be treated as a request for reconsideration ("RR"). The AC's letter also set dates for submissions from both parties, and indicated that the June 26th letter and all other submissions received would be provided to the member assigned to conduct the reconsideration. The AC promised that, once those submissions were reviewed, a decision would be issued.

[6] R.T. then submitted two RRs dated July 15, 2019.

[7] In the first RR ("first RR"), R.T. seeks:

1. A reconsideration of the decision of the AC's decision to "convert the Applicant's letter dated June 26, 2019 into a request for reconsideration".

2. Delivery of the letter dated June 26, 2019 "to the constituted panel that was constituted for the purpose of hearing the preliminary issue", meaning me.

[8] In his second, amended RR ("amended RR"), R.T. seeks:

1. reconsideration of the Tribunal's decision of June 24, 2019 to "statute bar him from his appeal" and to deny his cost request;

2. an Order from the Tribunal to cancel the Decision; and,

3. "In the alternative…an Order from the Tribunal to Order a rehearing on all of the matter".

[9] In paragraph 1 of his amended RR, R.T. asserts that the issues in RR2 "can only be heard" after the issues raised in his first RR1 have been determined. In paragraph 2 of his amended RR2, he further submits that the issues therein "can only be understood and appreciated by having a full context of the issues and concerns raised in the prior reconsideration." Accordingly, I will determine the issues in both RRs in this proceeding.

[10] To make my decision clearer and easier to understand, I will divide my reasons into the following three parts:

- Part 1: The Tribunal's Direction to R.T. to file an RR.
- Part 2: R.T.'s Request for Recusal and Re-Hearing
- Part 3: RR 2 - Reconsideration of the Decision (Statute Bar and Costs)

[11] Coseco opposes R.T.'s positions expressed in his first RR1 and submits that his amended RR lacks any basis upon which the Tribunal's decision should be reconsidered. Coseco also seeks costs in this matter.

[12] 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 applicable rules of the Tribunal.

RESULT

[13] Both of R.T.'s RRs are dismissed.

ANALYSIS

[14] The grounds for a request for reconsideration are contained in Rule 18.2 of the Tribunal's Common Rules of Practice and Procedure. In this case, R.T. argues that:

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

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

Part 1: THE TRIBUNAL'S DIRECTION TO R.T. TO FILE AN RR

[15] In a letter dated July 3, 2019, the AC communicated to R.T.'s legal counsel its decision to treat his letter of June 26, 2019 as substantively an RR. Information was provided on how to file such a request. The Tribunal advised that, once my Decision was released on June 24, 2019, that determination was final and could not be re-visited to consider R.T.'s concerns unless and until he made an RR. R.T.'s counsel took issue with this approach, viewing it as, among other things, intereference with my adjudicative independence. Eventually, in a letter dated August 9, 2019, the Tribunal's Manager of Legal Services, explained to R.T.'s counsel that, once my decision was issued, I was "*functus*" [1] and unable to respond to R.T.'s letter of June 26, 2019. In effect, the letter explained that R.T. needed to pursue his concerns through an RR.

[16] As explained above, R.T. then filed his two RRs. I will deal first with the first RR.

[17] In the first RR , R.T. argues that the AC has somehow "intervene[d]" in a "panel" (in this case a panel of one -- me) seized of his matter. R.T. submits that it is "readily apparent that Associate Chair Batty has exercised an authority he does not have to add himself to the already constituted panel to make a decision about how the Applicant's request for a recusal will be treated." Further, R.T. alleges that "[t]he effect of this decision is to deny the Applicant access to justice and oust the already constituted panel to consider questions that could avert a miscarriage of justice due to an administrative error and/or because of an apprehension of bias."

[18] I find that it is unnecessary for me to address R.T.'s first RR submissions in large part because they have been addressed by the actual decision taken by the AC in this matter. More specifically:

[1] That is, *"functus ex officio",* meaning that I had no more official or legal authority to make decisions on this case.

i. The purpose underlying R.T.'s request to have his letter dated June 26, 2019 delivered to the "panel constituted" to hear the preliminary issue was achieved when his first RR, to which his letter to me is appended, was assigned to me.[2]

ii. R.T.'s concerns about "interference" by the AC constituted a major portion of his first RR submissions. I find that the assignment of the first RR1 and all of R.T.'s materials to me effectively negates R.T.'s allegations of interference and achieves the practical result he wanted. The AC did not decide or opine on any of the issues or allegations in R.T.'s counsel's letter. . They are before me, as he requested , and R.T.'s concerns about accountability have now been met.

iii. I find that it is unnecessary for me to decide whether or not I was "*functus*" after my decision was released. R.T. fails to make a persuasive argument that any errors I allegedly made in my Decision cannot be met through the Tribunal's RR process. The courts have ruled that final decisions "cannot be reopened except for very limited and exceptional reasons".[3] In my view, this means that exceptions to the *functus* principle should only be considered where alternative, practical approaches to addressing a party's concern are unavailable. That is clearly not the case here, because the Tribunal has an RR process in which parties' claims of significant error or omission can be addressed.

iv. The AC's decision was a purely administrative, procedural step. Given that, and because it isn't even a final decision on any of the issues in this appeal, it doesn't fall within the ambit of Rule 18.

