**LICENCE APPEAL TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS**

**Safety, Licensing Appeals and Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario**

Ontario

**Tribunal File Number: 17-003702/AABS**

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

**A. A.**

**Applicant**

and

**RBC General Insurance Company**

**Respondent**

**DECISION**

| | |
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| **ADJUDICATOR:** | **Thérèse Reilly** |
| **APPEARANCES:** | |
| For the Applicant: | Jason Singer, Counsel |
| For the Respondent: | Phillip Pollack, Counsel |
| **Heard in Writing and by Teleconference:** | **July 3, 2018** |

## OVERVIEW

[1] The applicant was injured in an automobile accident on December 24, 2014 when his vehicle was hit from behind. He applied for and sought an income replacement benefit (IRB) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule*"). The respondent paid him the IRB from December 30, 2014 until June 18, 2015 when, following an insurer's examination, the respondent determined that the applicant did not meet the test to be eligible for an income replacement benefit. The applicant has not returned to work and the respondent has not paid him an IRB since that date. The applicant has applied to the Licence Appeal Tribunal – Automobile Accident Benefit Service ("Tribunal") seeking an IRB from June 18, 2015 onward.

[2] There are two statutory tests to meet to be entitled to an IRB. For the period being sought by the applicant from June 18, 2015 to December 22, 2016 (the pre 104 week IRB), the applicant has to establish that 1) he was employed or self-employed at the time of the accident and 2) during the 104 week period he suffered a substantial inability to perform the essential tasks of his pre-accident employment.

[3] For the IRB being claimed by the applicant from December 22, 2016 to date and ongoing (the post 104 week IRB), the applicant has to establish that he suffers a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training or education. The second test is more stringent in that the applicant must show a complete inability to engage in any employment for which he is reasonably suited by education, training or education.

[4] At the time of the accident, the applicant was self-employed as a carpenter apprentice. He claims that because of his injuries he meets both statutory tests and that he now suffers chronic pain.

[5] The respondent denies the applicant meets either test and maintains the applicant suffered no injuries that entitle him to an IRB post the date of denial, being June 18, 2015.

[6] The applicant gave evidence by affidavit dated January 10, 2018 and was cross examined on the affidavit at a hearing held by teleconference on May 10, 2018. All other evidence was submitted by way of written submissions with attached documentary evidence.

## ISSUES

[7] The following are the issues to be decided:

(a) Is the applicant entitled to an IRB in the weekly amount of $138.46 from June 18, 2015 to December 22, 2016 (pre 104 week IRB)?

(b) Is the applicant entitled to an IRB in the weekly amount of $185.00 from December 22, 2016 to date and ongoing (post 104 week IRB)?

[8] Is the respondent liable to pay an award under *Regulation 664, Automobile Insurance*[1] ("Regulation 664") because it unreasonably withheld or delayed payments to the applicant?

[9] Is the applicant entitled to interest on any overdue payment of benefits?

## RESULT

[10] The applicant is not entitled to an IRB in the weekly amount of $138.46 from June 18, 2015 to December 22, 2016 (pre 104 week IRB).

[11] The applicant is not entitled to an IRB in the weekly amount of $185.00 from December 22, 2016 to the date of this decision (post 104 week IRB).

[12] The applicant is not entitled to an award for unreasonably withheld or delayed payments under section 10 of Regulation 664.

[13] No interest is payable as there are no overdue payment of benefits.

## ANALYSIS

### Pre 104 week IRB

[14] Section 5(1) of the *Schedule* outlines the test applicable for the period starting one week after the date of the accident to or within 104 weeks of the accident. The applicant must have been employed or self-employed at the time of the accident and during the 104 week period the applicant is entitled to be paid an IRB if he suffered a substantial inability to perform the essential tasks of his pre-accident employment.

[1] R.R.O. 1990, Reg. 664

[15] The applicant contends that he suffered both physical and psychological impairments as a result of the accident.[2] In his affidavit, he states he suffered the following injuries as a result of the accident:

(a) Neck Pain

(b) Back Pain

(c) Sleep disturbance

(d) Decreased appetite

(e) Mood disturbance

(f) Feelings of anxiety

(g) Diminished interest in most activities

(h) Fatigue

(i) Feelings of worthlessness and indecision

[16] In his affidavit, the applicant indicates he has severe neck and back pain which increases with general activity, lying down, prolonged sitting and various activities including lifting, standing, jogging, squatting, reaching and walking.[3] He complained of this pain to his family doctor, Dr. James Carson, and reported this to the Cannabinoid Medical Clinic (the Clinic). He saw his family doctor on various occasions in 2015 and complained of pain. On January 14, 2015[4] and February 19, 2015 and complained of back pain as a result of the accident and that he could not work due to back pain. The applicant attended at the Clinic at various times in 2015 and 2016. The Clinic reported that the applicant had back and neck pain[5] and described his condition as "chronic pain and ADHD".

