



**Citation: Reynolds v. CUMIS General Insurance Company, 2022 ONLAT 20-001599/AABS**

**Licence Appeal Tribunal File Number: 20-001599/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:

**Nicholas Reynolds**

**Applicant**

and

**CUMIS General Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR: Ulana Pahuta**

**APPEARANCES:**

For the Applicant: Naphtali Silverman, Counsel

For the Respondent: Hooman Zadegan, Counsel

**HEARD: BY WAY OF WRITTEN SUBMISSIONS**

## BACKGROUND

- [1] The applicant was involved in an automobile accident on September 19, 2017, and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010 (including amendments effective June 1, 2016)*<sup>1</sup> (“Schedule”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [2] At a case conference<sup>2</sup> held on February 2, 2021, the issues in dispute were identified as being income replacement benefits, attendant care benefits and interest.
- [3] By way of subsequent motion<sup>3</sup> on May 20, 2021, the applicant added six treatment plans and two medical expenses to the issues in dispute. The applicant provided initial submissions for this written hearing on all six treatment plans, two medical expenses, income replacement benefits and attendant care benefits.
- [4] In its submissions dated November 11, 2021, the respondent stated that the applicant had now agreed to withdraw the six treatment plans, two medical expenses and the attendant care benefits as issues in dispute<sup>4</sup> as confirmed in the applicant’s reply submissions<sup>5</sup>. As such, the sole issue in dispute for this written hearing is whether the applicant is entitled to income replacement benefits and interest.

## ISSUES

- [5] The issues in dispute in this hearing are:
- a. Is the applicant entitled to an income replacement benefit of \$293.26 per week, from March 29, 2018 until April 2019, and again from March 2020 to date and ongoing?
  - b. Is the applicant entitled to interest on any overdue payment of benefits?

## RESULT

- [6] The applicant is not entitled to an income replacement benefit.

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<sup>1</sup> O. Reg. 34/10, as amended.

<sup>2</sup> Applicant’s Submissions, Tab 3, Case Conference Report and Order dated February 8, 2021.

<sup>3</sup> Applicant’s Submissions, Tab 4, Motion Order dated May 20, 2021.

<sup>4</sup> Respondent’s Submissions at paras 2-4.

<sup>5</sup> Applicant’s Reply Submissions at paras 7-10.

[7] The applicant is not entitled to interest.

## **LAW**

[8] Entitlement to an income replacement benefit is set out in sections 5 and 6 of the *Schedule*. Section 5(1)1(i) provides that the benefit is payable if the insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. Section 6(1) provides that the benefit is payable for the period in which the insured person suffers a substantial inability to perform the essential tasks of his/her employment or self-employment.

[9] Section 6(2) provides that the benefit is only payable after 104 weeks of disability if, as a result of the accident, the person suffers a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training or experience.

[10] The applicant bears the onus of demonstrating on a balance of probabilities that he is entitled to an income replacement benefit<sup>6</sup>.

## **ANALYSIS**

### ***Causation – Did the Accident Cause the Applicant’s Present Impairments?***

[11] In its submissions, the respondent raises the issue of causation. The respondent submits that the applicant suffered from serious medical conditions prior to the accident, and that his current level of functioning is not substantially different than that of his condition before the accident.

[12] The respondent relies on the pre-accident clinical notes and records (“CNRs”) of the applicant’s family physician, Dr. Idiko Sajo<sup>7</sup>, which note that the applicant’s kidneys were removed and that he underwent a renal transplant when he was 9 years old, that he was long-monitored for diabetes, in addition to issues such as smoking, hypertension and obesity.

[13] The respondent further submits that the fact that the applicant has been receiving Ontario Disability Support Program (“ODSP”) payments since 2002, is evidence of his significant level of impairment pre-accident. The respondent relies on the applicant’s initial applications for ODSP dated September 24, 2002 and December 5, 2002, where Dr. Sajo notes that the applicant needs constant

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<sup>6</sup> 16-004619 v *State Farm Insurance*, 2018 CanLII 13165 (ON LAT)

<sup>7</sup> Respondent’s Submissions, Tab B – CNRs of Dr. Sajo at p.266

medical supervision for his past renal transplant, that he has back pain, that he was being treated for depression, and that he required moderate assistance with a number of his personal care activities<sup>8</sup>.