[19] At paragraphs 112-113 of RR1, R.T. expresses concerns about unnecessary cost, expense and delay, all of which are a hardship to him as a seriously injured person. This is a legitimate concern, but one that has been addressed by having both RRs assigned to me.

[20] R.T.'s RR1 submissions indicate at paragraphs 103-104 that the RR process would limit the scope of my review of his concerns. That simply is not the case, as the contents of this reconsideration decision will illustrate.

Part 2: R.T.'S REQUEST FOR RECUSAL AND RE-HEARING

Apprehension of Bias

[21] In his letter dated June 26 2019, R.T. takes the position that my decision created a reasonable apprehension of bias, based on his arguments that I have summarized

[2] At paragraph 76 of his submissions, RT submits that I am the only person able "to provide a holistic consideration as to the possible violations of natural justice and to render a decision on the recusal request." As I have been assigned to review his RR, it appears that RT's point has been taken.

[3] *Stephens*, paragraph 9, opening sentence.

above. Based on his allegation of bias, R.T. requests that I recuse myself and void my decision.

[22] Neither of R.T.'s RRs include recusal under his heading "Order Sought". R.T. did, however, append his letter of June 26, 2019 to his first RR. His intention to have the issues therein determined is obvious, and it would be disingenuous and unfair of the Tribunal at this point to skirt any of R.T.'s concerns about bias, which are amply detailed in his letter and reinforced in his first RR submission. Accordingly, I will address them.

[23] The grounds for reconsideration would, in my view, be Rule 18.2.a. This is not clearly articulated by R.T.

[24] The test for a reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada,* 1976 CanLII 2 (SCC) at p. 394:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[25] In *Wewaykum Indian Band v. Canada,* 2003 S.C.R. 45 at para. 59, the Supreme Court confirmed the existence and importance of a strong presumption of judicial or quasi-judicial impartiality. In order to overcome this presumption, a party alleging actual or a reasonable apprehension of bias must establish the presence of serious grounds:

> Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

[26] The Court also noted that this inquiry is necessarily fact-specific and highly contextual:

> Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.[4]

[27] Put another way, a party cannot simply state that there is bias and then list a set of unrelated statements to support this allegation. Rather, these alleged facts must be first established, and then carefully understood in the context of the overall litigation and/or the relationship between the parties and the decision-maker.

[28] The grounds for finding a reasonable apprehension of bias must be substantial. Establishing an allegation of judicial bias requires cogent evidence.[5]

[29] It should also be noted that the case law makes it clear that an adverse decision does not, by itself, rebut the presumption of impartiality.[6]

[30] Taken together, the threshold for a finding of real or perceived bias is high, and there must be more than mere suspicion. Rather, cogent evidence is needed to support a "real likelihood or probability of bias." Further, the cumulative effect of all the adjudicator's conduct, comments, and interventions must be assessed to rebut the strong presumption of impartiality.

[31] I find that R.T. has submitted insufficient evidence of an apprehension of bias to warrant either my recusal or a voiding of my decision of June 24, 2019.

Does my professional history create an apprehension of bias?

[32] R.T.'s submissions include his letter of June 26, 2019, in which, as I describe above, he attributes my alleged bias to my professional history. R.T. explains his belief as follows:

> "It is clear that you have approached this matter with a closed mind, bent on denying a disabled person seeking justice to access enhanced accident benefits to assure his security of person. Your

[4] *Ibid*, at para. 77.
[5] *Marchand v. Public General Hospital Society of Chatham* , 2000 CanLII 16946 (ONCA), leave to appeal to SCC refused, at para. 131
[6] See *Taucar v. Human Rights Tribunal of Ontario*, 2017 ONSC 2604 at paras. 84-85.

> policy focused decision targeting efficiency flies in the face of the consumer protection nature of the [Statutory Accidents Benefits Schedule]…It appears that your policy driven objective blinded you to the legislation, the law and the submissions and evidence that were before you."

[33] R.T.'s argument of bias based on my career history is misguided. To begin, "impartiality and neutrality" do not mean that an adjudicator must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind the evidence and issues. There is, in other words, a critical difference between an open mind and an empty one.[7] Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind free from inappropriate and undue assumptions.[8] Because there is no evidence that I have failed to approach his case with an open mind, R.T.'s submissions about my career are a mere suggestion.

