



Citation: Mohamed v. Aviva General Insurance, 2022 ONLAT 19-010069/AABS

Licence Appeal Tribunal File Number: 19-010069/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:

Amina Mohamed

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: Tanjoyt Deol

APPEARANCES:

For the Applicant: Inna Zaremba, Paralegal

For the Respondent: Lauren Kolarek, Counsel

HEARD: By Way of Written Submissions

BACKGROUND

- [1] Amina Mohamed (“the applicant”), was involved in an automobile accident on February 4, 2017 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (“Schedule”).¹ She applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“Tribunal”) after her claims for benefits were denied by Aviva General Insurance (“the respondent”).
- [2] The applicant is currently 46 years old and at the time of the accident she was employed part time as a Home Support Worker since September 27, 2016. The applicant submits that she has been unable to return to work since the accident due to neck pain, left shoulder pain, left sided back pain, and headaches.

PRELIMINARY ISSUE

- [3] The respondent raised the following preliminary issue:
- a. The applicant’s reply submissions at paragraph 8 should be struck from the record or alternatively the respondent be granted leave for the sur-reply to be part of the evidentiary record.

SUBSTANTIVE ISSUES

- [4] The following are the issues to be determined for the purposes of this hearing:
- a. Is the applicant entitled to Income Replacement Benefits (“IRB”) in a weekly amount of \$178.98 from September 24, 2017, to date and ongoing?
 - b. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] With respect to the preliminary issue raised by the respondent, I will grant leave for the respondent’s sur-reply to be part of the evidentiary record.
- [6] I find that the applicant is not entitled to IRB from September 24, 2017, to date and ongoing or interest.

¹ O. Reg. 34/10 as amended.

ANALYSIS

Leave To File A Sur-Reply

- [7] I will grant leave for the respondent's sur-reply to be considered with respect to this hearing as the applicant did not oppose to the sur-reply and no prejudice has been established. However, I remind the respondent that it should have filed a Notice of Motion and sought leave from the Tribunal to file any additional submissions. In failing to seek leave prior to filing this sur-reply, the respondent risked exclusion of its sur-reply and it was solely within my prerogative to permit the sur-reply into the record.
- [8] On August 30, 2021, the respondent sent correspondence to the Tribunal which advised that it took issue with paragraph 8 of the applicant's reply submissions and sought leave to submit a brief sur-reply. In paragraph 8 of the applicant's reply, she suggested that the respondent should have provided the results of the ultrasound of the left shoulder, dated January 10, 2018, to s.44 assessor, Dr. Chris Boulias, physiatrist, to complete a further Insurer's Examination or Addendum.
- [9] The respondent in its sur-reply submits that the result of the ultrasound of January 10, 2018, was unremarkable as there was no obvious tear and as such an Addendum was not required. Further, the respondent submits that s.44 assessor, Dr. Michael Ko, physiatrist, reviewed the ultrasound of January 10, 2018, and provided his opinion with respect to same. The respondent requested that either paragraph 8 of the applicant's reply submissions be struck, or leave be given to submit its sur-reply.
- [10] I have granted leave for the respondent's sur-reply to be part of the record as no prejudice has been established and I place little weight on the report of Dr. Boulias with respect to my decision. I placed little weight on the report of Dr. Boulias as he did not comment on whether the applicant met the test for pre- or post-104 IRB. Dr. Boulias was retained by the respondent to provide an opinion of whether the applicant's injuries were classified within the Minor Injury Guideline ("MIG"). As the parties resolved all the medical and rehabilitation issues listed in the Case Conference Order, and only IRB with interest remains as an issue in dispute, I placed little weight on Dr. Boulias's report due to lack of relevancy.