- [14] As such, the respondent argues that the applicant's ongoing body pain, headaches and psychological problems are long-standing issues related to the applicant's pre-accident impairments and not related to the accident.
- [15] The applicant disputes this position and submits that the medical records and ODSP application the respondent relies upon are from 15 years prior to the accident. The applicant does not dispute that he has received ODSP payments, since 2002. However, he submits that for 10 years prior to the accident, he was still able to work, in addition to receiving ODSP payments. The applicant submits that he suffered serious physical and psychological impairments as a result of his accident that have rendered him unable to continue working.
- [16] Causation is established where the applicant proves that, on a balance of probabilities, the accident caused his injuries. In these cases, the "but for" test is used, whereby the applicant is required to establish that his injuries would not have occurred but for the accident
- [17] Upon review of the submissions and medical evidence of the parties, I agree with the applicant that his current level of impairment differs greatly from that pre-accident and therefore find that his pre-existing issues are not the cause of his current, accident-related impairments.
- [18] Firstly, I agree with the applicant that the fact that he has been receiving ODSP payments since 2002 does not necessarily mean that he suffered the same level of impairment pre-accident.
- [19] I also find that a number of the pre-accident medical conditions the respondent references are not relevant to the applicant's present level of impairment, namely, the kidney transplant, diabetes, smoking, obesity/hypertension. The respondent has not led any medical evidence establishing that these conditions are the cause of the applicant's present physical and psychological impairments or that an expert has linked these prior conditions, to his present state.
- [20] Rather, the applicant has provided extensive medical evidence that his current impairments are accident-related. While some of the applicant's present complaints, such as back pain or depression, were also referenced in the 2002

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<sup>8</sup> Respondent's Submissions, Tab C – ODSP file at pages, 295-308

ODSP application, I agree with the applicant that these records are from 15 years before the accident. The respondent has not provided any evidence that the applicant continued to suffer from back pain and depression for the 15 years leading up to the accident. Rather, they appear to be independent historic complaints. However, from the date of the accident onwards, there is extensive medical evidence that the applicant began to consistently report psychological and physical impairments.

- [21] With respect to the applicant's psychological complaints, the applicant was referred by his family physician Dr. Sajo soon after the accident to the Centre for Addiction and Mental Health ("CAMH"), with respect to post-traumatic stress disorder ("PTSD") and fear of driving<sup>9</sup>. I also note that Dr. Sajo explicitly references the accident in his referral.
- [22] The applicant was subsequently assessed by a psychiatrist, Dr. Ravi Kakar multiple times over the years post-accident, who diagnosed the applicant with severe major depression with mixed features, anxious distress, acute stress disorder in remission, generalized anxiety disorder, pain associated with psychological factor, social anxiety disorder and vehicular phobia<sup>10</sup>. Dr. Kakar also explicitly references the accident in his reports. Two of the applicant's psychological assessors, Dr. Maneet Bhatia<sup>11</sup> and Dr. Hannah Rockman<sup>12</sup> also diagnosed the applicant with a similar accident-related psychological impairments.
- [23] With respect to the applicant's physical impairments, I find that he has led sufficient evidence to establish that his chronic pain and headaches are accident related. Hospital records indicate that immediately post-accident he complained of pain in his left shoulder, left knee, neck, back and abdomen<sup>13</sup>. In 2017 he saw Dr. Albert Li, optometrist<sup>14</sup> and had a computerized tomography ("CT") scan<sup>15</sup> done to assess his headaches.
- [24] In 2020 the applicant saw a neurologist, Dr. Marke Jan Gawel with respect to his headaches where Dr. Gawel also referenced the accident. In 2021, Dr. Gawel proposed Botox injections for the applicant's headaches, which were accepted by

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<sup>9</sup> Applicant's Submissions, Tab 10, Referral from Dr. Sajo dated November 4, 2017

<sup>10</sup> Applicant's Submissions, Tabs 18, 19, 21, 27, 31, and 44 – Reports of Dr. Kakar dated September 12, 2018, October 11, 2018, December 11, 2019, April 24, 2020, July 22, 2020, April 29, 2021

<sup>11</sup> Applicant's Submissions, Tab 22 – Report of Dr. Bhatia dated December 21, 2019

<sup>12</sup> Applicant's Submissions, Tab 36 – Multi-Disciplinary Catastrophic Reports dated November 2, 2020

<sup>13</sup> Applicant's Submissions, Tab 6 – Clinical notes and records from Scarborough Hospital

<sup>14</sup> Applicant's Submissions, Tab 9, CNRs of Dr. Li dated October 10, 2017

<sup>15</sup> Applicant's Submissions, Tab 11, CT scan dated December 5, 2017

the respondent IE assessor Dr. Michael Angel, neurologist, as reasonable and necessary<sup>16</sup>.