[34] R.T. acknowledges that his information on my professional background is limited to a three-sentence biographical description posted on the Tribunal's website. R.T.'s submissions alleging professional bias based on "policy objectives" lacks merit because it is based on unproven assumptions and ignorance of the nature of my professional background, which includes policy-making and regulatory enforcement in the areas of consumer protection, business regulation, legal aid and public guardianship. Indeed, considering only this background, the reasonable person might actually see it as unlikely that I would favour efficiency over the consumer protection objectives of the Schedule.

[35] There is no basis for me to recuse myself from this matter. Beyond mere speculation, R.T. has not offered anything based on my professional background to meet the high standard for establishing bias or lack of impartiality.

Are errors in my decision sufficient to create an apprehension of bias?

[36] Lastly, R.T.'s case for recusal and cancellation are also argued on the basis of his assertion that I made a series of factual and legal errors so egregious and "incomprehensible" that I could not possibly have seen or read his responding submissions. This alleged failure to review and consider these submissions, R.T. contends, rendered the whole decision invalid because he had not in fact been properly heard. R.T. argues that this alleged failure to hear his submissions creates an apprehension of bias.

[37] Coseco submits that there is "ample support that all of the Applicant's submissions and materials served and filed were considered by Adjudicator Ferguson as noted in his Decision dated June 24, 2019."

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[7] *Yukon Francophone School Board v. Yukon (Attorney General)* 2015 SCC 25 at paras. 33 and 36

[8] Ibid.

[38] The fact that R.T. disagrees, however vehemently and incredulously, with my findings is not proof of bias, nor is it proof that I failed to review his submissions. Moreover, even if I did not refer in my decision to specific evidence led by either party in my decision, it does not follow that I failed to consider it. It is trite law that the Tribunal is not required to refer to every piece of evidence or submissions that it considered in arriving at its decision.

[39] I reject R.T.'s claim that I failed to consider the evidence before me: as explained in more detail below, I did in fact review his responding submissions.

[40] In my view, R.T. has not established a case for my recusal in this matter or for cancelling or voiding my Decision under Rule 18.2.a.

Part 3: RECONSIDERATION OF THE DECISION (STATUTE BAR AND COSTS)

[41] In his amended RR, R.T. alleges and details a large number of errors of law and fact and mixed fact and law that, he claims, meet the criterion set by Rule 18(b) – that the Tribunal would likely have reached a different conclusion had the errors not been made.

[42] Coseco argued that none of these alleged errors meet the threshold set by Rule 18(b) for reconsideration.

[43] For ease of reference, I will provide, for each issue, the paragraph numbers in R.T.'s amended RR. Hereinafter, all references to a paragraph refer to a paragraph in R.T.'s amended RR unless specified otherwise.

Did I fail to consider the adequacy of Coseco's Notice of IE?

[44] At paragraph 22, R.T. asserts that I ignored an issue[9] of whether the Tribunal has jurisdiction to bar his appeal for non-compliance with s. 44 where the notice required by s. 44(5) was not provided or where an IE is scheduled in the future. R.T. asserts that, "it was incumbent on Adjudicator Ferguson to consider this question, which based on his reasons, he did not."

[45] I covered this issue in paragraphs 25-29 of my Decision. I explicitly rejected R.T.'s contention that an IE had not been arranged, along with his submission that Coseco's CAT IE notices were deficient. I gave clear reasons for my finding. As a result, the purported jurisdictional issue does not arise.

[46] Despite this finding, I aknowledge that I didn't address all of R.T.'s submissions on this issue. My findings on Coseco's adequacy of notice referred to the IE notice of February 5, 2019 because R.T.'s submission did so.[10] Although R.T. does not

[9] Raised in paragraphs 58-64 of RT's Response Submissions.

[10] At paragraph 54 of RT's Response Submissions.

specifically say so in his RR, I did not address his submission that Coseco's IE notice of March 26, 2018 was deficient. I will do so now.

