



**Citation: Nagesu v Traders General Insurance Company, 2022 ONLAT 19-008171/AABS**

**Licence Appeal Tribunal File Number: 19-008171/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:

**Wignarajah Nagesu**

**Applicant**

and

**Traders General Insurance Company**

**Respondent**

## **DECISION**

**ADJUDICATOR: Thérèse Reilly**

### **APPEARANCES:**

For the Applicant:	Wignarajah Nagesu, Applicant David S. Wilson, Counsel Heidi Buchanan, Legal Assistant
For the Respondent:	Harkirat Sharda, Representative Rebecca Brown Greer, Counsel
Observers:	Andrea Dunbar, Litigation Specialist Selina Ferenac, Traders
Court Reporter:	Prashanth Thambipillai

**HEARD: by Videoconference: July 13 and 14, 2022**

## BACKGROUND

- [1] The applicant was involved in an automobile accident on **June 12, 2018**<sup>1</sup> and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010* (“Schedule”). The applicant seeks an award under section 10 of Regulation 664 for unreasonably withheld or delayed payment of a benefit? The respondent denies any payments were unreasonably withheld or delayed.
- [2] The applicant and the adjuster were called as witnesses.

## ISSUES

- [3] The substantive issue for the hearing are as follows:
- a. Is the applicant entitled to receive an **award** under Regulation 664 because the respondent unreasonably withheld or delayed payment of a benefit?
  - b. Is the applicant entitled to any interest on any overdue payment of benefits?

## RESULT

- [4] Based in the totality of the evidence the applicant had failed to prove entitlement to an award under section 10 of Regulation 664. The claims for an award and interest are dismissed.

## PRELIMINARY ISSUES

- [5] In his opening submissions, the applicant introduced three issues (collectively called the Three IRB Issues) for consideration by the Tribunal involving a late payments of an IRB claim for the following amounts and periods<sup>2</sup>:
- a. \$4165.09 (no interest paid) for June 19, 2018 to September 6, 2018 paid on January 30, 2019.
  - b. \$8284.98 (no interest paid) for September 7, 2018 to February 7, 2019 paid on January 30, 2019.

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<sup>1</sup> The Orders of the Tribunal from the case conferences held in this matter on November 28, 2019 and May 28, 2020 state the accident occurred on May 12, 2018. The application and letter from the applicant's counsel dated July 5, 2019 state the accident occurred on June 12, 2018.

<sup>2</sup> Summary of Claims for Award and Interest, tab 1, applicant document brief.

- c. \$2259.56 (no interest paid) for February 8, 2019 to March 21, 2019 paid on March 24, 2019.

The evidence indicates the applicant was paid IRBs from June 19, 2018 to March 21, 2019 excluding interest.<sup>3</sup>

- [6] The respondent in its opening submission objected to the Three IRB Issues being added as they are not properly before the Tribunal. The respondent states no motion was filed before the hearing to add the Three IRB Issues. This is the first time the respondent was provided any notice to add the Three IRB Issues. On that basis it objected to having these issues added. The respondent referred to the Tribunal decision in *Ivylyn O'Connor and Aviva General Insurance Company*<sup>4</sup> that held the applicant could not raise an issue not properly brought before the Tribunal. I agree with the respondent.
- [7] The applicant wanted an opportunity to reply. I declined the request to allow a reply on the basis that this is not a motion and new issues were raised in the applicant's opening submissions without any prior notice to the respondent or the Tribunal. No motion was raised in advance of the hearing or at the outset of the hearing. The applicant was offered an opportunity to do so on day 2 of the hearing but his counsel declined. The applicant failed to follow Rule 15.2 of the *License Appeal Tribunal Common Rules of Practice and Procedure*<sup>5</sup>. The respondent is the party that is prejudiced in that they are caught by surprise with no opportunity or notice to properly respond to a motion. The Tribunal can control its processes, prevent prejudice and avoid surprise.
- [8] As the hearing progressed the parties advised the applicant was also seeking an award in respect of a delayed payment for medical benefit for a psychological assessment for \$2200 dated April 18, 2019 which was approved December 5, 2019 and paid in full in February 2020. The applicant alleges no interest was paid on this amount and seeks an award on the late payment. This medical benefit was not listed as an issue for this hearing and as it was approved in full, I find it is not an issue in dispute.
- [9] The applicant stated it had sent email dated February 9, 2021 to the respondent which set out particulars of its award claim.<sup>6</sup> However, this email is

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<sup>3</sup> Application filed with the Tribunal on July 5, 2019 with letter from counsel, exhibit 28.