- [25] Throughout 2018 and 2019, the applicant continued to report his ongoing pain to his psychiatrist, Dr. Kakar and his rheumatologist Dr. Michael Pflug. Dr. Pflug subsequently took on the role of the applicant's family physician once Dr. Sajo retired in 2020. Dr. Pflug diagnosed the applicant initially with chronic back pain "since MVA"<sup>17</sup>, and later added the diagnoses of left sciatic nerve root tension, neck pain, left arm radiculitis and radiating left leg paresthesia<sup>18</sup>. Dr. Taj Getahun, orthopaedic surgeon, similarly diagnosed the applicant in October 2020, with accident-related impairments including: chronic pain syndrome, bilateral shoulder strain, chronic myofascial strain of the cervical and lumbosacral spine.<sup>19</sup>
- [26] Therefore, I find that there is ample evidence to establish that the applicant's psychological impairments, chronic pain and headaches can be causally linked to the accident or were greatly exacerbated by the accident.
- [27] However, I do agree with the respondent that the applicant's recent complaint of bilateral ankle pain cannot be linked to the accident. The applicant submits a report dated June 30, 2021,<sup>20</sup> by Dr. Christopher John Peskun, an orthopaedic surgeon, assessing the applicant for bilateral ankle pain. The applicant submits that Dr. Peskun subsequently recommended bilateral ankle surgery. I find that there is no medical evidence that the applicant complained of ankle pain soon after the accident, or in the almost four years post accident.
- [28] Further, the report of Dr. Peskun states that the applicant "believes"<sup>21</sup> that the accident caused his ankle pain. However, there is no medical evidence corroborating this. There is an extensive record of CNRs and reports of the applicant complaining of, and seeking treatment for chronic pain of his back, shoulder and leg. A number of treating physicians have linked those impairments to the accident. However, given that the applicant does not point me to any record of him having previously reported bilateral ankle pain prior to 2021, I find that his recent ankle pain is not accident related.

### ***Income Replacement Benefit ("IRB") – Disability Period***

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<sup>16</sup> Applicant's Submissions, Tab 54, Report of Dr. Angel dated September 23, 2021

<sup>17</sup> Applicant's Submissions, Tab 20, CNRs of Dr. Pflug from 2018 to date

<sup>18</sup> Ibid.

<sup>19</sup> Applicant's Submissions, Tab 36 – Multi-Disciplinary Catastrophic Reports dated November 2, 2020

<sup>20</sup> Applicant's Submissions, Tab 49, Report of Dr. Peskun dated June 30, 2021

<sup>21</sup> Ibid.

- [29] The respondent initially approved the applicant's entitlement to IRBs and the applicant began to receive IRB payments from September 26, 2017.<sup>22</sup> However, after the respondent conducted psychological and psychiatry Insurer's Examinations ("IE"s) dated March 18, 2018, the respondent denied the applicant further IRBs.<sup>23</sup> As such, the applicant received IRBs only for the period of September 26, 2017 to March 29, 2018.
- [30] The applicant submits that he returned to work in April 2019 and was employed until March 2020, until he stopped working again due to his accident-related impairments.<sup>24</sup> As such the applicant is claiming an entitlement to IRBs for two periods, from March 29, 2018 until April 2019, and again from March 2020 to date and ongoing. Given that the first denial period is within 104 weeks of the accident and the second period is post-104 weeks of the accident, the two periods are subject to different tests for entitlement. As such, I will assess these periods separately.