[47] R.T. contended that Coseco's IE notice of March 26, 2018 was deficient because Coseco failed to state in it that it had determined that R.T. was not CAT impaired. In R.T.'s view, s. 45(3)(b) prescribes that a notice of CAT IE must include a statement that the insurer has determined that the impairment is not a CAT impairment. Since no such statement was made, R.T. argues, Coseco cannot seek a statute-bar against him.[11] This specific oversight was not referenced in R.T.'s RR submission, but I think it is fair and prudent to correct it, as R.T.'s submissions on adequate notice are an important part of his argument against a statute bar. I find that Coseco's notice of March 26, 2018 was adequate for the following reasons:

i. I find that a common-sense reading of s. 45(3)(b) would lead to a conclusion that, to be considered adequate, a notice may simply indicate that an insurer is conducting an examination to determine whether the insured is CAT impaired. I find Coseco's notice adequate because it clearly stated, with reference to R.T.'s OCF-19 and other medical reports, that the insurer was "not satisfied that the information provided is sufficient to allow us to accept that you have sustained an impairment(s) in accordance with the definition of a Catastrophic Impairment."

ii. A literal, technical application of s. 45(3)(b) should not be used an excuse for non-attendance, or a shield against the consequences of non-compliance, simply because the disputed notice does not specifically state that a person has not been determined to be CAT impaired. Such a reading could compel insurers to make a CAT determination without sufficient medical information, which I do not believe is the intent of the Schedule.

iii. I note that similar notices using similar language were sufficient for him to attend other CAT IEs. He does not raise this alleged deficiency with respect to other CAT IEs, indicating that insufficient notice was not really a factor in his non-compliance with either s. 44(9)2.ii or s. 44(9)2.iii.

[48] There is no error on these issues of the kind that would alter the conclusion I reached.

Section 37(7) of the Schedule as a basis for statute-bar.

[49] At paragraph 24, R.T. submits that I erred at paragraph 27 of my Decision in not addressing his arguments[12] that the Tribunal has no jurisdiction to bar his appeal by application of s. 37(7) of the Schedule.

[50] As I noted at paragraph 14 of my Decision, s. 37(7) of the *Schedule* prescribes that, if an insured person fails to attend an IE, the insurer may determine that the insured person is no longer entitled to the specified benefit and may refuse to pay the specified benefit relating to the period during which the insured person failed to

[11] At paragraph 51 of RT's Response Submissions.

[12] At paragraphs 46-48 of RT's Response Submissions.

comply with s. 44(9). At paragraph 15, I noted that s. 38 prescribes that entitlement may be restored if the insured person provides a reasonable explanation for his or her non-attendance at a s. 44 IE.

[51] While I included s. 37(7) in my overview of the Schedule provisions prescribing the consequences of failing to attend IEs, s. 37(7) did not form any part of my Decision, and there is nothing in my reasons to suggest that it did. At paragraph 27 of my Decision, I rejected R.T.'s defence that Coseco had not actually met the prescribed criteria for arranging an IE. I found that Coseco had done so since it had met the prescribed notification requirements and, absent any other evidence to the contrary, this was sufficient evidence that Coseco arranged the disputed IEs. I also found that R.T.'s attendance at another IE covered by the same notice was also evidence that the disputed IE had indeed been arranged.

[52] Perhaps I should have been explicit that I was not adopting Coseco's position on s. 37(7) as the basis for my decision, and that I was using s. 44(9)2.iii and s. 55(1)2, as Coseco recognizes in its response to R.T.'s RR submissions. However, there was no error here that would alter the outcome of my Decision.

R.T.'s concerns about Focus Assessments or other IE service providers

[53] At paragraph 25, R.T. submits that I erred at paragraph 28 of my Decision in stating that he had offered no explanation for why the service providers retained by Coseco to coordinate or provide IE services are not independent.

[54] Paragraph 28 of my Decision addressed R.T.'s allegation that Coseco had provided "no evidence to prove that [it] had chosen a regulated health professional to examine him."[13]

[55] There was no substantive error here. My review of R.T.'s submissions[14] reveals no plausible explanation for his position and my Decision explains why.

[56] Section 44 of the Schedule does not prohibit insurers from retaining third party service providers to conduct IEs. A third party service provider could directly employ persons, or retain independent contractors, to do so. The legal requirement is that whoever actually performs the assessment must be a regulated health professional.[15] R.T.'s submissions gave me no reason to believe, indeed he never suggested, that the actual medical examination of him would not be carried out by a regulated health professional, such as Dr. Kumchy.

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[13] At paragraph 79 of RT's Response Submissions.

[14] At paragraphs 86-101 of RT's Response Submissions.

[15] *JP vs. Royal Sun Alliance* (Reconsideration) 2019 CanLII 34605, paragraph 18, led by Coseco

[57] At paragraph 36, R.T. alleges that I incorrectly stated that he had not questioned anyone's medical expertise or credentials and points me to paragraph 95 of his Responding Submissions in rebuttal. I made the statement at paragraph 28 of my Decision, and it is correct. R.T.'s responding submissions paragraph 95 argues that a consent form authorizing that "Focus Assessments Inc. and its examination/assessment team to conduct an examination and write a report" means that someone other that a regulated health professional was conducting the IE, contrary to the requirements of the Schedule."