Entitlement to IRBs within 104 weeks of the accident (September 24, 2017, to February 4, 2019)

- [11] The test for eligibility to receive IRBs within 104 weeks of the accident is set out in s. 5(1) of the *Schedule*. An insured person is eligible to receive IRBs if, as a result of the accident, she suffers a substantial inability to perform the essential tasks of her pre-accident employment within 104 weeks after the accident. The burden of proof rests with the applicant.
- [12] The applicant relies on the authority of *16-000179 v. Old Republic Insurance Company*² that the test for pre-104 IRB is as follows:
- a. Was the applicant employed at the time of the accident?
 - b. Causation; and
 - c. Does the applicant suffer a substantial inability to perform the essential tasks of her pre-accident employment as a Home Support Worker? This component is further broken into two further determinations:
 - i. What are the essential tasks of the applicant's employment?
 - ii. Is the applicant substantially unable to perform the essential tasks of her employment?³
- [13] The respondent relies on the authority of *17-002651 v. Aviva General Insurance*⁴ which outlines the same test for pre-104 IRB with the exception of adding an additional criterion to consider with respect to whether the applicant suffers a substantial inability. The additional criterion is to what extent is the applicant unable to perform those tasks?⁵
- [14] Both authorities referred to are non-binding, however I find the additional criterion mentioned in *17-002651 v. Aviva General Insurance* to be persuasive and adopted the following criteria to consider with respect to substantial inability in this matter: The applicant must identify the essential tasks of her employment, which tasks she is unable to perform, and to what extent she is unable to perform them.

² 2016 CanLII 73692 (ON LAT).

³ *Ibid*, para 5-20.

⁴ 2018 CanLII 13150 (ON LAT).

⁵ *Ibid*, para 7.

Essential tasks of the applicant's pre-accident employment

- [15] The applicant submits that she worked as a Home Support Worker at the time of the accident. The applicant submits that her duties were as follows: general housekeeping services, cleaning kitchen and bathrooms, floor cleaning, laundry, vacuuming, spot cleaning of refrigerator, cleaning of the stove, occasional cleaning of the oven, dusting and polishing furniture, cleaning mirrors, bed making, grocery shopping, light meal preparation, effective communication with clients, reporting any concerns regarding client's health or safety, maintaining client information, following guidelines and procedures for dealing with incidents, maintaining a safe and healthy work environment, and attending in service learning, training, and development opportunities.⁶
- [16] The applicant submits that she is unable to return to work due to neck pain, left shoulder pain, left-sided back pain, and headaches. In particular, she submits that due to her ongoing left shoulder issues, she is unable to perform physically demanding employment duties that she was performing at the time of the accident.
- [17] The respondent submits that the applicant does not meet the test for pre-104 IRB as she has not produced evidence demonstrating that she suffered a substantial inability to return to the essential tasks of her pre-accident employment from September 24, 2017, to date.

Which tasks the applicant was unable to perform and the extent that she was unable to perform them

- [18] The applicant has failed to meet her evidentiary onus to demonstrate that she is entitled to pre-104 IRB from September 24, 2017, to February 4, 2019, for the reasons outlined below.
- [19] Firstly, the records of the applicant's family physician, Dr. N. Awad from the time of the accident to March 31, 2020, do not support that she cannot perform the essential tasks of her pre-accident employment as a result of the accident. In fact, on February 13, 2017, Dr. Awad completed a note which stated that the applicant was unfit and unable to work until February 20, 2017.⁷ Further, I acknowledge at that time, the applicant advised that she cannot sit or stand for long periods of time, however Dr. Awad concluded that she is only unfit to work until February 20, 2017.⁸ Dr. Awad did not provide a further medical opinion of

⁶ Employer's Confirmation Form (OCF-2).

⁷ Clinical Notes and Records of Dr. Awad, page: 15.

⁸ *Ibid.*

whether the applicant remained unfit to work after this date nor do any of the entries state that the applicant cannot perform her essential tasks of pre-accident employment. While I acknowledge that the applicant reported severe back pain, neck pain, and left shoulder pain, this is not the test for IRB. The applicant has failed to demonstrate that as a result of her back pain, neck pain, and left shoulder pain she cannot substantially perform the essential tasks of a Home Support Worker. I further acknowledge that the applicant obtained a new family physician Dr. F. Asrar in September 2020, however this is unpersuasive as Dr. Asrar did not provide an opinion of whether the applicant could perform the essential tasks of a Home Support Worker. On September 28, 2020, the applicant advised Dr. Asrar of this accident and that she had lower back pain, left sided head pain, and left shoulder pain.⁹ The applicant further advised that she has been working on and off on an assembly line.¹⁰ Once again, while I acknowledge the applicant's pain complaints, Dr. Asrar did not opine that she cannot work as a Home Support Worker as a result. Further, while I acknowledge that on December 10, 2020, the applicant advised Dr. Asrar that she was having a lot of shoulder and back pain,¹¹ which resulted in missing time from work, Dr. Asrar once again did not provide a medical opinion of whether she cannot work because of this accident.