***IRBs for Period from March 29, 2018 to April 2019 – pre 104 week test***

- [31] The applicant submits that the respondent's March 18, 2018 denial of ongoing IRBs on the basis of its s.44 assessments, was unwarranted. The applicant submits that the s.44 report of Dr. Gerald Dancyger, psychologist, was not an accurate assessment of his psychological impairments, as Dr. Dancyger based his conclusions on a finding that the applicant's test results could not be interpreted due to concerns about validity testing.<sup>25</sup> The applicant argues that the subsequent psychological diagnoses by multiple specialists and years of treatment, make clear that he suffered from serious psychological impairments, despite any concerns about validity testing.
- [32] The applicant also disputes the respondent's denial of ongoing IRBs on the basis of the s.44 psychiatry assessment of Dr. Alfonse Marchie, physical medicine and rehabilitation specialist, who diagnosed the applicant with soft tissue strains and sprains to the cervical, thoracic, lumbar, shoulder, chest and abdomen region.<sup>26</sup> Dr. Marchie found that the applicant's accident-related impairments did not cause a substantial inability to perform the tasks of his pre-accident employment. The applicant argues that Dr. Marchie did not properly consider the applicant's chronic pain in his assessment.

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<sup>22</sup> Applicant's Submissions, Tab 59, Letter from CUMIS dated December 22, 2017.

<sup>23</sup> Applicant's Submissions, Tab 60, Denial letter from CUMIS dated March 16, 2018

<sup>24</sup> Applicant's Submissions at para 73-76.

<sup>25</sup> Applicant's Submissions, Tab 15, IE Report of Dr. Dancyger dated March 16, 2018

<sup>26</sup> Applicant's Submissions, Tab 61 IE Report of Dr. Marchie dated March 16, 2018

- [33] The respondent relies on these two s.44 assessments to support its denial of IRBs. The respondent submits that in the psychological IE, Dr. Dancyger found that the applicant's results revealed a significant degree of symptom exaggeration. Dr. Dancyger concluded that the test results did not support any subjective complaints that the applicant suffered a substantial inability to perform the essential tasks of his employment. The respondent asserts that similar validity concerns were found by the applicant's s.25 psychological assessor Dr. Bhatia,<sup>27</sup> and that even Dr. Bhatia did not opine that the applicant was unable to return to work.
- [34] The respondent further relied upon the s.44 physiatry assessment of Dr. Marchie, who opined that the applicant had sustained only soft-tissue strains and sprains and that this would not result in an inability to perform the essential tasks of his data-entry job, from a physical perspective.<sup>28</sup>
- [35] The respondent also raises the issue that the applicant has not provided any evidence as to the actual date of his return to work, despite the applicant's submissions. The respondent submits that there is evidence that the applicant returned to work much earlier, namely, soon after the IRBs were denied, in August 2018.
- [36] Upon a review of the evidence and submissions of the parties, I find that the applicant has not adduced sufficient evidence to establish that he is entitled to IRBs for the period of March 29, 2018 to April 2019.
- [37] Firstly, I agree with the respondent that the applicant has not led any evidence to confirm as to when he returned back to work after the accident. The applicant submits that it was in April 2019. However, it is well-established that submissions alone are not evidence and are not persuasive without such.
- [38] The applicant did not provide any documentation from his employer indicating when he returned to work. I note that the respondent raised the issue of the applicant's earlier return to work date in its submissions, questioning his entitlement to IRBs for this period. The applicant provided his Income Tax returns from 2014-2017, but omitted to include the years from 2018 onward, which could have established the date of his return to work.
- [39] I also find that there are a number of contemporaneous reports that the applicant may have returned to work much earlier than April 2019, possibly even beginning

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<sup>27</sup> Applicant's Submissions, Tab 22 – Report of Dr. Bhatia dated December 21, 2019

<sup>28</sup> Applicant's Submissions, Tab 61 IE Report of Dr. Marchie dated March 16, 2018



in April 2018, immediately after his IRBs were stopped. The applicant's treating endocrinologist Dr. Minna Woo<sup>29</sup>, psychiatrist Dr. Kakar<sup>30</sup> and s.25 assessor Dr. Bhatia<sup>31</sup> all noted in their reports that the applicant returned back to work in a staggered manner, beginning in April 2018. As such, I find that the applicant has not properly established a timeline of his return to work.