[58] In my Decision, "anyone" means an individual and it refered to anyone actually examining him or reviewing his medical documentation for the purposes of an IE report. R.T.'s submissions gave me no reason to believe, indeed he never alleged, that the actual medical examination of him would not be carried out by a regulated health professional. And none of his submissions question the qualifications of any individual assigned to perform a medical examination. An error was not made here.

[59] R.T. submits that I failed to address his concerns about the nature and purposes of the relationship between Coseco and Focus Assessments ("Focus").[16] In fact, I address this issue at paragraph 31 of my Decision. I noted that Focus is a licensed service provider under the *Insurance Act* and Schedule, a fact included in Coseco's documents, and I dismissed R.T.'s suggestion that there is anything improper in health professionals providing s. 44 IE assessments or other services through licensed assessment companies such as Focus. I dismissed R.T.'s purported concerns about Focus as any basis or explanation for failing to attend an IE. There is simply no basis in law for R.T.'s claim that he is entitled to submit information directly to individual IE medical assessors instead of through the firm that coordinates and manages their services.

[60] In paragraph 32 of my Decision, I dismissed as unevidenced R.T.'s claims that Coseco was preventing him from sending information to the IE assessors.

[61] At paragraph 30 of my Decision, I rejected as unevidenced the claims made by PM (in his affidavit dated April 1, 2019) of unlawful collusion between Focus and Coseco for the purposes of "bolstering Coseco's position in litigation" against R.T. I elaborate briefly on my take of PM's statements as unsupported by evidence.[17]

[62] I did not take "judicial notice", as R.T. argues I should have done at paragraph 33, that the evidence for his assertions were "in Coseco's hands". I saw no

[16] At paragraphs 108-112 of RT's Response Submissions.

[17] In footnote 3, page 6 of my Decision

reason to do so, as I am unaware of (and R.T. did not point me to) any obligation under the Schedule for Coseco to share with insured persons its contracts with service providers, and I consider the information irrelevant to the preliminary issue before me.[18] The allegations made by R.T.'s legal representatives do not gain weight because they are unable to obtain evidence to support them or to offer any persuasive explanation for their suspicions.

[63] My findings with respect to R.T.'s allegations and purported concerns about Focus remain the same.

Did I assign appropriate weight to P.M.'s affidavit?

[64] At paragraph 31, R.T. submits that I erred by disregarding the affidavit dated April 1, 2019 of P.M., a lawyer representing R.T., and he asserts that this was "seemingly on the basis of Coseco's claims of interference" with IE examiners. He argues that, since those claims of interference were retracted by Coseco, my alleged basis for disregarding P.M.'s affidavit does not exist.

[65] In fact, I made no finding on Coseco's claims of "interference" by R.T.'s legal representatives. I did note the numerous e-mails from them to Dr. Kumchy, the medical assessor retained to conduct the neurological IE scheduled for March 8 and March 25, 2019: these were outlined by P.M. in his affidavit in paragraphs 15-20. I found that the explanation for sending these e-mails (and calls to other Focus personnel) were based on unsubstantiated suspicions and, as a result, testimony on those calls had no persuasive value to me on any issue.

[66] I acknowledge that the second sentence of paragraph 30 of my Decsion, which references Coseco's account of R.T.'s legal representatives' communications with Dr. Kumchy was poorly placed and may have obscured my meaning. However, this is not an error that would change my decision.[19]

[67] I did not "disregard" P.M.'s affidavit. I read it and assessed it.

[68] At paragraph 30 of my Decision, I found that "P.M.'s affidavit lacks credibility and in my opinion its allegations amount to nothing more than scandalous innuendo on the affiant's part; P.M. states plenty of 'beliefs' with a paucity of proof." I was referring

[18] *JP vs. Royal Sun Alliance* (Reconsideration) 2019 CanLII 34605, led by Coseco, was persuasive to me on this point.

[19] I also note that my remarks were based on submissions by Coseco including evidence in the form of a letter dated March 4, 2019 from Focus to Coseco in which Focus stated that Dr. Kumchy declined new assessment dates for RT due "to the volume and nature of the correspondence she had received from the claimant's Counsel".

to P.M.'s allegations, which I had detailed in paragraph 26(iii-v) of my Decision. Earlier in the text, I had elaborated briefly on my take of P.M.'s statements about unlawful conduct by Coseco, Focus and Dr. Kumchy, stating that "P.M. offers no evidence to support this accusation. He cites 'knowledge as a personal injury lawyer' and implies that he has information from other cases that he cannot share due to unwaived solicitor-client privilege in other cases."[20] In paragraph 26(iii), I described P.M.'s own admission that he could not verify his suspicions about "contractual arrangements" between Coseco and Focus.

[69] My assignment of no persuasive weight to P.M.'s affidavit was based on a simple lack of any evidence to back its claims.

