RECONSIDERATION DECISION

Before: Jesse A. Boyce, Vice-Chair

Date: February 8, 2021

File: 18-008876/AABS

Case Name: Soumya Padhay and Aviva General Insurance Company

Written Submissions by:

For the Applicant: Cecil Jaipaul, Paralegal

For the Respondent: Sonya M. Katrycz, Counsel

OVERVIEW

[1] This request for reconsideration was filed by the applicant. It arises out of a decision dated May 8, 2020 in which the Tribunal found that the applicant was subject to treatment within the Minor Injury Guideline ("MIG") as a result of her accident-related impairments. Further, the Tribunal determined that the applicant did not demonstrate entitlement to an income replacement benefit ("IRB") or various treatment and assessment plans in dispute.

[2] The applicant submits that the Tribunal made numerous errors of fact and law that would have resulted in a different outcome had the errors not been made. In addition, the applicant asserts that the Tribunal's decision did not provide sufficient reasons to support its findings, that the adjudicator was biased and acted as an advocate for the respondent, Aviva, and that the hearing process and decision violated the rules of procedural fairness.

[3] Complicating this request is the fact that the three-day in-person hearing proceeded as a single day in-person hearing on the documentary evidence and testimony alone. Critically, there were no written submissions filed by the parties nor was a transcript of the proceedings produced. Pursuant to Rule 18 of the Tribunal's *Common Rules*[1] I have been delegated responsibility to reconsider this matter.

RESULT

[4] The applicant'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 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;

[1] *Licence Appeal Tribunal, Animal Care Review Board and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017) ("Common Rules").*

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 evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would have affected the result.

[6] Here, the applicant asserts that the basis of her reconsideration request seemingly falls under every ground of Rule 18.2, outlined in greater detail below. For the reasons that follow, I dismiss the applicant's request for reconsideration.

The Tribunal failed to find that the denial letters relating to the disputed treatment and assessment plans do not comply with the notice requirements in the Schedule, the requirements of Smith v. Cooperators[2] and Augustin v. Unifund Assurance Co.[3]

[7] A significant portion of the applicant's reconsideration submissions relate to the explanation of benefit ("EOB") letters provided by Aviva in response to her various accident benefit claims. The applicant submits that the Tribunal erred in its determination that Aviva's EOB notices were proper because the notices do not advise that the MIG applies, did not provide adequate medical or other reasons for the denials and were not clear and unequivocal.

[8] To begin, at paras. 7-9 of the Tribunal's decision, I find the adjudicator laid out the applicant's concerns regarding the interplay between Aviva's EOBs and the procedural requirements of s. 38(8) and s. 38(11) of the *Schedule*. However, I disagree that the adjudicator's analysis failed to take the notice requirements of the *Schedule* or the relevant jurisprudence into consideration. At para. 11 of the decision, the adjudicator states: "For each of the treatment plans I have reviewed the chronology of denials and EOB provided by the respondent and find that the denials contain all the required information outlined in section 38(8). I set out a brief summary of the explanation of benefits." What immediately follows are six bullet-point paragraphs detailing findings on the various EOBs: that the $3,500 cap under the MIG is referenced; that further information was required; that no benefits would be considered payable until further information was provided; that a s. 44 assessment found her injuries to be minor, *etc*.

[9] Then, at para. 12, the adjudicator summarizes: "After reviewing the evidence, I find the reasons for the denial that were provided were sufficient. The various EOBs reviewed above clearly demonstrate that the insurer set out the reasons for

[2] *Smith v. Co-Operators General Insurance Co*., 2002 SCC 30 (CanLII), [2002] 2 SCR 129.
[3] *Augustin v. Unifund Assurance Company*, [2013] FSCO 12-000452.

the denial of the requests for the various treatment plans and assessments and the IRB." Further, at para. 13, the adjudicator addresses the applicant's concerns over the MIG box not being checked off: "The insurer clearly articulated that not only could they not consider the payment of benefits until additional information [was] provided but also, based on an insurer examination, there was no evidence that the injuries sustained were not predominantly minor. I also find that while the [EOBs] failed to check off the applicability of the MIG as a reason for the Notice, it is clear that the applicability of the MIG was an issue as set out in the EOB of November 30, 2016 which clearly references the cap of $3,500 in benefits payable in respect of an impairment that is primarily minor in nature." [*sic*] For what it is worth, on my own review of the various EOBs in the file, I find limited indication that Aviva's denials were improper or unclear.