- [40] Secondly, although the applicant asserts that he was suffering from serious physical and psychological injuries at the time the respondent denied his IRB claim, he does not submit any opinion from his treating physicians that he was substantially unable to perform the essential tasks of his employment.
- [41] The applicant submits that Dr. Pflug had been treating him for chronic pain from November 2018 onwards and relies on the doctor's CNRs. However, the applicant does not direct me to any entry during the period in dispute where Dr. Pflug states that the applicant is unable to work due to pain.
- [42] In fact, Dr. Bhatia described the applicant's return to work in April 2018 and how it was structured to accommodate his pain complaints. The doctor states that "he now works eight-hour shifts, three days per week to accommodate his pain needs. It was stated by Mr. Reynolds that his employer has been understanding of his situation".<sup>32</sup> As such, it appears that the applicant's chronic pain was not an impediment to him completing the essential tasks of his employment.
- [43] Similarly, the applicant asserts that given his serious psychological diagnoses, it is self-evident that he would be unable to work. However, with respect to this period in dispute, from March 2018 to April 2019, the applicant does not point me to any medical opinion that his psychological diagnoses created a substantial inability for him to perform the essential tasks of his employment.
- [44] During the period in dispute, the applicant was assessed by two psychiatrists, Dr. Ebenezer Okyere<sup>33</sup> and Dr. Kakar. While I acknowledge that the applicant was diagnosed with a number of psychological impairments during this period, none of these mental health professionals opined that the applicant was unable to work as a result of mental health concerns.
- [45] In fact, the applicant continued to be diagnosed with these same psychological impairments throughout 2019, while he was back at work. From April 2019 to

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<sup>29</sup> Applicant's Submissions, Tab 13, Letter from Dr. Woo dated February 21, 2018

<sup>30</sup> Applicant's Submissions, Tab 18,

<sup>31</sup> Applicant's Submissions, Tab 22 – Report of Dr. Bhatia dated December 21, 2019 at pg.9

<sup>32</sup> Ibid.

<sup>33</sup> Applicant's Submissions, Tab 12 – Report of Dr. Okyere, dated February 21, 2018.

March 2020, Dr. Kakar continued to diagnose the applicant with severe major depression, pain associated with psychological factors and social anxiety disorder. Similarly, Dr. Bhatia in December 2019 diagnosed the applicant with major depressive disorder, PTSD, somatic symptom disorder, moderate and specific phobia -automobile<sup>34</sup>. Both of these doctors mentioned in their reports that the applicant was presently working and yet neither of them opined that these psychological diagnoses rendered him unable to work.

- [46] Finally, I note that although the applicant submits that he was substantially unable to perform the essential tasks of his employment, he has not provided any description or evidence as to what the tasks of his employment are.
- [47] The applicant submits that prior to the accident, he had been employed for 10 years doing data entry at IBM, which had been coordinated through Community Living Toronto. However, the applicant has not provided any documentation from his employer or affidavit evidence clarifying the tasks of his employment or how his chronic pain or psychological impairments render him unable to fulfill his duties. In fact, in Dr. Bhatia's s.25 assessment, she expressly noted that the applicant had been able to find a work arrangement that accommodated "his pain needs" and that "his employer has been understanding of his situation".<sup>35</sup>
- [48] The onus rests on the applicant to establish that he is entitled to the benefits in dispute. While he has led evidence to establish that he suffered physical and psychological accident-related impairments, he has not provided sufficient objective evidence that he was substantially unable to perform the essential tasks of his employment as a result of these impairments.

***IRBs for Period from March 2020 to date and ongoing – post-104-week test***

- [49] Despite the fact that the applicant has not established the date that he returned to work post-accident, whether it was April/August 2018 or April 2019, both parties agree that at some point the applicant returned to work. The parties also agree that around March 2020, the applicant again stopped working.
- [50] The applicant claims that he was forced to stop working from March 2020 on, due to his accident-related impairments. The applicant further asserts that the medical evidence establishes that his psychological impairments, headaches and chronic pain, prohibit him from working in any capacity.