[70] In paragraph 32 R.T. suggests I made a significant error of fact in accepting Coseco's submissions as evidence, which is not in the form of a sworn affidavit over the evidence of the Applicant, which is in the form of a sworn affidavit.

[71] I preferred Coseco's submissions because they were supported by evidence provided in the submissions packages of both parties. For reasons noted above, I found P.M.'s affidavit unpersuasive. R.T. points me to no authority for preferring an affidavit unsupported by corroborating evidence over the submissions and evidence of the opposing party.

Did I give inappropriate weight to Coseco's allegations of interference?

[72] At paragraphs 27 and 30, R.T. complains that I placed weight on Coseco's allegations of interference by his legal representatives, suggesting that this played a role in forming my findings. It did not. Because I made no finding on Coseco's claims of "interference" by R.T.'s legal representatives, and because those claims played no role on my decision, I did not find it necessary to note that Coseco's specific allegation of "interference" by legal representatives was retracted. I note that while the "interference" allegation was withdrawn, Coseco's submissions did (and, in response to R.T.'s RRs, continue to) object to R.T.'s lawyers' contacts with Dr. Kumchy, Focus and other people asscoated with IEs.

My error in stating that R.T. failed to attend an IE booked for March 5 and 28, 2019.

[73] At paragraph 35, R.T. submits that I made an error in my statement at paragraph 21 of my Decision that "Coseco submits that R.T. has simply failed to attend an IE CAT Neuropsychological assessment scheduled for March 8 and 25, 2019." In his view,

[20] In footnote 3, page 6 of my Decision

this amounts to me making a submission on Coseco's behalf and undermines the basis for my Decision.

[74] R.T. is correct that my statement is an error of fact. R.T. is correct that the CAT IE scheduled for March 8 and 25, 2019 was cancelled, and not by him. My statement is therefore wrong, although my Decision, as R.T. notes, did indeed acknowledge the cancellation.

[75] R.T. argues that my mistake undermines my Decision (and demonstrates bias) because he cannot possibly be found to have failed to attend an IE that was cancelled by the other side. At paragraph 38-39, R.T. also argues that Coseco's position that he failed to provide information as required by s. 49(9)2.ii of the Schedule "crumbles" because the cancellation occurred on February 28, 2019, six business days before the March 8th IE date – and the deadline for required information is five business days prior, which would have been March 1, 2019. R.T. argues that he cannot be found to have failed to comply with s. 49(9)2.ii of the Schedule because it was cancelled before his time ran out.

[76] R.T. argues in paragraph 35 that "the crux of" Coseco's submissions is that he is barred because he failed to provide information as required by s. 44(9)2ii of the Schedule. This is not true. Coseco's submissions also clearly indicate its position that R.T. is barred from his appeal because he failed to attend s. 44 IEs. This is plainly stated in multiple submissions, including Coseco's Reply Submission dated June 12, 2019,[21] which referenced its Notice of Motion dated May 23, 2019 in which the insurer's case for a statute-bar were laid out in detail that included submissions on non-attendance. This position is reiterated in Coseco's response to R.T.'s RR submissions. It was reasonable and fair for me to deal with non-attendance issues raised by Coseco, especially as R.T. mounted a detailed defence on the attendance issue.

[77] I find that R.T. offers no basis for finding that this factual error of stating that he didn't attended the March 5 and March 24 IE prejudiced him in any way, or that the reasons I gave for my decision to not apply to any of the disputed IEs brought to my attention in the submissions.

[78] I find that rectifying my factual error about the CAT IE scheduled for March 5 and 24, 2019 and its cancellation would not change the outcome of the hearing. Coseco submitted, and the evidence is clear, that as of Coseco's June 12 Reply Submissions for this hearing R.T. had not attended any neuropsychological IE assessments requested by Coseco under s. 44. I noted R.T.'s continued non-compliance, with footnoted details at paragraph 35 of my Decision. I addressed this, but only in relation to denying permission to proceed with R.T.'s appeal under s. 55(2) of the Schedule. However, R.T.'s continued non-compliance with s. 49(9)2.iii also supports the statute-bar, exactly as Coseco argued. I should have

[21] At paragraphs 17-19

addressed R.T.'s ongoing non-compliance with s. 44(9)2.iii as a reason for barring his appeal. Rectifying this would not have produced a different result.