[17] There are contradictions between the injuries listed by the applicant and the medical records. The X-ray taken at the hospital on the day of the accident of his lumbar spine did not reveal any bone abnormality and the disc spaces were preserved.[6] The Disability Certificate,[7] dated February 21, 2015, completed by his family doctor, Dr. Carson refers only to back pain and whiplash (WAD 1)

[2] Affidavit of the applicant dated January 10, 2018, paragraphs 3, 14, 15, 36.
[3] Affidavit of the Applicant, January 10, 2018, paragraphs 9, 10.
[4] Clinical notes and records of Dr. Carson, tab 4 of the applicant's document brief.
[5] Letter dated February 19, 2015, Cannabinoid Medical Clinic, Tab 7 of the applicant document brief.
[6] Written submissions of the respondent, paragraph 9.
[7] OCF 3 dated February 21, 2015, tab 1 of the applicant's document brief.

arising from the accident and indicates that the applicant, as a result of these injuries, cannot return to his pre-accident employment as an apprentice, including modified duties. The family doctor noted that the disability would persist for 9 to 12 weeks. On cross examination, the applicant was questioned about the OCF 3 and the fact that his family doctor only listed two medical conditions. No explanation was provided on why the two listed injuries in the OCF 3 differ from his list of injuries. Moreover, the Disability Certificate stated he suffered low back pain which was ongoing but indicated that the whiplash was mostly resolved.

[18] The records from the physiotherapy clinic and his family doctor indicate he attended only eight sessions between January 5, 2015 and February 6, 2015. On March 6, 2015, he was discharged from physiotherapy treatment for not attending.[8] In the three years prior to the hearing, the records indicate that the applicant has not attended physiotherapy treatment for back pain.

[19] As a result of the accident, the applicant also claims he has had to resort to using cocaine to deal with the pain and stress, as well as Tylenol and medical marijuana to provide some relief from pain.[9] This is also not consistent with the medical evidence. The January 26, 2016 clinical notes of the Clinic indicate the applicant had a past history of cocaine abuse.[10] The hospital records indicate that on December 18, 2014, the applicant had a "crisis with cocaine".[11]

[20] The applicant maintains that his injuries sustained from the accident prevent him from engaging in any pre-accident employment.

[21] In his affidavit, the applicant explains that his work as an apprentice carpenter involved heavy labour tasks, including installing structures and fixtures, measuring, cutting and shaping various materials including wood, steel and plastic, constructing, building frameworks, including walls, roofs, floors, and inspecting and replacing damaged frameworks and other structures.[12] His work was physically demanding. He carried a tool box weighing approximately 25-30 pounds and also had to climb ladders, crouch, bend, extend and reach.

[22] Because of his back pain, the applicant states he is unable to lift any objects. He has difficulty performing certain tasks of his employment including standing, bending, reaching and squatting (he can only complete a partial squat). He

[8] Written submissions of the respondent, paragraph 12.
[9] Written submissions of the applicant, page 6. Affidavit of the Applicant, January 10, 2018, paragraphs 16, 40.
[10] Written submissions of the respondent, paragraph 24.
[11] Written submissions of the applicant, paragraph 7.
[12] Written submissions of the applicant, page 3. Affidavit of the applicant, January 10, 2018, paragraphs 36.

cannot climb ladders, wear his tool belt, and lift industrial furniture, etc.[13] On September 8, 2015 his family doctor noted the applicant told him he had quit his construction job due to pain.

[23] The applicant attended a chronic pain assessment on August 2, 2017 with Dr. David Mula, physician and chronic pain specialist. In his September 13, 2017 report,[14] Dr. Mula found the applicant suffered from severe back and neck pain. Dr. Mula diagnosed the applicant with the following:[15]

(a) Chronic Pain syndrome

(b) Chronic Cervical Pain

(c) Chronic Mid Back Pain

(d) Chronic Lower Pain

(e) Chronic Left Sacroiliac Joint Dysfunction

(f) Chronic Mood Disturbances

(g) Chronic Sleep Disturbances

[24] Dr. Mula noted that the applicant's ability to stand and walk for prolonged periods was intact but he had trouble lifting, carrying, bending, squatting and twisting. He was able to walk and drive. He reported only mild pain (1 out of a possible 10) while walking.

[25] It was his diagnostic impression[16] that the applicant cannot perform the essential tasks of his employment. Dr. Mula stated the applicant provided him with a four year occupational history of his work as an apprentice construction worker, with the essential tasks being installing shelving and carpentry. His diagnostic impression is that the chronic pain is likely due to the accident and he could not return to his pre-accident employment.