[10] Accordingly, I am not persuaded that the Tribunal committed an error of law that would have resulted in a different outcome had the error not been made. Indeed, while I do not have written submissions or a transcript, based on the framing of the applicant's reconsideration submissions and Aviva's arguments for same, it appears that she is making the same arguments she made at the first instance hearing that were unsuccessful. While the Tribunal's decision did not explicitly cite to the requirements provided in *Smith* in its analysis, based on the above, I find it clear that the adjudicator, a Vice-Chair with the Tribunal, was alive to the notice requirements, analyzed the EOBs accordingly, and found that the notices were proper, which in my view, easily satisfies the requirements of *Smith*. While I note *Augustin* is not binding on the Tribunal, having determined that the notices were sufficient under s. 38(8), it was not error for the Tribunal not to engage with the consequences of s. 38(11) or with *Augustin*.

[11] Next, tucked within the same ground for reconsideration, the applicant offers a number of assertions that the Tribunal's decision "misapprehended the facts and evidence" of Aviva's adjuster, Ms. Koshy, who provided testimony at the hearing. The applicant argues that in her testimony Ms. Koshy conceded that Aviva did not respond within the timelines provided by s. 38 on several treatment plans. She submits that the Tribunal's failure to engage with this alleged deficiency is an error that would have affected the outcome of the hearing had it not been made.

[12] I find this line of argument difficult to assess because I am not in receipt of a transcript of Ms. Koshy's testimony in order to cross-reference with the applicant's submissions. Without evidence of her testimony, I cannot find that Ms. Koshy conceded what the applicant submits she conceded, nor can I find that the Tribunal somehow erred in considering or not considering this evidence. Problematically, the Tribunal's decision does not even mention Ms. Koshy's testimony, so it is also

difficult to reconcile the applicant's position that a reversible error was made where the decision does not rely on the testimony giving rise to the alleged error. Further, even if it were true that Aviva conceded not responding to three OCF-18s within the 10-day period required by the *Schedule*, I agree with Aviva that the applicant has not provided evidence on reconsideration that she incurred or partially incurred the treatment before Aviva's EOBs were sent.

[13] The applicant's request takes further issue with Ms. Koshy's testimony, stating that she improperly delegated her authority to the s. 44 assessors rather than making her own conclusions regarding the treatment plans, that she failed to provide certain medical documentation to assessors, and failed to schedule additional assessments for the applicant's headaches. As I understand it, the applicant asserts that this resulted in the Tribunal erring in failing to evaluate and comment on Aviva's fulfillment of its obligations, denying her procedural fairness because it did not adjudicate a point in dispute.

[14] Again, I cannot find that the Tribunal erred in assessing Ms. Koshy's testimony because I was not furnished with a transcript of Ms. Koshy's testimony to verify what was said at the hearing. On the EOB documents, I have no basis to believe that Aviva's adjuster delegated her authority to a s. 44 assessor where an adjuster is very much entitled to rely on the opinion of a medical professional retained for the specific purpose of conducting an assessment. The applicant's other submissions at paras. 40-42 and 44 all cite testimony allegedly provided by Ms. Koshy at the hearing. Where I do not have a transcript to verify what Ms. Koshy testified to and where the Tribunal's decision does not engage with nor mention her testimony at all, I cannot find that the Tribunal committed an error of fact or law that would have affected the outcome of the decision.