[79] There is some merit to R.T.'s point that I should have focused more attention on his non-compliance with s. 44(9)2.ii of the Schedule. But this would not have changed my decision because:

i. Coseco's evidence, which I accept, is that R.T. had not yet[22] complied with s. 44(9)2.ii of the Schedule. This means that R.T.'s appeal is barred under s. 55(1)2 because that section prohibits an application to the Tribunal by an insured person who has received notice of a s. 44 examination but "has not complied with that section." R.T.'s continued non-compliance with s. 48(9)2.ii also supports the statute-bar, exactly as Coseco argued.

ii. I was clear at paragraphs 28 and 30-32 of my Decision that I did not accept any of R.T.'s arguments about the role of Focus in the IE process or his claims that he was "blocked" from providing information to the physican scheduled to assess him, all of which he uses to rebut Coseco's claim that he failed to comply with s.44(9)2.ii and to claim that he was making efforts to comply. His rebuttal lacks merit, and I find (and would have found) for Coseco on the issue of R.T.'s non-compliance with s. 44(9)2.ii of the Schedule.

iii. Accounting for the cancellation of the March 8 and 25, 2019 CAT IE would not have led me to a different conclusion because:

a. R.T.'s arguments, focused on the March 8 and 25th CAT IE, miss the larger compliance picture. They do not defeat Coseco's arguments about R.T.'s ongoing non-compliance with s. 49(9)2.ii and s. 49(9)2iii, which cover other CAT IE requests for neuropyschological assessments.

b. As R.T. notes,[23] his counsel got notice of the cancellation on March 4, 2019 (as did R.T. himself). At that date, he had failed to meet the "5 business days prior" deadline prescribed by s. 49(9)2.ii. I find R.T.'s arguments that he cannot be found non-compliant in any way with respect to the March 8 and 25, 2019 CAT IE because it was cancelled to be disingenuous. He offers no evidence that he has complied with s.49(9)2.ii with respect to any CAT IE requests for neuropyschological assessments.

[22] "Not yet" means as of Coseco's June 12, 2019 Reply Submissions; Coseco also notes in its response to RT's RR that he has yet to attend the neuropsychological CAT IE.

[23] At paragraph 24 of RT's Response Submissions.

Did I ignore R.T.'s efforts to comply with s. 44(9)2.ii?

[80] R.T. submits at paragraph 37 that I "wholly ignored the attempts he made to comply with the assessments" as outlined in his submissions[24] and described by P.M. in his affidavit. A similar complaint is made in paragraph 34.

[81] R.T. is referring to his legal representative's communications with Focus, Dr. Kumchy and others. I acknowledged the contacts by R.T.'s legal representatives at paragraph 30 of my Decision, but I did not and do not on review characterize them as R.T. (or P.M. in his affidavit) does, because:

i. While R.T.'s Responding Submissions describe his lawyers' contacts as "active steps in an attempt to meet his obligations" they did not provide me with any legal argument that these "efforts" fulfil his duty of compliance or mitigate non-compliance with s. 44(9)ii.

ii. The description of communications between R.T.'s legal representatives and Focus, Dr. Kumchy (and her staff) and Coseco in R.T.'s own documents[25] did not lead me to consider them an "effort to comply" because they appeared to me to be simply an insistence that their own demands be met for information about Focus's role, for direct access to a confifential e-mail address for submitting medical information, and for the process for submitting medical information regarding IE assessors to be changed to suit them.

iii. My review of other demands for information by R.T. included in Coseco's evidence indicates the same thing. I do not find that these contacts excuse or or mitigate R.T.'s non-compliance with s. 49(2)2.ii.

[82] In paragraph 34, R.T. states that I also failed to consider his attendance at other IEs which he implies should be weighed in his favour. I stated at paragraph 20 of my Decision that "Coseco has acknowledged that R.T. attended the first two MDA[26] IEs, the above-noted psychiatric assessment and an in-home occupational therapy CAT assessment on July 9, 2018."

[83] R.T.'s Response Submissions made no argument that his attendance at previous IEs were "efforts to comply" with s. 44(9)ii or s. 44(9)iii or that they should be considered as such – this description appears to apply the series of communications with Focus, Dr. Kumchy's office and Coseco outlined in P.M.'s affidavit.

[84] I did not and do not consider R.T.'s attendance at other IEs, noted above, as conclusive evidence that he should not be barred for non-compliance pertaining to

[24] At paragraphs 20-24 of RT's Response Submissions

[25] This was my reading of PM's affidavit and of the letters he sent to Focus and to Coseco, included in RT's Response Submissions package.

[26] MDA stands for Multidisciplinary Assessment.

the neuropsychological IE in dispute, because R.T. provided me with no legal basis for doing so, and I do not believe that such a basis exists.

Did I err in failing to consider Coseco's request for a paper review?

[85] A "paper review" is an examination by a medical expert of an applicant's medical documentation conducted to determine whether the applicant's medical evidence supports entitlement to the benefits claimed. In some instances, it may substitute for an in-person examination.