[26] The evidence concerning the applicant's inability to perform the essential tasks of his employment is inconsistent with two reports provided by the respondent's assessors. The insurer sent the applicant to an insurer examination on April 20, 2015, four months after the accident. Dr. Osinga, orthopaedic surgeon, examined

[13] Affidavit of the applicant, January 10, 2018, paragraphs 37, 38, 41.
[14] Chronic Pain Assessment Report dated September 13, 2017, tab 17 of the applicant document brief.
[15] Chronic Pain Assessment Report dated September 13, 2017, tab 17 of the applicant document brief, page 9.
[16] Chronic Pain Assessment report dated September 13, 2017, at tab 17, page 9.

the applicant and noted the applicant appeared generally well but was pain focussed. Dr. Osinga found no reproducible musculoskeletal evidence of substantial motor vehicle accident impairment.[17] He found no evidence of any accident-related disability and, based on these findings, no substantial inability to perform his pre-accident employment. The injuries were soft tissue injuries. Based on Dr. Osinga's findings and medical evidence, the insurer denied the claim for the IRB.

[27] A Functional Abilities Evaluation (FAE) dated May 25, 2015[18] was completed by J. Duffy, physiotherapist, who reported that the applicant was able to walk and had no issues while sitting. He was able to shift in his seat with no sign of pain. He was observed walking around the clinic freely. During the evaluation, the applicant declined to perform low lift testing. He also declined all tests for carrying, kneeling, crouching, and reaching, due to fear of aggravating pain. He declined to stoop, kneel and crouch. The evaluator noted he was fine to sit, walk and stand. He was also able to lift 10 pounds and hold it for 5 seconds. The evaluator concluded that there were no objective signs consistent with limitations. The FAE revealed inconsistent performance.

[28] Dr. Osinga completed two addendum reports, dated November 28, 2015 and January 15, 2018. In both reports, Dr. Osinga's medical opinion in his report dated May 28, 2015 and examination of the applicant on April 30, 2015 did not change. Dr. Osinga indicated in the second addendum report a review of Dr. Mula's chronic pain assessment. Despite this review, Dr. Osinga's initial medical opinion did not change.[19]

[29] I also note a review of the clinical notes and records of his family doctor indicates that he suffered from certain medical conditions other than the neck and back pain prior to the accident. For example, he was diagnosed with ADHD in 2011 and he reported to his doctor on May 2, 2013 that he felt "like a zombie" and was prescribed medication. On June 3, 2014, he reported to his family doctor that he was unable to sleep. Also, the hospital records of December 5, 2014 indicate he had issues with anger management (the applicant acknowledges this condition in his affidavit). The applicant had attended at the hospital after he had hit a wall with his right hand and injured it as a result of a fight with his father. The consultation note from the hospital dated December 18, 2014 refers to an altercation with his father.

[17] Orthopaedic Assessment Report of Dr. Osinga, applicant document brief, tab 9.
[18] Functional Abilities Evaluation completed May 25, 2015, applicant document brief, tab 11.
[19] Written submissions of the respondent, paragraphs 41 and 44.

[30] Although Dr. Osinga is not a chronic pain specialist, I prefer his report over that of Dr. Mula for several reasons. First, the orthopaedic assessment was completed in April 2015, whereas the chronic pain assessment was completed 32 months after the accident. This is important, as there is a gap in time between the examinations completed by Dr. Osinga and J. Duffy in April and May 2015 and the chronic pain assessment completed August 2, 2017. The medical records also indicate several other events may be creating or exacerbating the applicant's back pain. For example, on May 27, 2017, Dr. Carson noted that the applicant re-injured his back after he got into a fight. He also apparently injured his right ankle playing road hockey.[20] The applicant acknowledged in his affidavit that he tried to return to playing road hockey. However, if the applicant has the level of pain he self-reported to Dr. Mula, I find it is questionable he could contemplate playing road hockey.

[31] Further, Dr. Mula's assessment presents a diagnostic impression that the chronic pain is likely due to the accident. This raises the possibility there are other reasons at play that prevent the applicant from performing the essential tasks of his employment. – This along with the timing of the assessment, 32 months post-accident, also leads me to assign less weight to Dr. Mula's conclusion.

[32] The most compelling reason I discredit the report of Dr. Mula is the extent the chronic pain assessment report is based on self-reporting by the applicant and some of which is inconsistent with the applicant's evidence and medical records.[21] The applicant reported to Dr. Mula that he had no history of prior injury, existing pain or pre-existing medical conditions prior to the accident. He denied taking medications before the accident. I find these statements are not consistent with the medical evidence. The hospital records of December 5, 2014 and December 18, 2014 reflect an injury to his hand following altercations with his father and anger management issues. The family doctor notes, which were reviewed by Dr. Mula refer to the applicant being prescribed medication including for ADHD. The Clinic notes, also reviewed by Dr. Mula, refer to a past history of drug abuse including use of cocaine. He also mentioned to Dr. Mula that he attended physiotherapy a few weeks to a month after the accident, which continued twice a week until a few months before the assessment. The physiotherapy clinic records and discharge statement confirm he only attended eight visits in 2015 and was discharged from treatment in March 2015. Dr. Mula's Brief Pain Inventory is also based on self-reporting. I find the self-reporting by the applicant inconsistent with the medical evidence, which leads me to question the reliability of Dr. Mula's chronic pain assessment and his impression that the

[20] Written submissions of the respondent, paragraph 30.
[21] Written submissions of the respondent, June 21, 2018, paragraph 12.

chronic pain is most likely the result of the accident.