- [20] Secondly, the Disability Certificate ("OCF-3") submitted by Dr. M. Boodhram, chiropractor, on February 10, 2017, is outdated and only supported that the applicant met the test for IRB for 9-12 weeks.¹²
- [21] Thirdly, the ultrasound of the applicant's left shoulder dated January 10, 2018, is insufficient to demonstrate that she cannot perform the essential tasks of a Home Support Worker. While I acknowledge that the ultrasound revealed extensive rotator cuff tendinosis,¹³ the applicant has failed to demonstrate that as a result of this diagnosis, she cannot perform the essential tasks required for a Home Support Worker. The applicant met with Dr. A. Bahrami, on January 7, 2021, who diagnosed her with chronic rotator cuff tendinosis in the left shoulder, which severely limited the movement of her left shoulder.¹⁴ While I acknowledge that the applicant self-reported that she had severe limited movement of her left shoulder, I have placed less weight on this diagnosis for the following reasons. Firstly, there is a gap in the records with respect to her left shoulder complaints. From 2017, until she saw Dr. Asrar in September 2020, she only complained of

⁹ Clinical Notes and Records of Glen Gate Medical, page: 3.

¹⁰ *Ibid.*

¹¹ *Ibid*, page: 7.

¹² OCF-3 dated February 10, 2017.

¹³ Clinical Notes and Records of Dr. Awad, page: 34.

¹⁴ Clinical Note and Record of Dr. Bahrami.

left shoulder pain 4 times to Dr. Awad, the last one of which was on February 3, 2018. The next time the applicant complained of left shoulder pain to a treating practitioner was on September 28, 2020, to Dr. Asrar. Secondly, she did not advise Dr. Bahrami of this accident. Thirdly, no objective testing was conducted by Dr. Bahrami. Fourthly, the applicant has failed to establish that her left shoulder impairment is linked to this accident, and she has failed to address which employment tasks the limited movement of her left shoulder would affect and to what extent.

- [22] I further acknowledge that the applicant has made submissions with respect to the deficiencies of the IE reports of Dr. M. Ko, Dr. S. Mor, and Dr. Boulias. However, the onus is on the applicant to demonstrate that she is entitled to IRB, and not on the respondent to disprove entitlement.
- [23] On the medical evidence before the Tribunal, I find no reason to interfere with Aviva's determination to stop the IRBs, as there is limited medical evidence beyond the applicant's self-reporting indicating an occupational disability. I find that the applicant has failed to meet her onus to prove that she is entitled to IRB from September 24, 2017, to February 4, 2019, because there is no medical indication that she cannot perform the essential tasks of her pre-accident employment.

Entitlement to IRBs beyond 104 weeks of the accident (February 5, 2019, to date and ongoing)

- [24] To be eligible to receive IRBs 104 weeks post-accident, an applicant must meet the stricter test of a complete inability to engage in any employment for which he or she is reasonably suited by education, training, or experience.
- [25] The applicant made no submissions whether she met the test for post-104 IRB. The applicant has the evidentiary onus to demonstrate that she is entitled to post-104 IRB. The applicant further failed to refer to any medical evidence or expert reports in her submissions that supports that she meets the test for post-104 IRB. As such, I find that the applicant has failed to discharge her evidentiary onus to demonstrate that she is entitled to post 104-IRB from February 5, 2019, to date and ongoing.

Interest

- [26] Pursuant to section 51 of the *Schedule*, interest is payable on the overdue payment of benefits. As there are no benefits owing, no interest is payable.

CONCLUSION AND ORDER

[27] For the reasons outlined above, I find that:

- a. The applicant is not entitled to pre-104 IRB from September 24, 2017, to February 4, 2019;
- b. The applicant is not entitled to post-104 IRB from February 5, 2019, to date and ongoing;
- c. The applicant is not entitled to interest; and
- d. The application shall be dismissed by the Tribunal.

Released: July 28, 2022



Tanjoyt Deol
Adjudicator