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<sup>34</sup> Applicant's Submissions, Tab 22 – Report of Dr. Bhatia dated December 21,

<sup>35</sup> Applicant's Submissions, Tab 22 – Report of Dr. Bhatia dated December 21, 2019 at pg.9

- [51] To establish the severity of his impairments, the applicant submits the ongoing reports from his psychiatrist Dr. Kakar<sup>36</sup> which continued to detail his ongoing psychological diagnoses of severe major depression with anxious distress, pain associated with psychological factors and social anxiety disorder (now in remission).
- [52] With respect to his chronic pain, the applicant relies on the CNRs of Dr. Pflug and a report from Dr. Viet Dao, pain specialist. In a report dated May 10, 2021, Dr. Dao diagnosed the applicant with chronic headaches, chronic neck, shoulder and back pain, bilateral knee, hip, ankle pain, and myofascial pain.<sup>37</sup> With respect to his chronic headaches, the applicant submits the reports of neurologist, Dr. Gawel<sup>38</sup> corroborating his severe headaches, and the fact that the respondent's IE assessor Dr. Michael Angel, neurologist<sup>39</sup>, found the proposed Botox injections to treat the headaches be reasonable and necessary, thereby demonstrating the severity of the applicant's headaches.
- [53] The applicant also relies upon multi-disciplinary occupational therapy, psychological and orthopaedic catastrophic impairment ("CAT") assessments<sup>40</sup> conducted in October 2020, which cumulatively found that the applicant suffered a 44% whole person impairment. The applicant submits that these assessments corroborate his chronic pain, psychological impairments and difficulties with social functioning and activities of daily living.
- [54] Finally, the applicant also asserts that Dr. Pflug has provided two medical notes supportive of the fact that the applicant is unable to work due to his medical conditions. One note was provided on April 6, 2020,<sup>41</sup> soon after the applicant stopped working and another on July 16, 2021<sup>42</sup>.
- [55] The respondent submits that the applicant has not provided persuasive evidence that he suffers a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training or experience.

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<sup>36</sup> Applicant's Submissions, Tabs 22, 27, 31, and 44 - Reports of Dr. Kakar, dated December 11, 2019 April 24, 2020, July 22, 2020 and April 29, 2021

<sup>37</sup> Applicant's Submissions, Tab 49 – Report of Dr. Dao dated May 10, 2021

<sup>38</sup> Applicant's Submissions, Tabs 37 and 53, Reports of Dr. Gawel dated November 11, 2020 and September 16, 2021

<sup>39</sup> Applicant's Submissions, Tab 54, Report of Dr. Angel dated September 23, 2021

<sup>40</sup> Applicant's Submissions, Tab 36 – Multi-Disciplinary CAT Reports

<sup>41</sup> Applicant's Submissions, Tab 26, Letter from Dr. Pflug dated April 6, 2020

<sup>42</sup> Applicant's Submissions, Tab 50, Letter from Dr. Pflug dated July 16, 2021

[56] Upon a review of the evidence and submissions of the parties, I find that the applicant has not met his evidentiary burden to establish that he is entitled to IRBs from March 2020 onwards.

[57] Firstly, although the applicant states that he was forced to stop working in March 2020 due to his accident-related impairments, I agree with the respondent's submissions that this is not corroborated by the evidence submitted. Rather, contemporaneous CNRs<sup>43</sup> from the applicant's therapy sessions indicate that the applicant reported that he stopped working in March 2020 due to Covid concerns, namely:

- On April 6, 2020 the applicant reported to his therapist that his work was awaiting his return after a 14-day isolation period due to his mother returning from India. The applicant stated that he was concerned, as he was on immunosuppressant medication due to his previous kidney transplant.
- On April 20, 2020, the applicant discussed his concerns with his therapist that his workplace required him to handle shipping material without protective gear. The applicant reported that he feared he was susceptible to Covid. He further stated that he was concerned that he did not properly communicate his concerns about the handling of shipping materials to his physician, as the physician's note to his employer did not properly reference his Covid fears, but instead discussed his post-accident anxiety. The therapist states "(t)o date Mr. Reynolds has not returned to work due to the elevated risks he faces if he contracts the virus".
- On April 27, 2020 the applicant reported that he got a new note from his physician about proper protective equipment. He received a note from his work stating that they are considering greater protective measures and they will get back to him.
- On May 25, 2020 the applicant reported that he was "off work while his workplace goes through the process of putting safety controls in place" and that there was no word as to when he would return. The applicant also reported that he had applied for the Canada Emergency Response Benefit ("CERB").

[58] Therefore, from the evidence submitted, it appears that the applicant did not stop working in March 2020 due to accident-related impairments. Although the therapist's CNRs referenced above indicate the existence of correspondence

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<sup>43</sup> Applicant's Submissions, Tab 23 – Treatment Records from Bhatia Psychology Group

with the applicant's employer discussing his return to work, the applicant has not provided any of this correspondence to the Tribunal. As such, I agree with the respondent's submissions that it appears that the applicant stopped working in March 2020 due to Covid-related concerns, rather than his accident-related impairments.