[33] Dr. Mula observed the applicant sitting and standing and noted he did so with difficulty. However, he also noted the applicant can stand and walk for long periods of time. These observations are contradictory to the findings of the physiotherapist, J. Duffy and Dr. Osinga from April and May 2015.

[34] The applicant relies on the case of *J.V. v. Wawanesa Mutual Insurance Company*[22] to support his position that his physical pain condition seriously interferes with his ability to perform the essential tasks of his employment. The applicant claims he struggled to return to work in the summer and fall of 2017 and was not able to cope with the work tasks.

[35] I find the evidence about ongoing back and neck pain and other pain complaints resulting from the accident in the years 2015 to 2017 is contradictory and does not support the claim that the applicant suffered as a result of the accident a substantial inability to perform the essential tasks of his pre-accident employment. In conclusion, I find the applicant has failed to establish that from June 2015 to December 2016 he met the pre 104 test for an IRB.

**Claim for the Post 104 week IRB**

[36] I also find the applicant does not meet the more stringent post 104 week test for an IRB. The statutory test to meet to be eligible for an IRB post 104 weeks is set out in Section 6 (1) of the *Schedule* which provides that for the period after the first 104 weeks of disability, the applicant must demonstrate he suffers a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training or education.

[37] The applicant maintains that his inability to lift, bend, squat, reach and extend restricts him from performing any employment.[23] He states he also has limited education and work experience having only finished a grade 10 high school education. Due to the accident he could not complete his journeyman in carpentry and he claims he would have but for the accident. He maintains he cannot return to his work due to physical limitations. He also has no formal education or training in any field (my emphasis) and his marketable skills remain in carpentry. The applicant maintains he would not excel in any field other than carpentry and he has only an aptitude for carpentry.

[22] *J.V. v. Wawanesa Mutual Insurance Company* (2017 Can LII9800 (Ont LAT)
[23] Applicant written submissions, page 10, affidavit of the applicant, paragraph 47.

[38] With respect to the IRB for the period post 104, the applicant claims that he has no training or education in any field. I question this conclusion. The evidence indicates that the applicant attended college in a business degree program but did not complete the program. This suggests he could pursue a college degree in business.

[39] Furthermore, his training and experience in the field of carpentry includes not only the physical aspects of the work but also the ability to read building plans, knowing and understand building codes and how to put cabinets together. The applicant has certain learned skills that could be used in other fields of employment where skills and knowledge of reading plans and building codes would be useful or necessary.

[40] Moreover, in his closing submissions [24] the applicant indicates that he does have work experience in other fields. He stated that he only worked in restaurants, grocery stores and carpentry.

[41] Neither party submitted evidence of employment for which the applicant might be reasonably suited by reason of education, training or experience.

[42] The applicant claims that if he has made out a prima facie case for the post 104 IRB, the onus then shifts to the respondent to establish that there is a specific occupation the applicant is capable of performing. The applicant argues that since the respondent has failed to offer evidence on suitable alternatives, the applicant has met the past 104 test. I disagree and find the applicant bears the onus and did not present evidence to support a claim for the post 104 week IRB.

[43] I find the applicant has failed to establish that he suffers a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training or education.

**Claim for an Award under Section 10 for Unreasonably Withheld or Delayed Payments.**

[44] The applicant claims he is entitled to an award for unreasonably withheld or delayed payments.

[45] Section 10 of Regulation 664 permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. the applicant) was entitled at the time of the award together with interest on all amounts then owing (including

[24] Applicant closing submissions, paragraph 4.

unpaid interest) if it finds that that an insurer (i.e. the respondent) has "unreasonably" withheld or delayed payments.

[46] Having found that the applicant is not entitled to the IRB and therefore not entitled to the benefits he claims, there is no basis on which to make an award. The applicant's award request is dismissed.

## CONCLUSION

For the reasons outlined, I find that:

[47] The applicant is not entitled to a claim for an income replacement benefit. The applicant is not entitled to an award for unreasonably withheld or delayed payments under section 10 of Ontario Regulation 664.

[48] Interest is not payable as there are no overdue payments.

**Released: September 19, 2018**

**Thérèse Reilly, Adjudicator**