The Tribunal's failure to consider Aviva's non-compliance with s. 40(3)

[15] Here, the applicant alleges that the Tribunal did not address Aviva's conduct under s. 40(3), which provides that within five business days after receiving a treatment confirmation form, the insurer shall send a notice to the person claiming benefits and to the health practitioner, (a) acknowledging receipt by the insurer of the treatment confirmation form; and (b) advising if the person claiming benefits is an insured person with respect to the accident. The applicant submits that Aviva's failure to comply with its obligations under this section was fatal because the notice did not tell the applicant if she "is an insured person with respect to the accident". The applicant submits that "consistent with *Smith*, and the modern approach to statutory interpretation, this failure must be read in conjunction with sections 40 (4), 38 (8), (9) and (11)." As I understand it, the applicant submits that the Tribunal's

error was in not providing reasons for not addressing Aviva's s. 40(3) non-compliance and that it "was incumbent on the Tribunal" to reference her OCF-23 and OCF-24 documents "to explain this discrepancy." In the same section, the applicant asserts that the Tribunal erred in not assessing the "plethora of medical evidence provided by the applicant in any meaningful way" while also making the "unsupportable finding" of accepting "flawed" s. 44 reports and "discredited" surveillance.

[16] I disagree. It is not an error of law for the Tribunal not to engage with the minor procedural requirement under s. 40(3)(b) of Aviva "advising if the person claiming benefits is an insured person with respect to the accident." Neither *Smith* nor *M.F.Z. v. Aviva Insurance Canada*, 2017 CanLII 63632 (ON LAT Reconsideration), the authorities referenced by the applicant, even address s. 40(3)(b). Unless the applicant is not an insured, it is unclear how this could have resulted in an error by the Tribunal. Further, I was provided with no authority from the applicant to support her argument that this section "must be read in conjunction with sections 40(4), 38(8), (9) and (11)" or that it was "incumbent" on the Tribunal to address an apparent discrepancy between her OCF-23 and OCF-24. It is unclear how the allegations regarding s. 44 reports or the surveillance report fit into this s. 40(3)(b) ground, as the parties' submissions seem to agree that these matters were handled as preliminary motions at the hearing. The Tribunal would have benefitted from a more cogent theory of this ground.

[17] In any case, it is well-settled that an adjudicator does not have to refer to every argument or piece of evidence offered by a party in arriving at a decision. Where a decision does not touch on an incredibly minor procedural dispute that was addressed in a preliminary fashion and where there is no transcript to confirm same, it is difficult to find that the Tribunal committed an error on the face of the decision where s. 40(3)(b) is not mentioned.

Prohibition on taking MIG position under s. 38(11)1

[18] The applicant submits that the Tribunal erred at paras. 12-13 when it concluded that the EOB dated November 30, 2016 complied with s. 38(8) and (9) because it "clearly references the cap of $3,500." The applicant submits that notice "must so advise the insured person" that the "MIG applies to the insured person's impairment" and "the cap is NOT the Minor Injury Guideline." To this end, the applicant submits that Tribunal erred in not considering s. 38(11) because it was the evidence of the Ms. Koshy that she did not read or pay attention to the health practitioner's comments in the OCF-23, where she also submitted an OCF-24, that

Aviva's denial was confusing and it was error not to order the treatment plans payable under s. 38(11)1.

[19] I find no error. First, and again, as I do not have evidence of Ms. Koshy's testimony, I cannot find the Tribunal erred on the alleged OCF-23 ground. Second, the Tribunal did not have to consider the consequences of s. 38(11) where it made clear findings that Aviva's EOB notices complied with s. 38(8). While the applicant may disagree with the Tribunal's analysis, it does not constitute an error by the adjudicator. Third, in any event, having reviewed the EOB dated November 30, 2016, I disagree that the notice was not clear, as it states "reasons why expenses are not payable" in bold lettering in Part 4. Further, this is followed by: Aviva actually providing a partial approval (leaving only $285 unpaid), indicating that minor injuries are subject to a $3,500 treatment limit under s. 18 and notifying the applicant that it was waiting on the invoices for the OCF-3 and OCF-24 with respect to the unpaid $285. All of the information the applicant might need to dispute the decision was attached in Part 6.