<sup>4</sup> *Ivylyn O'Connor and Aviva General Insurance Company*, 19-006131 Ont. LAT.

<sup>5</sup> *License Appeal Tribunal Common Rules of Practice and Procedure*, Version 1, October 2, 2017 as amended.

<sup>6</sup> Exhibit 76, email from the applicant to the respondent dated February 9, 2021, submitted to the Tribunal July 14, 2022.

communication between the parties. It is not notice. It is not a motion to add issues. There is no Order of the Tribunal as required that added these issues as issues for this hearing. The applicant to add these issues at the hearing must have done so by motion with proper notice and he did not. He can also file a separate application to the Tribunal to add these issues in dispute. Lastly, the email of February 9, 2021 demonstrates the applicant knew about adding these issues at least one year in advance of the hearing and took no steps to being a motion prior to the hearing.

- [10] At the outset of the second day of the hearing, I rendered my decision that the applicant is not entitled to introduce the Three IRB Issues as they are not properly before the Tribunal. The applicant failed to bring any motion at the outset of the hearing and in advance of the hearing as required by Rule 15.2. The applicant provided no notice to the respondent of its position to add these issues to the hearing.

#### **Applicant's Request to Recluse Adjudicator**

- [11] The applicant then requested that I recluse myself from the hearing on the basis of bias. The respondent objected. After hearing brief submissions, and on the basis that there is no evidence of any bias, I declined to do so. A request to recluse an adjudicator on the basis of bias must involve evidence to support a claim of bias. No such evidence was advanced. Further, a decision that is not agreeable to a party is not a basis to allege bias. No case law and no facts were advanced by the applicant to support his request.

#### **Claim for an Award under Section 10 for Unreasonably Held or Delayed Payments**

- [12] The applicant claims he is entitled to an award for unreasonably held or delayed payments.
- [13] 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 unpaid interest) if it finds that that an insurer (*i.e.*, the respondent) has "unreasonably" withheld or delayed payments.
- [14] The applicant's award claim is in respect of a delayed payment of the IRB for the period March 22, 2019 to January 14, 2021 paid in full on January 14, 2021 when the respondent paid \$40,094.99 for IRBs for the period March 22, 2019 to January 13, 2021 with interest (except interest was not paid for three days from

January 11 to the 14th, 2021). The applicant was being paid an IRB at the time of the hearing.

- [15] The applicant's award claim is also in respect of a medical benefit for an OCF-18 for psychological treatment dated August 19, 2019 for \$4122.39 was partially approved on December 2, 2019 on payment of \$2793.76. The balance for \$1328 was paid on January 7, 2021. The award claim is in respect of the delayed payment of \$ 2793.76 for the period between August 30, 2019 and December 2, 2019 and the payment of \$1328 between the denial date of December 2, 2019 to the payment on January 7, 2021.
- [16] The respondent maintains that to be successful in a claim for an award, the behaviour of the respondent must be proven by the applicant to be either excessive, imprudent, stubborn, inflexible, unyielding or immoderate.<sup>7</sup>
- [17] Based on the totality of evidence, I find the applicant has not established any basis in respect of the behavior on the part of the respondent to make an award. The request for an award is dismissed.

### **Analysis**

- [18] The applicant maintains the initial denial of the IRB claim based on the respondent's IE orthopaedic assessment by Dr. Yee, orthopaedic surgeon was inappropriate and unreasonable.<sup>8</sup> He maintains an insurer is required to make decisions respecting termination of a benefit on the entirety of information available to it, and not just on excerpts of a report. He maintains, Dr. Yee made it clear in his report that he was providing his opinion based solely from an orthopaedic perspective. He maintains that based on Dr. Yee's report, the respondent should have led the respondent to realize that other assessments were required, and that termination of the applicant's income replacement benefits was premature.
- [19] The applicant further maintains that the respondent improperly denied the IRB on the basis of Dr. Yee's, orthopaedic assessment, which he submits is flawed in that 1)Dr. Yee did not consider medical documentations provided to him in November 2019 and 2) at the time of his report Dr. Yee did not have any clinical notes and records of the applicant's family doctor. There are 5 medical reports of the applicant listed in the November 6, 2019 email from the applicant to the

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<sup>7</sup> *EM v. Guarantee Company of North America*, 2019 CanLII 101475 (ONT LAT), paragraph 43 of page 113, applicant document brief.

<sup>8</sup> Exhibit 76, email from applicant to the respondent dated February 9, 2021.

respondent.<sup>9</sup> These reports include the report of Dr. Kanagaratman referencing a psychological impairment which although dated June 29, 2019, was not sent to the respondent until November 2019. There was also an Functional Abilities Evaluation (FAE) dated June 2019 from the applicant although not provided to the respondent until November 2019. The email of November 2019 with the enclosed medical reports indicates that at the time of the initial denial the respondent only had the OCF-3 of the treating chiropractor for consideration.

