

REASONS FOR DECISION

RYAN BELL J.

Overview

[1] In May 2015, Rogiar Jamali was involved in a motor vehicle accident. She sought benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (“SABS”) on the basis that she was catastrophically impaired as a result of the accident. Ms. Jamali claimed that she had suffered marked impairments that undermined her ability to work, her ability to live independently, and her social functioning. Economical Insurance Company denied the benefits claimed by Ms. Jamali.

[2] Ms. Jamali then applied to the Licence Appeal Tribunal for catastrophic impairment designation and an income replacement benefit. After a seven-day hearing, Vice-Chair Jeremy Roberts released his decision dismissing Ms. Jamali’s application (the “LAT Decision”). Ms. Jamali’s request for reconsideration of the LAT Decision was dismissed (the “Reconsideration Decision”).

[3] Ms. Jamali appeals the LAT Decision and the Reconsideration Decision to this court on four grounds. She alleges:

- (i) the Vice-Chair provided insufficient reasons;
- (ii) the LAT Decision “fell outside” the reasons given by Economical and the denial of benefits letters;
- (iii) the Vice-Chair denied Ms. Jamali procedural fairness; and
- (iv) the LAT Decision contains palpable and overriding errors of fact.

[4] Ms. Jamali also seeks judicial review of the LAT Decision and the Reconsideration Decision. She alleges she was denied procedural fairness and the Vice-Chair made and relied on unreasonable findings of fact that were not supported by the evidence.

[5] There is no merit to any of the grounds of appeal. Ms. Jamali was not denied procedural fairness. The appeal and the application for judicial review amount to a request to reweigh the evidence before the Tribunal. The appeal and the application for judicial review are dismissed.

¹ O. Reg. 34/10, s. 1.

The LAT Decision

[6] The hearing before the Vice-Chair proceeded by videoconference from February 12 to 21, 2024. On May 15, 2024, the Vice-Chair released the LAT Decision in which he concluded that Ms. Jamali is not catastrophically impaired and is not entitled to an income replacement benefit.

(i) *Procedural orders*

[7] Multiple procedural issues arose throughout the hearing in respect of which the Vice-Chair made orders under s. 25.0.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. Section 25.0.1 provides that a tribunal has the power to determine its own procedures and practices and may, for that purpose, make orders with respect to the procedures and practices that apply in any particular proceeding and to establish rules under s. 25.1 of the *SPPA*.

[8] The Vice-Chair summarized fourteen procedural rulings at paras. 6 to 38 of the LAT Decision. Some of the rulings went in favour of Ms. Jamali; some went in favour of Economical. The procedural orders were:

- (i) Ms. Jamali was permitted to call additional expert witnesses.
- (ii) In accordance with the Case Conference Report and Order (“CCRO”), Ms. Jamali was required to choose one lay witness.
- (iii) Ms. Jamali was not permitted to call the adjuster because she was not listed as a witness on the CCRO.
- (iv) Ms. Jamali’s claim of bias – advanced prior to the commencement of the hearing – was dismissed.
- (v) Economical was limited to 3.5 hours to cross-examine Ms. Jamali.
- (vi) In rejecting Ms. Jamali’s concern that Economical was not providing her with clear reasons for their benefit denials, the Vice-Chair ruled that Ms. Jamali could make submissions on Economical’s conduct in her closing submissions.
- (vii) In response to Ms. Jamali’s objections that the cross-examination of her was aggressive and too fast, the Vice-Chair offered the parties two options: (i) proceed with the cross-examination with a 15-minute break after one hour; or (ii) end the cross-examination and allow the parties to make submissions as to how much weight Ms. Jamali’s testimony should be given. After hearing submissions, the Vice-Chair exercised his authority under s. 23(2) of the *SPPA* and ordered that the cross-examination be concluded.

- (viii) Over Economical's objection, Ms. Jamali's daughter was permitted to testify. Both parties were provided the opportunity to make submissions as to the weight to be given to the daughter's testimony in their closing submissions.
- (ix) Ms. Jamali was provided 15 minutes for her examination in chief of the occupational therapist to clarify anything in her exhibited report; Economical was limited to 45 minutes for its cross-examination.
- (x) On day five of the hearing, because of excessive objections by both parties, the Vice-Chair ordered that it would hear objections following the testimony of the witness.
- (xi) Economical was not permitted to admit the rebuttal report of Dr. Eisen in evidence because it was not received by Ms. Jamali within 60 days prior to the hearing as outlined in the CCRO.
- (xii) Over Ms. Jamali's objection, Economical's witnesses were permitted to testify; the Vice-Chair found Ms. Jamali had knowledge of the witnesses and their reports well in advance of the hearing.
- (xiii) The Vice-Chair determined that it would not hear from Dr. Khaled because neither party intended to make the doctor's report an exhibit in the hearing. Following the Vice-Chair's ruling, Ms. Jamali made Dr. Khaled's report an exhibit.
- (xiv) The Vice-Chair refused to permit Economical to enter as exhibits two reports dated January 19, 2024 because they were not provided to Ms. Jamali until one week prior to the hearing.