[20] While more information is always preferable, I find the EOB in dispute meets the requirements of *Smith*. Finally, it cannot be said that the adjudicator did not consider s. 38(11) where, at para. 14, she made a specific finding on same, stating: "I therefore find that the denial letters are not deficient and the consequences under s. 38(11) do not follow." Accordingly, I disagree that the Tribunal made an error of fact or law that would have resulted in a different outcome had it not been made.

The Tribunal erred in failing to address the claim for prescription expenses

[21] The applicant asserts that the Tribunal did not address her claim for prescription expenses as outlined in para. 4(vii) of the decision. Therefore, the applicant submits that "this is a situation in which the Tribunal erred by not adjudicating a point in dispute that was referenced in the applicant's submissions, something that could amount to a denial of natural justice and procedural fairness."

[22] Paragraph 4 of the decision indicates that "If the applicant's injuries are not considered minor as defined under the *Schedule*, the Tribunal must determine the following:" and then identifies the various medical and rehabilitation benefits in dispute, including the applicant's prescription claim at para. 4(vii). As we know, at para. 38, the adjudicator made the substantive determination that the applicant sustained predominantly minor injuries as a result of the accident that are subject to treatment within the MIG. Accordingly, since the applicant was in the MIG and her $3,5000 limits were exhausted, it follows that an adjudication of $31.39 in prescription expenses was not required. This does not amount to a denial of

procedural fairness when the applicant was not successful on the threshold MIG issue that would have invited adjudication on her benefit claims. In any case, the applicant's submissions on this ground amount to the above, with no evidence to speak to any marginal amounts that may be remaining in the MIG or that her prescription claims were as a result of the accident.

The Tribunal's failure to consider the applicant's request to exclude the IE reports of Dr. H. Benfayed and its error in accepting surveillance evidence

[23] The applicant submits that she challenged the admissibility of the insurer examination reports prepared by Dr. Benfayed on the basis that an Acknowledgment of Expert's Duty was not served as required by Rule 10.2 of the Tribunal's *Common Rules*. She submits that the Tribunal erred in admitting and relying on the insurer examinations without the Acknowledgement of Expert Duty form and failing to provide a reason why they were admitted. Further, since the applicant was not clear that the addendum reports were prepared for the purpose of adjusting the file or otherwise and because she did not receive a notice of examination, she submits that she challenged the admissibility of the Addendum reports. The applicant relies on Tribunal case law to submit that the Tribunal erred in its failure to assess whether the potential prejudice to the applicant of not having notice outweighs that of any prejudice to the respondent in excluding the Addendum report. Therefore, she argues that this is a situation in which the Tribunal erred by not adjudicating a point in dispute that was referenced in the applicant's submissions, "something that could amount to a denial of natural justice and procedural fairness."

[24] Again, where there is no transcript or written submissions from the hearing, I have no insight into the preliminary issue discussions that the parties engaged in. Similarly, it appears that the parties' submissions speaking to whether the Tribunal should exclude or admit certain evidence for the hearing—namely the report of Dr. Benfayed and the surveillance evidence and report conducted by Aviva—as well as the adjudicator's orders for same were made orally at the outset of the hearing. I was not provided with any binding authority, nor am I aware of any, that provides that preliminary issue or preliminary motion discussions and any procedural orders arising from those discussions must be duplicated in the substantive reasons of a decision on benefits. Where an issue is largely clerical in nature—such as a missing Expert Duty form under Rule 10.2—I sincerely doubt that this justifies attention in substantive reasons, especially so if the parties received an oral order for same and continued with the hearing. In any case, the applicant did not provide evidence that she formally objected to Dr. Benfayed as an expert under Rule 10.4 of the *Common Rules*.