- [20] The respondent denied the IRB based on the Orthopaedic Surgery Assessment Report of Dr. Gilbert Yee, orthopaedic surgeon dated March 1, 2019<sup>10</sup> which was based on the medical documentation provided which included a disability certificate (OCF-3) dated June 26, 2018<sup>11</sup> from Dr. Arsenault, chiropractor which stated the applicant's injuries were within the Minor Injury Guideline (MIG). From an orthopaedic perspective and based on the available documentation and clinical findings, Dr. Yee did not identify any objective reliable clinical findings to suggest that the applicant suffered a substantial inability to perform the essential tasks of his pre-accident employment. He also stated that there are no objective clinical findings to suggest any active radiculopathy or myelopathy. He indicated in his report he would welcome a review of any family doctor notes. The evidence also indicates the applicant did not advise Dr. Yee of any psychological issues.
- [21] Dr. Yee completed a paper review dated May 8, 2019<sup>12</sup> to address the issue of MIG. In his report, Dr. Yee concluded his opinion from March 1, 2019 remained unchanged.
- [22] The respondent maintains any delay is a result of the delay of the applicant in attending IEs and in providing documentation and supporting medical records. The applicant for example failed to submit 1) income documentation about the three jobs that he held at the time of the accident until at least six months after the accident and 2) a number of medical reports until November 2019. I agree with the respondent that the applicant delayed providing medical records to the respondent regarding its IRB claim until at least the end of November 2019.
- [23] When the medical records were sent in November 2019 the respondent arranged for new IE examinations. The evidence indicates that throughout 2019 and 2020 the respondent requested medical records from the applicant. As mentioned

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<sup>9</sup> Exhibit 34, email from the applicant to the respondent dated November 6, 2019, tab 34, applicant document brief.

<sup>10</sup> Exhibit 24, Orthopaedic Assessment of Dr. Yee dated March 1, 2019, tab 24, applicant document brief.

<sup>11</sup> Exhibit 75, OCF-3 dated June 26, 2018, tab 1, applicant medical brief (the Brief)

<sup>12</sup> Exhibit 27, Orthopaedic Surgery Report Paper Review of Dr. Yee dated May 8, 2019, tab 27, the Brief.

some were provided in November 2019. Some family doctor records and hospital records were not sent to the respondent until December 14, 2019.<sup>13</sup> One of the applicant's employment file from the security company was not sent to the respondent until December 14, 2019.<sup>14</sup> The applicant also sent a section 25 FAE report on December 17, 2019.<sup>15</sup> On receipt of the additional medical records the respondent arranged further IEs regarding the IRB claim. The additional IEs were completed by Dr. Nikkou and Dr. Yee.<sup>16</sup> The opinion of both IE assessors remained unchanged.<sup>17</sup> Both opined the applicant did not meet the test for a pre-104 week IRB and the applicant could return to work.<sup>18</sup>

- [24] Dr. Nikkhou found the psychological impairment was very mild and did not pose any restrictions on the applicant's ability to return to work. Dr. Yee did not find the result of the applicant's FAE<sup>19</sup> compelling and suggested a more current FAE be obtained to assess the applicant's condition. In his report he states that he did not find the FAE assessment reliable in that it did not identify reliable clinical findings to support the level of disability.<sup>20</sup> The respondent attempted to schedule a further FAE.<sup>21</sup> The applicant refused to attend the FAE.<sup>22</sup> Ultimately an order was issued at a motion compelling the applicant to attend an FAE.<sup>23</sup>

### **The Denial of the Medical Benefit**

- [25] On receipt of a medical benefit an OCF-18 for psychological treatment in August 2019, the respondent scheduled an IE to assess the OCF-18. Dr. Nikkhou, neuropsychologist assessed the OCF-18. Dr. Nikkhou in his report indicated the applicant magnified his symptoms. He diagnosed the applicant with mixed mild anxiety. Dr. Nikkhou did not find any evidence of chronic pain or a somatic disorder. In his report of November 19, 2019 he recommended that the treatment plan for psychological treatment be partially approved.<sup>24</sup>

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<sup>13</sup> Exhibits 39, correspondence from applicant dated December 5, 2019 to the respondent, and exhibits 40 and 41, correspondence dated December 14, 2019 to the respondent, the Brief.

<sup>14</sup> Ibid, Exhibit 41.

<sup>15</sup> Exhibit 44, email dated December 17, 2019 stating FAE required, tab 44, the Brief.