(ii) *Catastrophic impairment*

[9] To succeed on her application for catastrophic impairment designation under "criterion 8", Ms. Jamali was required to demonstrate that she has suffered accident-related impairments that result in a "marked" or "extreme" impairment in one or more areas of function (activities of daily living, social functioning, concentration, persistence and pace, and adaptation) due to a mental or behavioural disorder.

[10] The Vice-Chair found that Ms. Jamali did not meet her onus of demonstrating that the functional impairments associated to her psychological diagnoses would not be present but for the motor vehicle accident. The Vice-Chair also found that Ms. Jamali did not demonstrate that her impairments rise to the level of "marked" impairment. The Vice-Chair found that Ms. Jamali failed to meet her onus "due to suspected malingering or over-exaggeration of symptoms": LAT Decision, at para. 46.

[11] In respect of the causal link between the motor vehicle accident and Ms. Jamali's functional impairments, the Vice-Chair found that the evidence presented by Ms. Jamali was inconsistent

with her patient history and not in conformity with the signs and symptoms known to occur, “making it impossible to make a ‘but for’ finding”: LAT Decision, at para. 48.

[12] The Vice-Chair “placed little to no weight in [Ms. Jamali’s] subjective evidence that these impairments arose immediately following and because of the accident.” The inconsistencies in her functional history called into question the reliability of her self-reporting. The Vice-Chair was “equally sceptical” of Ms. Jamali’s continuum of symptoms argument given “the significant multi-year gap” in medical records after 2017: LAT Decision, at para. 48i.

[13] The Vice-Chair concluded that the available objective findings did not support Ms. Jamali’s self-reported levels of impairment. The Vice-Chair noted that several assessors received invalid test results on psychometric tests, suggesting over-exaggeration or feigning of symptoms: LAT Decision, at para. 48ii.

[14] The Vice-Chair found that the inconsistencies in Ms. Jamali’s self-reporting combined with the fact that the objective findings were not in conformity with known signs and symptoms were “enough for [the Vice-Chair] to question whether these impairments, as she describes them, are accident-related”: LAT Decision, at para. 48iii.

[15] On this issue, the Vice-Chair concluded:

In taking a robust and pragmatic approach to the evidence, I cannot conclude that the subject motor vehicle accident was a necessary cause of the impairments she describes because the subjective evidence of causation lacks credibility and the objective evidence does not support the case: LAT Decision, at para. 48iv.

[16] Notwithstanding its finding on causation, the Vice-Chair went on to consider whether the impairments alleged by Ms. Jamali are “marked.” The Vice-Chair found Ms. Jamali’s functional impairments “do not rise to the level of severity required for a ‘marked’ impairment in any of the four spheres.” The Vice-Chair canvassed the various functional impairments in each sphere, concluding that many of the examples cited by Ms. Jamali did not “hold up” against her patient history: LAT Decision, at para. 49. The Vice-Chair also observed that were these impairments as significant as outlined, “I would have expected to see a more extensive treatment and medication history”: LAT Decision, at para. 50.

(iii) *Income replacement benefits*

[17] Sections 6(1) and (2)(b) of the SABS provide that the insured person is entitled to receive an income replacement benefit up to 104 weeks after the accident for the period in which they suffered a substantial inability to perform the essential tasks of the employment in which they spent the most time during the 52 weeks before the accident, and after 104 weeks if they suffered a complete inability to engage in any employment or self-employment for which they are reasonably suited by education, training, or experience.

[18] Ms. Jamali received income replacement benefits until January 15, 2019, based on the assessment of Dr. Kiraly, who found Ms. Jamali to have suffered both a substantial and complete inability to return to work. Benefits were terminated as a result of a subsequent assessment from Dr. Eisen who found that Ms. Jamali no longer met the “complete inability” test.

[19] Before the Tribunal, Ms. Jamali argued that she is entitled to income replacement benefits because it was inappropriate to schedule a subsequent assessment and report on post-104-week eligibility when Economical already had the results of Dr. Kiraly’s report. Ms. Jamali also argued that Dr. Kiraly’s report better matched Ms. Jamali’s current condition.