[25] Further, it does not appear that the applicant is arguing that the adjudicator prevented her from making submissions on the Expert Duty Form or on the admissibility of the report or surveillance. Indeed, based on the decision, it appears that Dr. Benfayed's report was admitted (which I can only infer means that the Expert Duty Form issue was resolved preliminarily) and the Tribunal only admitted the surveillance report and not the actual footage. As Aviva notes in its submissions, the adjudicator did not at any point admit the surveillance footage precisely because of the applicant's objections. Instead, Aviva submits that "at the outset of the hearing, the parties agreed that the video would not be shown, but that the report, which had been served well in advance of the hearing, would be the sole element of surveillance to be relied upon" and that counsel for the applicant specifically consented to this arrangement.

[26] The applicant does not dispute this characterization, so I cannot find that the applicant was denied her procedural rights by the Tribunal where she was heard on, and then allegedly consented to, admitting the report. Indeed, while I acknowledge not having a transcript to verify how significant or lengthy the preliminary discussions were or if there was any ambiguity in the adjudicator's oral orders that would invite confusion, it appears that the adjudicator did address the preliminary issues at the outset of the hearing and gave the parties an opportunity to make their submissions on same. By all accounts, the adjudicator gave the parties oral reasons for admitting or excluding certain evidence. Contrary to the applicant's submissions, this is not a *Kanareitsev*-type error.[4]

[27] While the applicant also asserts she was denied procedural justice to cross-examine the investigator, I find she did not provide evidence that she summonsed the investigator who conducted the surveillance and who wrote the report she objected to when the report was made available to her in advance of the hearing. While the applicant may disagree with the adjudicators' decision to admit certain evidence, I am not persuaded that the adjudicator committed an error in doing so and I am not persuaded that the applicant's procedural rights were neglected.

Procedures for Claiming Benefits – s. 33 of the Schedule; Claim forms under s. 227 of the Insurance Act

[28] As I understand, the applicant submits that the Tribunal erred in arriving at its conclusion on the applicant's failure to comply with s. 33. She asserts that "a large part of the Tribunal's reasoning was not based on textual analysis of s. 33(1) in its entire context. Rather, in large measure, the Tribunal made its conclusions after engaging in a purposive approach." Further, she submits that since Tribunal has

[4] *Kanareitsev v. TTC Insurance Company Limited*, 2008) CanLII 26262 (ON SCDC) 297 D.L.R. (4th) 373.

consistently determined that the Employer's Confirmation Form (OCF-2) is not "reasonably required" to determine entitlement to IRB and, in fact, the OCF-2 is not a form prescribed by s. 66 or any other provision of the Regulation, that it was error to find that Aviva's s. 33 requests were proper. Finally, she asserts that the Tribunal erred in not considering that Aviva failed to notify the applicant of the s. 34 reasonable explanation provision and that the Tribunal failed to consider her responses to Aviva's s. 33 requests.

[29] I note the decision identifies the s. 33 requests that Aviva made of the applicant regarding her IRB claim at paras. 44-46 and the adjudicator makes a finding at para. 46 that "the evidence above clearly indicates the insurer was acting appropriately under s. 33 of the *Schedule*." I agree with the applicant that the decision does not identify any of the documents that the applicant provided to Aviva to satisfy its s. 33 requests. However, I am not persuaded that this is an error that would have resulted in a different outcome.

[30] Indeed, the very next paragraph provides evidence that the adjudicator made her IRB determination based on substantive rather than procedural grounds. At para. 47, she provides her reasons: "After hearing submissions from the parties and reviewing the evidence, I am not persuaded that the applicant suffered a substantial inability to perform the essential tasks of her pre-accident employment as a result of the accident. The following factors were persuasive in reaching this conclusion: i. The applicant returned to work immediately after the accident for a period of five weeks ending October 26, 2016; ii. There are conflicting statements given to doctors that she had "not worked since the accident" yet she worked for approximately five weeks after the accident; iii. The first disability certificate was only completed on November 1, 2016." These three reasons are then followed by a paragraph providing further detail to support the adjudicators findings on substantive entitlement. It is unclear what effect, if any, the procedural defects alleged by the applicant would have had on the Tribunal's substantive analysis on her IRB entitlement. The IRB test is the correct one.