- [59] In addition, although the applicant states that Dr. Pflug has provided two medical notes dated April 6, 2020, and July 16, 2021, supportive of the fact that he is unable to work due to his accident-related impairments, this similarly is not corroborated by the evidence submitted.
- [60] The April 6, 2020 note<sup>44</sup> from Dr. Pflug states that the applicant is "unfit to work outside of his home. His disability is severe. It is prolonged. It is increasing". However, when read together with the applicant's therapist's CNRs detailed above, the entry could be interpreted to be referencing concerns about work outside of the home, due to Covid and the applicant's immunocompromised state. Moreover, the therapist's CNRs also stated that the applicant subsequently requested a second doctor's note which specifically referenced protective equipment rather than accident-related impairments. This follow-up note was not provided as part of the evidence submitted.
- [61] With the respect to the July 16, 2021 note<sup>45</sup> provided by Dr. Pflug, from my review of the note, I do not see that it states that the applicant cannot work due to accident-related impairments. The note states that Dr. Pflug has "completed a work certificate", although no such work certificate has been provided to the Tribunal as part of the evidence tendered for this hearing and no details are provided as to what was stated on the work certificate as a reason for the work stoppage. The only other reference to the applicant's employment in this note, is that the applicant has been "off work on Covid 19 IR 2000\$ a month".
- [62] As such, I find that although the applicant submits that his "treating physicians are supporting his inability to work"<sup>46</sup> the applicant has not led evidence to establish that his treating physicians or his assessors are of the view that the applicant suffers a complete inability to engage in any employment for which he is reasonably suited by education, training or experience, due to accident-related impairments.
- [63] The applicant submits that the medical record clearly establishes that he is completely unable to work. However, while I accept that the applicant suffers

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<sup>44</sup> Applicant's Submissions, Tab 26, Letter from Dr. Pflug dated April 6, 2020

<sup>45</sup> Applicant's Submissions, Tab 50, Letter from Dr. Pflug dated July 16, 2021

<sup>46</sup> Applicant's Submissions at para 78.

from accident-related psychological impairments, chronic pain and headaches, he has not adduced sufficient objective evidence that these impairments render him completely unable to engage in any employment for which he is reasonably suited by education, training or experience.

- [64] I agree with the respondent's submissions that in the years post-accident, the applicant's various impairments have intermittently increased and decreased in severity. For example, around April 2020, when the applicant asserts that he needed to stop working due to his accident-related impairments, Dr. Kakar, his psychiatrist had actually reported a substantial improvement in the applicant's condition. Dr. Kakar stated that the applicant's depression was completely under control, he was able to do his activities of daily living, his pain symptoms were completely under control, and he had no anxiety related to pain symptoms, just anxiety due to the coronavirus.<sup>47</sup>
- [65] While the applicant continues to report ongoing psychological impairments, chronic pain and headaches, these are symptoms that he has reported over a four-year period post-accident, from 2017 onwards. However, despite these impairments the applicant was still able to return to work, at a minimum from 2019 to 2020, until he stopped working due to Covid-19 in March 2020.
- [66] I note that the post-104-week test for entitlement to IRBs is a high threshold. The applicant must 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 experience. The applicant has not provided any details as to his schooling, what training he has had over the years, or any details as to his job experience.
- [67] In totality, the weight of the medical evidence fails to establish that the applicant meets the eligibility test for post 104-week IRBs. The applicant does not direct me to any opinion of a treating physician or assessor who opined that the applicant suffered from a complete inability to work, due to his accident-related impairments.
- [68] Although the applicant has established that he suffered from psychological impairments and chronic pain post-accident, he has not led any evidence detailing how these impairments have affected his ability to engage in employment. The onus of proof is on the applicant and I find that he has failed to meet it.

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<sup>47</sup> Applicant's Submissions, Tab 27 - Report of Dr. Kakar from April 24, 2020

***Interest***

[69] As no benefits are payable, no interest is payable.

**CONCLUSION**

[70] For the reasons outlined above, I find that the applicant is not entitled to an IRB. No interest is payable. The application is dismissed.

**Released:** November 10, 2022



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**Ulana Pahuta**  
Adjudicator