



Citation: Fagundes v. Intact Insurance, 2023 ONLAT 21-008699/AABS

Licence Appeal Tribunal File Number: 21-008699/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:

Tracey Fagundes

Applicant

and

Intact Insurance

Respondent

DECISION

ADJUDICATOR: Clive Forbes

APPEARANCES:

For the Applicant: Tracey Fagundes, Applicant
Peter Cimino, Counsel

For the Respondent: Ian Heritage, Adjuster
Kevin So, Counsel

Court Reporter: Bruce Porter

Heard by Videoconference: February 13 and 15 to 17, 2023

OVERVIEW

- [1] Tracey Fagundes, the applicant, was involved in an automobile accident on April 06, 2019, and sought benefits, including an income replacement benefit (“IRB”) pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (“Schedule”). At the time of the accident, the applicant was employed full-time.
- [2] The respondent, Intact Insurance, paid the applicant an IRB in the amount of \$400 per week for the period April 13, 2019, to May 23, 2021. The respondent terminated payment based on s. 44 multi-disciplinary reports that found the applicant did not suffer a complete inability to engage in employment for which she is reasonably suited by education, training or experience at 104-weeks post-accident. The applicant disagreed and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“Tribunal”) for resolution of the dispute.

ISSUES

- [3] The following issues are in dispute:
1. Is the applicant entitled to an IRB in the amount of \$400.00 per week from May 24, 2021, to date and ongoing?
 2. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] I find that the applicant has not demonstrated entitlement to post-104-week IRBs in the amount of \$400.00 per week from May 24, 2021, to date and ongoing. As no benefits are payable, no interest is payable.

ANALYSIS

The applicant is not entitled to post-104-week IRBs pursuant to s. 6(2)(b) of the Schedule

- [5] There is no dispute that the applicant met the pre-104-week IRB test for the period between April 13, 2019, to May 23, 2021, and that the respondent made \$400.00 weekly payments on the basis that the applicant suffered a substantial inability to perform the essential tasks of her pre-accident employment, being the applicable test under s. 5(1) of the *Schedule*. At the time, she was employed full-time as housekeeper.

[6] However, the test for entitlement to post-104-week IRB is different and is set out in s. 6(2)(b) of the *Schedule*. It states that an insurer is not required to pay an IRB after the first 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment or self-employment for which they are reasonably suited by education, training or experience. The burden remains with the applicant to demonstrate entitlement on a balance of probabilities.

Applicant's post-accident education and employment history

[7] Prior to and at the time of the accident, the applicant was employed full-time as a housekeeper at Penmarvian Nursing Home. She had started working there in July 2018. After the accident, the applicant met the pre-104-week IRB test for the period of April 13, 2019, to May 23, 2021, and the respondent made \$400.00 weekly payments accordingly.

[8] The applicant testified that as a housekeeper she earned \$16-\$17 per hour and her duties included housekeeping, cleaning, moving furniture and bathing residents. She also testified that she has a grade 10 education and did similar housekeeping jobs at different times prior to her job at Penmarvian. She also stated that in the past she worked as a car detailing supervisor, did car detailing jobs, and has some experience with customer service and sales.

[9] In addition, the applicant testified that since the accident she has not worked in any capacity, has not submitted any job applications, and has not attempted any re-training. She also shared that she has not done any research on any employment that she might be suited for because she believes she is not able to work in any capacity due to her accident-related impairments.

[10] While I appreciate that the applicant has not worked since the accident, it is simply not enough to have not attempted a return to pre-accident employment or any employment based on a belief that injuries prevent suitable employment. There must be objective evidence that supports a complete inability to work in a suitable position based on the applicant's education, training and experience. I was not directed to any such post-accident employment attempts or medical records or opinions that would support the applicant's position that she has a complete inability to work. As such, I am not convinced that she has established on a balance of probabilities that she meets the post-104-week IRB test. However, I will consider the applicant's other submissions for fairness and thoroughness.

Canada Pension Plan Disability (CPPD) Benefits application

- [11] The applicant submits that she is entitled to post-104-week IRB because of her pain and psychological impairments. She relies on her CPPD benefits application dated September 10, 2021, because her family physician Dr. Jaswinder Dhillon stated on same that she cannot function in an environment with even minimal stress and is easily fatigued because of her depression disorder. Dr. Dhillon also stated on the application that the applicant cannot engage in sustained physical activities because of her chronic neuropathic pain. Dr. Dhillon mentioned that from a strictly medical standpoint the applicant was not expected to return to work in the future.
- [12] I do not agree with the applicant that she is entitled to post-104-week IRB based on Dr. Dhillon's statements on the CPPD application. A review of Dr. Dhillon's clinical notes and records ("CNRs") does not support the position that the applicant's psychological impairments prevent her from working or that she was specifically assessed by Dr. Dhillon to determine vocational issues. In addition, the applicant testifies that since the accident she has not been referred to any psychiatrist or psychologist, has not gone to any psychological appointment or attended any counselling with a psychologist. I find the applicant's testimony about her psychological condition more persuasive than Dr. Dhillon's statements on the application.
- [13] I agree with the respondent that even though the applicant's family physician supported her application for CPPD, this is not a determinative factor when considering post-104-IRB entitlement because the totality of the medical and documentary evidence must be considered to determine whether the applicant meets the complete inability test. This includes Dr. Dhillon's CNRs where there is no mention that the applicant was referred to a psychiatrist or psychologist, attended any psychological appointment or counselling with a psychologist. I put little weight on Dr. Dhillon's CCPD submissions as they were made under different framework and for a different purpose. Furthermore, I note that the CCPD application was denied, further undermining the significance of Dr. Dhillon's statements therein. I assign less weight to the CPPD application, and I am not persuaded based on Dr. Dhillon's CNRs that the applicant's psychological and pain issues prevented her from engaging in any employment for which she is reasonably suited by education, training or experience.