[31] Further, I was not provided with authority to support the applicant's position that the Tribunal erred because it did not find that Aviva should have directed the applicant to s. 34 and its reasonable explanation provision. The applicant did not indicate whether she provided submissions under s. 34 at the hearing and same were not provided on reconsideration.

[32] In addition, the applicant submits that by "sending and requesting the OCF-2 to/from the applicant, Aviva was in breach of s. 227(1) of the *Insurance Act*, as it was not using an approved form. As such, the Tribunal erred in its focus on the

request for, and the use of an unapproved form, in effect, overruling statutory language. As the *Act* specifically provides that insurers shall not use unapproved claims forms. The Tribunal does not have the power to waive those mandatory requirements." While it may not be a listed form under s. 66, insurers (and the Tribunal) frequently rely on OCF-2 documents when calculating IRB quantum. It is difficult to find that requesting same was not reasonable and it is unclear how the Tribunal could have erred by not indicating in its decision that the applicant eventually complied with this s. 33 request and, more importantly, where the Tribunal made its IRB determination on substantive grounds. The statement that the Tribunal overruled statutory language is misguided and unsupported.

[33] Finally, and for the reasons above, I find no indication that the Tribunal erred in conducting its analysis on s. 33 or in its interpretation of the provision, which only found that the requests were reasonable. I find that the Tribunal would have benefitted from a more cogent theory of this ground.

IRB and Chronic Pain

[34] Here, the applicant asserts that her evidence on IRB entitlement was unchallenged, that Aviva took no issue with the applicant's credibility, that the Tribunal erred in limiting the definition of "disability certificate" to an OCF-3, that it was an error not to consider the "plethora" of other evidence or her Functional Abilities Evaluation and that the Tribunal erred where it "refused" to comment on Dr. Mazzarella's "rebuttal" report.

[35] First, I find the applicant's evidence on IRB entitlement was most certainly challenged by Aviva, as it relied on its own s. 44 reports in denying the claim. Further, the applicant's submissions acknowledge that Aviva's cross-examination addressed discrepancies in both her attendance at work and in the clinical notes and records. Aviva clearly took issue with the applicant's credibility.

[36] Second, I find no evidence that the Vice-Chair limited the definition of "disability certificate" to just an OCF-3 but rather that she considered all of the medical evidence before her, including the reports of Dr. Benfayed and Dr. Kumbhare, the clinical notes and records in evidence and the report of Dr. Mazzarella. As she noted at para. 6, "I have reviewed all the testimony, submissions and evidence led during the hearing and I have only summarized what I found relevant to my determination below." I find this is instructive when considering the applicant's many alleged grounds for reconsideration. An adjudicator is not required to refer to every piece of evidence that informs their decision and any omission does not constitute a "refusal." I see no error.

[37] At the hearing, the applicant alleges that she indicated that around May 1, 2018 she was referred to a pain specialist for her alleged chronic pain symptoms. The applicant submits that the Tribunal "refused to hear her evidence", which she submits is an error because the Tribunal should have the benefit of all of the parties' evidence and submissions before rendering its decision, particularly given its primary duties of weighing evidence, finding facts, and interpreting legislation. The applicant submits that this approach promotes finality and both the Tribunal's and parties' efficient use of resources and, somewhat ironically, it also "prevents the reconsideration process from being turned into a separate adjudicative or fact-finding forum." To this end, the applicant submits that "this is an exceptional circumstance in which a new argument should be permitted on a reconsideration." The applicant urges the Tribunal to consider 79 additional pages of records from The International Pain Specialists.