[20] The Vice-Chair was satisfied that Economical had a good basis for requesting a subsequent assessment given that Dr. Kiraly’s initial post-104-week assessment did not conclude an indefinite inability to return to work and suggested that, at that time, an additional 9-12 months of treatment and time off work would be required before a re-assessment: LAT Decision, at para. 57.

[21] The Vice-Chair was not satisfied that Ms. Jamali suffers from a complete inability to engage in any work for which she is reasonably suited. The Vice-Chair explained the basis for his conclusion:

- Ms. Jamali was able to work for 10-11 months for her father’s company;
- Ms. Jamali’s father testified that he would have kept her employed if she wished to continue working for his company;
- the Vice-Chair placed little weight on Dr. Kiraly’s testimony because Dr. Kiraly’s conclusions were based largely on Ms. Jamali’s self-reporting;
- Ms. Jamali provided conflicting information regarding her employment history pre- and post-accident;
- Ms. Jamali managed planning multiple trips and international moves which “suggests that she is capable to a degree of completing the sort of logistical tasks that might be required in an office-like setting”; and
- Ms. Jamali also reported that she enjoyed reading, “also suggesting she possessed the skills necessary to complete such a job”: LAT Decision, at para. 59.

The Reconsideration Decision

[22] The Vice-Chair dismissed Ms. Jamali’s request for reconsideration. The Vice-Chair found, contrary to Ms. Jamali’s argument, that he did not act outside the Tribunal’s jurisdiction – he came to a decision based on the law and the evidence before him: Reconsideration Decision, at para. 12. The Vice-Chair rejected the argument that he could not base the LAT Decision on suspicions of malingering or over-exaggeration because the issue was not included in Economical’s denial letters. The Vice-Chair explained that this issue was raised in the medial evidence as indicated in

paras. 45(iii) and 48(ii) of the LAT Decision. In any event, even if the Vice-Chair's findings on causation were discounted, he would not have found Ms. Jamali to be catastrophically impaired because she did not meet the threshold for criterion 8: Reconsideration Decision, at para. 13.

[23] The Vice-Chair also rejected Ms. Jamali's argument that he materially breached procedural fairness by "proffering a medical diagnosis of malingering without conducting a proper medical examination" and by limiting and terminating Ms. Jamali's testimony. In regard to the former, the Vice-Chair explained that he did not offer a medical diagnosis of malingering; instead, he conducted a legal analysis of the evidence. In regard to the latter, the Vice-Chair stated that proper accommodations were offered to Ms. Jamali during her testimony: Reconsideration Decision, at paras. 16-18.

[24] Finally, the Vice-Chair rejected Ms. Jamali's argument that he made an error of law or fact that would have led to a different result: Reconsideration Decision, at paras. 20-24.

Standard of Review

[25] The appeal is limited by s. 11(6) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sched. G to questions of law. On an appeal on a question of law, the correctness standard of review applies: *Canada (Minister of Employment and Immigration) v. Vavilov*, 2019 SCC 65, at para. 37.

[26] Appellate standards apply to questions of procedural fairness, which are questions of law: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29.

[27] The presumptive standard of review on judicial review is reasonableness: *Vavilov*, at para. 23. Reasonableness review "finds its starting point in judicial restraint and respect for the distinct role of administrative decision-makers": *Imperial Oil v. Haseeb*, 2023 ONCA 364, at para. 43. A reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Imperial Oil*, at para. 43, citing *Vavilov*, at para. 85.

The Appeal

[28] There is no merit to Ms. Jamali's contention that the Vice-Chair provided insufficient reasons. The Vice-Chair applied the proper legal tests and provided detailed, comprehensive reasons to explain how he arrived at his conclusions. A review of his reasons reveals that the Vice-Chair considered the entirety of the evidentiary record, understood the issues in dispute, the positions of the parties, and the questions to be determined.

[29] In finding that Ms. Jamali's impairments were not caused by the motor vehicle accident, the Vice-Chair properly applied the "but for" test set out by this court in *Sabadash v. State Farm et al.*, 2019 ONSC 1121. After summarizing the positions of the parties, the Vice-Chair provided comprehensive reasons explaining why he found it impossible to make a "but for" finding: LAT Decision, at para. 48. In finding that Ms. Jamali was not catastrophically impaired, the Vice-Chair

considered the inconsistencies in the presentation of functional impairments in assessing each of the four mandated domains: LAT Decision, at para. 49. And the Vice-Chair provided detailed reasons in support of his finding that Ms. Jamali was not entitled to income replacement benefits: LAT Decision, at paras. 57-60.