<sup>16</sup> Ibid, Exhibit 39.

<sup>17</sup> Exhibit 50, Explanation of Benefit dated February 13, 2020, tab 50, the Brief.

<sup>18</sup> Exhibits 47, Multidisciplinary Report, Dr. Yee and Dr. Nikkhou, dated February 7, 2020, tab 49, the Brief.

<sup>19</sup> Functional Capacity Evaluation report, Mr. Atila Balaban, dated June 27, 2019, tab 3 Exhibit 75.

<sup>20</sup> Ibid, Exhibit 47.

<sup>21</sup> Exhibits 43 Email dated December 17, 2019 and Exhibit 44, Ibid, and Explanation of Benefit dated February 13, 2020, Exhibit 50, tab 50, the Brief.

<sup>22</sup> Exhibit 45, Email, from applicant dated December 18, 2019 (will not attend IE), tab 45, the Brief.

<sup>23</sup> Exhibit 64, tab 64, the Brief.

<sup>24</sup> Exhibit 35, Psychological Assessment Report, Dr. Nikkhou, dated November 19, 2019, tab 35, the Brief.

## **Re-Instatement of the IRB and Full Approval of the Medical Benefit**

- [26] It was not until the applicant submitted three independent reports late in 2020 that the respondent reinstated the IRB. At that time the applicant submitted a November 9, 2020 vocational assessment report, a physiatry report dated December 1, 2020 from Dr. Kekosz, physiatrist and a December 2, 2020 report from Dr. Arseneault, chiropractor. After a review of the new medical reports the respondent reassessed the IRB claim and reinstated it.<sup>25</sup> In the same letter it also reassessed the OCF-18 for psychological treatment for \$4122.34 and fully approved the OCF-18 for psychological treatment.
- [27] The applicant maintains the respondent scheduled IE assessments which were not necessary. For example, he maintains there was no need for a second assessment regarding the medical benefit as the balance of the treatment plan was approved in January 2021.<sup>26</sup>
- [28] The respondent maintains the applicant's failure to attend IEs delayed its ability to address the IRB claim. It had to bring a motion for example requiring the applicant to attend an FAE. The motion was successful. The IRB claim and the hearing were delayed however until the applicant attended an FAE.
- [29] Moreover, he maintains the reliance upon the reports delivered by the applicant in the November and December 2020 exemplifies in his view the unreasonable nature of the respondent's conduct prior to that date.

## **DECISION**

- [30] I find based on the totality of evidence there is no basis for an award in respect of the IRB claim or the medical benefit. The evidence indicated the applicant delayed providing medical documents until the late fall 2019 and that he sporadically provided medical documents. As such he was responsible for a number of delays in the assessment of this file. For example, he failed to provide medical documents to support the IRB claim until late 2019 despite repeated requests. He refused to attend an FAE until a motion was obtained requiring his attendance.
- [31] The respondent I find did not act unreasonably in scheduling IE examinations as they were required to assess the new medical documentation being provided to it so that it could assess the IRB and the medical benefit. Section 44 of the Schedule provides that an insurer to determine if an insured is or continues to be

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<sup>25</sup> Exhibit 72, January 7, 2021, Explanation of Benefits, tab 72, the Brief.

<sup>26</sup> Exhibit 35, Ibid.



entitled to a benefit may but not more often than necessary may require an insured to be examined. I find the IEs were scheduled after receipt of new medical information from the applicant, for example, the records received in November 2019 and the FAE in December 2019. The applicant had submitted an FAE which was reviewed by Dr. Yee who explained in his report why he concluded the FAE from the applicant was not reliable. He suggested a more current FAE was required. I find it was not unreasonable to schedule another IE to address Dr. Yee's concerns.

[32] I do not find any evidence that the requests to attend an IE amounted to unreasonable behavior on the part of the respondent. At all material times the respondent acted reasonably in that they received and reviewed information and communicated with the applicant. The respondent has an ongoing obligation to adjust the file. The insurer asked repeatedly for medical information that was missing and required for its determinations of the IRB and medical benefit in dispute. An insurer is not held to a standard of perfection. The initial denial of the IRB was based on the information available to it at the time. There is no evidence to suggest denials were based on excessive, imprudent, stubborn, inflexible or immoderate behavior.

[33] The respondent argues that even if the respondent relied on a report that is incorrect, this does not amount to conduct that is excessive, imprudent etc. Something additional and significant is needed. I agree.

## **CONCLUSION**

For the reasons outlined, I find that:

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

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

**Released: September 12, 2022**



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**Thérèse Reilly, Adjudicator**