[38] I decline the applicant's request. First, it is well-settled that reconsiderations are not the venue for new argument. Second, and again, as there is no transcript of the proceedings, I am unable to discern whether the applicant indeed raised this issue and whether there is any truth to her bald accusation that the Tribunal refused to hear her evidence, which I have no reason to believe is true. Third, even though the applicant submits the Tribunal refused to hear her arguments, I agree with Aviva that the adjudicator addressed chronic pain at length in paras. 27-39 under a section entitled "Does the Applicant suffer from Chronic Pain so as to remove her from the MIG?", ultimately concluding she had not met her burden. Finally, this is not an exceptional circumstance as the applicant has not provided any evidence to suggest that this report was not available at the initial hearing in order to satisfy ground 18.2(d) on reconsideration.

Procedural Fairness; Acting as an Advocate; Bias

[39] Throughout her 24 pages of single-spaced reconsideration submissions, the applicant offers a number of sweeping accusations that the adjudicator denied her procedural fairness, acted as an advocate for Aviva and was biased towards her. I address each in turn.

[40] The applicant asserts that "while the Tribunal was alive on the s. 38 obligations and prohibitions issues which were a key feature of the applicant's arguments, it misapprehended the facts, and in what appears to be a bias against the applicant, relied on, and reviewed a "phantom" EOB denial dated May 4, 2018." It is unclear what the applicant means when she refers to a "phantom" EOB or why this may be considered bias. On review, with the exception of a denial date for a single treatment plan listed in para. 4(iv) of the "Issues" section, the decision does not

mention any denial that occurred on May 4, 2018, nor does it rely on this EOB in making its determination.

[41] The applicant then submits that "it is Aviva's obligation, not the Tribunal's, to make their case and, further, note that the Tribunal should not puzzle through documents in order to decipher and then assemble an evidentiary foundation for Aviva's case." For example, the applicant asserts that "on its own initiative, the Tribunal prepared a chronology of Aviva's purported section 33 requests, and in an apparent bias toward the applicant did not mention any of the more than 15 responses from the applicant." On review, I find, at para. 44, the Tribunal's chronology is comprised of the copied contents of Aviva's December 1, 2017 s. 33 letter and not a list prepared "on its own initiative" as alleged. In any case, the fact that the Tribunal did not reference the applicant's s. 33 responses is not evidence of bias, as again, the Tribunal's determination did not turn on s. 33 and it is not required to refer to every piece of evidence.

[42] The applicant submits that "the adjuster's file notes and her evidence confirmed that on December 20, 2016, while she was requesting an OCF-2, she called the applicant's employer but, despite receiving a summons to bring a transcript of that call, the respondent refused to produce a copy of the transcript of the call." The applicant submits that the Tribunal erred in not addressing this blatant disregard for the *Common Rules*, that the Tribunal acted as an advocate for Aviva which was grievously unfair and that the Tribunal made a significant error in law by not drawing an adverse inference when the respondent did not comply with the summons and failed to provide fulsome answers. The applicant did not provide evidence that a transcript of the alleged call was available, nor did she direct me to an order for same. Further, it is unclear how not drawing an adverse inference, which is a discretionary decision for an adjudicator that goes to weight, is an error of law that would have affected the outcome of the decision.

[43] Finally, I find the applicant's submission that the adjudicator, a Vice-Chair, acted as an advocate for Aviva to be troubling and without merit or evidence. Indeed, the role of an adjudicator is to assess the evidence and testimony in order to resolve a dispute between parties, which I find is precisely what occurred in this case. While a party is certainly entitled to disagree with a decision, parties seeking reconsideration are encouraged to refine their arguments and provide supporting evidence rather than resort to allegations of bias or advocacy or impropriety towards an adjudicator. In a similar vein, the applicant's concluding submissions refer to a s. 10 award, however, it is unclear what is being argued or what the alleged error is, as the submissions abruptly end without a detailed request for relief.

[44] As Aviva did not provide substantive submissions under Rule 19 of the *Common Rules*, I decline to order Aviva's request for $2,000 in costs.

CONCLUSION

[45] The request for reconsideration is dismissed, as the applicant did not meet the criteria for reconsideration under Rule 18 and therefore failed to establish that the Tribunal made an error such that its decision should be reconsidered.

Released: February 8, 2021

Jesse A. Boyce, Vice-Chair