



Citation: Foster v. Aviva Gen. Ins. Co., 2021 ONLAT 19-014657/AABS - R

RECONSIDERATION DECISION

Before:	Jesse A. Boyce, Vice-Chair
Licence Appeal Tribunal File Number:	19-014657/AABS
Case Name:	Jason Foster v. Aviva General Insurance Company
 Written Submissions by:	
For the Applicant:	Josh Lang, Counsel
For the Respondent:	Danielle Ralph, Counsel J.C. Rioux, Counsel

BACKGROUND

- [1] This request for reconsideration was filed by the applicant. It arises out of a decision dated September 15, 2021 in which the Tribunal found that the applicant was entitled to an income replacement benefit (“IRB”) in the amount of \$400.00 per week from April 14, 2020 to May 8, 2021, but was not entitled to an IRB for the post-104 week period or the chiropractic treatment plan in dispute.
- [2] The applicant seeks reconsideration solely on the adjudicator’s findings at paras. 48-55 of the decision that the Canada Recovery Benefit (“CRB”) and the Canada Emergency Response Benefit (“CERB”) were deductible from his IRB amounts payable under the *Statutory Accident Benefits Schedule*, being O. Reg. 34/10 (“*Schedule*”).
- [3] The applicant submits that the adjudicator made a significant error of law that would have resulted in a different outcome had it not been made when he determined that CRB/CERB are deductible from his IRB because CRB/CERB is not salary or wages, is not “gross employment income” that is deductible, is not considered income from self-employment, is not “remuneration from other employment” and is paid under the *Canada Emergency Response Benefit Act* and therefore not akin to benefits received under the *Employment Insurance Act*.
- [4] The applicant requests that the original decision be replaced with a decision that CERB is not deductible from his IRB and that he is entitled to his full IRB amount for the period in question. Aviva provided responding submissions, indicating that it does not dispute the Tribunal’s determination on IRB entitlement and, to its credit, submitted that it agrees with the applicant that the Tribunal erred in determining that CERB is deductible from IRB under the *Schedule*.
- [5] Pursuant to Rule 18 of the Tribunal’s *Common Rules of Practice and Procedure*, I have been delegated responsibility to reconsider this matter, as the original adjudicator is no longer with the Tribunal.

RESULT

- [6] The applicant's request for reconsideration is granted under Rule 18.2(b).

ANALYSIS

- [7] The grounds for a request for reconsideration are contained in Rule 18.2 of the Tribunal’s *Common Rules*. The applicant’s request relies on criteria 18.2(b): that the Tribunal made an error of law such that the Tribunal would likely have reached a different result had the error not been made. The test for reconsideration under

Rule 18.2(b) involves a high threshold. Reconsideration is only warranted in cases where an adjudicator has made a significant legal or evidentiary mistake preventing a just outcome, where false evidence has been admitted, or where genuinely new and undiscoverable evidence comes to light after a hearing. Under Rule 18.4(b)(i), upon reconsidering a decision of the Tribunal, the Tribunal may confirm, vary, or cancel the decision or order.

- [8] Following the accident of May 8, 2019, the applicant returned to work in a reduced capacity until April 14, 2020, then began receiving one or both of the CRB/CERB during the pandemic. He claimed IRB from April 14, 2020 onward. At para. 48 of the decision, and as part of his final analysis, the adjudicator states that the parties requested a determination of whether the CRB/CERB received by the applicant is deductible from IRBs. The adjudicator identified s. 4(1) and s. 7(3)(a) and determined, at para. 52, that CERB is “tantamount to other remuneration from employment, and therefore deductible,” before finding that “it is essentially akin to Employment Insurance (“EI”) benefits in the context of the *Schedule*.” Finally, at para. 55, the adjudicator determined that CRB/CERB should be treated in the same manner as EI benefits or “other remuneration from employment” and, in his order at para. 56, indicated that CRB/CERB was to be deducted from the \$400 per week IRB payment.
- [9] I am in the rare position on reconsideration where the parties agree that an error of law was made. The parties also agree that at the hearing, neither party made fulsome submissions on the legal issue of the deductibility of CRB/CERB from an IRB that would have guided the original adjudicator’s analysis. On review of the decision, I agree with the parties that a legal error was made.
- [10] The adjudicator incorrectly focused on the definition of “gross employment income” in s. 4(1) of the *Schedule* to conclude that CRB/CERB is deductible from IRBs pursuant to s. 7(3)(a) as “other remuneration from employment.” Whereas IRBs are directly connected to, and calculated with respect to, an insured’s pre-accident earnings, CERB is not calculated with reference to income from employment. Indeed, everyone who is eligible receives the same amount without reference to the amount of income they earned pre-pandemic. As CRB/CERB eligibility is not tied to employment status, it follows that it cannot be considered “gross employment income” under s. 4(1) because it is not analogous to “salary, wages and other remuneration from employment”, as the adjudicator determined. In turn, as CRB/CERB is not considered “gross employment income”, it cannot be deducted from an IRB under s. 7(3)(a).

- [11] The applicant provided an IRB report prepared by ADS Forensic Accountants, dated October 5, 2021, which was helpful in distinguishing why CRB/CERB is not salary, wages or “remuneration from other employment”, chiefly: that a claimant need not be employed prior to receiving CRB/CERB and that payments for same are not made by an employer, but as part of an *ad hoc* government relief program paid by the Canada Revenue Agency. Further, the Report provides that CERB is not akin to EI, as the adjudicator determined, as it is not paid under the *Employment Insurance Act*, but rather under the *Canada Emergency Response Benefit Act*. In a similar vein, the Report argues that being employed is not a prerequisite to receiving CERB and the applicant did not receive same as a result of being employed after the accident, meaning that CERB cannot be deducted from IRB under s. 7(3).
- [12] Accordingly, for these reasons, I agree that CRB/CERB are not deductible from IRBs under the *Schedule*. I find that the Tribunal erred in law when it ordered that CRB/CERB be deducted from the applicant’s \$400.00 per week IRB.

ORDER

- [13] The applicant’s request for reconsideration is granted. It was an error of law for the Tribunal to determine that CRB/CERB is deductible from IRB under the *Schedule*.
- [14] Accordingly, pursuant to Rule 18.4(b)(i) of the *Common Rules*, I order that para. 56 of the decision dated September 15, 2021 be varied to reflect the following result regarding the applicant’s IRB entitlement:

[56] J.F. is entitled to IRBs in the amount of \$400.00 per week from April 14, 2020 until May 8, 2021 and to interest on this benefit.



Jesse A. Boyce
Vice-Chair
Tribunals Ontario – Licence Appeal Tribunal

Released: November 17, 2021