[86] At paragraph 29 R.T. asserts that I erred in failing to consider Coseco's letter of April 25, 2019 indicating that it would conduct a a paper review (neuropsychological), to which R.T. consented. He does not elaborate as to why this is an error that would result in a different decision.

[87] R.T.'s responding submissions are not clear as to why Coseco's decision to conduct a paper review was an issue. I accept Coseco's right to conduct IEs in the most efficient it deems appropriate, I accept Coseco's explanation that the paper review was suggested to "move things along", my review of the April 25, 2019 confirms Coseco's submission that it expressly reserved the right to conduct further in-person IEs and I accept its right to make a subsequent decision to schedule an in-person IE after all, as it did.[27] R.T. does not have the right to control or impose terms on his participation in IEs unless he can show that they are unreasonable – a claim he does not make.

[88] I find that rectifying my failure to note the paper review would not change the outcome of the hearing. Coseco submitted, and the evidence is clear, that as of Coseco's June 12 Reply Submissions for this hearing R.T. had not attended any neuropsychological IE assessments requested by Coseco under s. 44. R.T.'s continued non-compliance with s. 49(9)2.iii supports the statute-bar, exactly as Coseco argues.

COSTS

[89] In paragraph 23, R.T. argues that I made a significant error of fact, acted outside of jurisdiction and denial him "Natural Justice" because I noted at paragraph 8 of the decision "R.T. asks for an order diecting (sic) how to seek costs" and made a similar statement at paragraph 40 of my Decision." R.T. notes that he provided detailed submissions for a cost award[28] "so it is unclear why his decision would state that R.T. is asking for an order directing how to seek costs. It is clear that the Applicant has not been heard."

[90] My characterization of R.T.'s cost request was derived from paragraph 36 of R.T.'s response submissions dated April 1, 2019 in which he states that he "seeks a further

[27] *Deschambault and Wawanesa Mutual Insurance Company* (2015 FSCO A14-005855)

[28] At paragraphs 151-165 of RT's Response Submissions.

Order from the Tribunal regarding how the Applicant should proceed with respect to claiming costs." It does not indicate that R.T. "was not heard."

[91] I ruled that R.T.'s cost request was effectively extinguished by his being statute-barred. Although R.T. did not raised it in his submissions, this was an error in law on my part. However, correcting the error would not change my decision on his cost requests.

[92] I did not address R.T.'s cost submissions in detail by addressing his arguments individually, but I did write in paragraph 40 that "I found nothing in R.T.'s submissions to suggest that Coseco has engaged in any of the conduct contemplated by Rule 19.1"[29] This reflects my review of his responding submissions.

[93] R.T.'s responding submissions focused on Coseco's filing and withdrawal of motions during the pre-hearing stages of the appeal process, in part depending on his argument that a motion to statute-bar was filed before an IE scheduled for July 2019. I do not find that the filing of a motion to statute-bar based on past non-compliance is necessarily inconsistent with a continuing efforts like Coseco's to get a claimant such as R.T. to a neuropsychological CAT IE. I do not find that the filing, retraction and refiling of motions in a contentious proceeding automatically represent frivolous, vexatious or bad-faith conduct. Overall, I reviewed R.T.'s submissions, and did not find them persuasive that Coseco had met the standard of conduct contemplated by Rule 19.1, and this supported my denial of his cost request.

[94] I should also have noted in my Decision that R.T. sought $15,000 in costs but that he provided no basis for this *quantum*, despite the restriction on costs set by Rule 19.6. This was in contrast to Coseco's cost request which addressed the basis for the amount sought (I also denied Coseco's cost request).

[95] More detail from me might have avoided R.T.'s concerns on the cost issue. However, my decision to not address in detail R.T.'s arguments in my Decision does not mean that I failed to consider them. It is trite law that the Tribunal is not required to refer to every piece of evidence that it considered in arriving at a decision. I therefore reject the applicant's claim that I failed to consider the evidence before me, and that this was an error that would have altered my decision on costs.

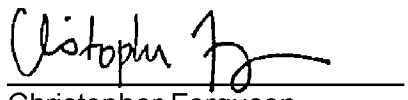
[96] I note that Coseco has reiterated its cost request for $10,000 in its response to R.T.'s RR submissions. Coseco did not provide me with any arguments that would change the reasons I gave in paragraph 45 of my Decision for denying its request and accordingly I dismiss Coseco's latest cost request.

[29] The type of conduct I was referring to was described in paragraph 38, which quoted Rule 19.1.

CONCLUSION

[97] I find that the applicant has failed to satisfy any of the grounds that warrant reconsideration. For the reasons noted above, I dismiss R.T.'s request for reconsideration.

[98] My decision to deny the costs requests of both parties also stands.



Christopher Ferguson
Adjudicator
Tribunals Ontario

Released: October 1, 2019