[30] Ms. Jamali's second ground of appeal is the Vice-Chair erred by "accepting Economical's argument" that Ms. Jamali was malingering when malingering was not indicated as a reason for denial of benefits in Economical's denial letters. There is no merit to this submission. The Vice-Chair made no medical diagnosis of malingering. He did find that the evidence presented by Ms. Jamali failed to convince him that she satisfied the "but for" test for causation. The issue of malingering or over-exaggeration was raised in the psychometric testing results that formed part of the record: LAT Decision, at paras. 45(iii), 48(ii). Further, the Vice-Chair explained that, in any event, he would not have found Ms. Jamali to be catastrophically impaired because she did not meet the threshold for criterion 8. I would not give effect to this ground of appeal.

[31] Ms. Jamali's third ground of appeal is she was denied procedural fairness. I disagree. The factors to consider in assessing procedural fairness are: (i) the nature of the decision being made, and the process followed in making it; (ii) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (iii) the importance of the decision to the individual affected; (iv) the legitimate expectations of the person challenging the decision; and (v) choices of procedure made by the agency itself: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 Can LII 699 (SCC).

[32] In evaluating procedural fairness, "[t]he guiding principle is that the person affected should be afforded the means to present their case fully and fairly, and have a decision made in a fair, impartial, and open process, taking into consideration the statutory, institutional and social setting of that decision": *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320, at para. 31.

[33] Over the course of the seven-day hearing, Ms. Jamali was allowed to present her case, be represented by counsel, call witnesses, raise objections, cross-examine Economical's witnesses, and make submissions. The Vice-Chair provided detailed reasons. The Vice-Chair made procedural rulings throughout the hearing, after hearing submissions from the parties' counsel. He further explained those rulings in his reasons. The Tribunal has the authority to determine its own procedures and practices, to make rules governing its practices and procedures, and to make orders with respect to the practices and procedures that apply in any particular proceeding: *SPPA*, s. 25.0.1.

[34] The *Licence Appeal Tribunal Rules* set out procedural requirements and rules governing motions and hearings before the Tribunal. The *Licence Appeal Tribunal Rules* permit the Tribunal to vary or waive the application of any of its rules or procedures on its own initiative except where to do so is prohibited by legislation. The *Rules* also permit the Tribunal to make orders or give directions in a proceeding to control its own process or to prevent abuse of its process.

[35] There is no indication the hearing was conducted in a manner inconsistent with Ms. Jamali's expectations. The *SPPA* and the *Licence Appeal Tribunal Rules* afford the Tribunal broad discretion to control its own procedures. The rulings made by the Vice-Chair and the procedures adopted by him are owed a significant amount of deference. There was no procedural unfairness in the conduct of the hearing. I would not give effect to this ground of appeal.

[36] Fourth and finally, Ms. Jamali argues the LAT Decision contains palpable and overriding errors of fact. For example, Ms. Jamali argues that the Vice-Chair "favoured the opinion of Dr. Hope on psychometric testing", "misunderstood the amount of objective evidence", "misapprehended or unreasonably concluded that Jamali 'worked' with her father post-accident", and "dubbed Jamali an international traveler who moved around the world." In essence, Ms. Jamali asks this court to reweigh and reassess the evidence that was before the Tribunal, which is not our role. There is no merit to this ground of appeal.

[37] For these reasons, the appeal is dismissed.

The Application for Judicial Review

[38] Ms. Jamali advances two main arguments on her application for judicial review. The first is that she was denied procedural fairness. I have already concluded there was no denial of procedural fairness.

[39] The second argument is that the Vice-Chair made and relied on unreasonable findings of fact that were not supported by the evidence. Again, Ms. Jamali asks this court to reweigh and reassess the evidence. That is not our role on judicial review. The LAT Decision is based on an internally coherent and rational chain of analysis. It is justified in relation to the facts and the law that constrained the Tribunal. The LAT Decision is reasonable. The application for judicial review is dismissed.

Conclusion

[40] The appeal and the application for judicial review are dismissed. In accordance with the parties' agreement, Ms. Jamali shall pay Economical the costs of the appeal and the application for judicial review in the amount of \$10,000 all inclusive.

Ryan Bell J.

I agree: _____
Backhouse J.

I agree: _____
Faieta J.

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ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Backhouse, Faieta, Ryan Bell JJ.

BETWEEN:

JAMALI JAMALI

– and –

ECONOMICAL INSURANCE COMPANY

AND BETWEEN:

JAMALI JAMALI

– and –

ECONOMICAL INSURANCE COMPANY
and LICENCE APPEAL TRIBUNAL

REASONS FOR DECISION

Ryan Bell J.

Released: March 4, 2025