Post 104-week IRB s. 25 and s. 44 IE medical examination reports and other medical evidence

- [14] The applicant was not the subject to any post-104-week IRB s. 25 medical assessments. However, she relies on the s. 25 catastrophic impairment (“CAT”) reports of Dr. Ken Fern, orthopedic surgeon, dated July 12, 2022, and Ms. Leah Christie, occupational therapist, dated September 19, 2022, to argue that from a physical and psychological perspective she suffers from a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.
- [15] The respondent relies on the post 104-week IRB s. 44 IE reports of Ms. Ruth Billet, vocational assessor, Dr. Debra Mandel, clinical psychologist, and Dr. Jamie Rusen, orthopedic surgeon all dated May 06, 2021, to argue that the applicant does not meet the post-104-week IRB test.
- [16] During Ms. Christie’s s. 25 CAT occupational therapy assessment, she noted that there was evidence of heightened stress and irritability with the applicant when her pain and fatigue was very high. Ms. Christie opined that given the applicant’s demonstrated issues with reduced function, decreased initiation and motivation, the applicant returning to any job would not be possible. However, Ms. Christie testified that she was not a vocational assessor, she did not conduct any vocational tests and was not asked to address the post-104-week IRB test. In addition, Ms. Christie also shared that despite basing her conclusion on the applicant’s capacity to work on her own assessments, her assessments were limited and did not assess for all potential job duties. As such I assign less weight to the findings in Ms. Christie’s report.
- [17] In her vocational evaluation and transferable skills analysis report, Ms. Billet suggested that based on the applicant’s transferable skills and aptitude, she would be able to do jobs with similar pre-accident remuneration such as retail sales associate/greeter; food service attendant/sandwich maker/ food assembler or locker room attendant/ sauna room attendant. Ms. Billet also indicated in her labour market analysis report that the suggested jobs were readily available. I agree with the respondent’s position that the applicant has not brought forth evidence to suggest she is incapable to work in these roles or to do these roles on a part time basis. I was not directed to any s. 25 post 104-week IRB vocational assessment or rebuttal report by the applicant to support her position that she is incapable to work in these or other roles on a fulltime or part-time basis.

- [18] One of the primary reasons the applicant raised for her inability to continue work is related to her psychological impairments and she relies on the psychiatric evaluation report of Dr. Shahzad Shahmalak, psychiatrist, dated June 26, 2021. Dr. Shahmalak diagnosed the applicant with adjustment disorder with depressed mood and somatic symptom disorder with predominant pain, persistent and indicated that her prognosis for recovery was poor.
- [19] However, the applicant testified that she was never referred to a psychiatrist, has not received any psychological counselling since the accident nor has she taken any prescription medication for mental health difficulties on a regular basis. She reported taking muscle relaxants, 10 mg of cyclobenzaprine three times per week and 5 mg of CBD oil daily. In fact, Dr. Dhillon's CNRs reveal that on August 29, 2022, the applicant was prescribed Cymbalta 30 mg for the first time.
- [20] Dr. Shahmalak also mentioned in his report that he assessed the applicant's psychological ability to cope with work like demands such as capacity to sustain attention and concentration, work activity pace, persistence, productivity, stamina, interpersonal functioning and work like demeanor at a competitive level over a full week and concluded that she would struggle in those areas. Dr. Shahmalak also opined that the applicant was competitively disadvantaged in the workforce. However, Dr. Shahmalak made no mention in his report of the type of employment tasks the applicant was asked to perform over one full week.
- [21] I agree with the respondent that in the absence of the type of employment tasks the applicant was asked to perform over the one full week of observation this amounts to conjecture and speculation. I assign less weight to the psychiatric evaluation report of Dr. Shahmalak because in my view, the bulk of the medical and documentary evidence does not support the position that from a psychiatric or psychological perspective the applicant suffers a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.
- [22] I agree with Dr. Mandel that from a purely psychological perspective, the applicant does not suffer from a complete inability to engage in any employment for which she is suited by education, training or experience given her current psychological impairment. Dr. Mandel indicated that at the time of the assessment the applicant's clinical presentation was consistent with somatic symptom disorder, predominant pain, as well as symptoms of anxiety and that her prognosis is likely good. Dr. Mandel also concluded that the applicant would benefit from psychotherapy to address her anxious and depressive symptomatology specifically twelve one-hour sessions. I accept Dr. Mandel's

opinion that the applicant has psychological issues but that they do not rise to post-104-week IRB levels. I find that Dr. Mandel's findings and conclusion are consistent with the balance of the medical evidence provided.

- [23] A review of Dr. Dhillon's and Dr. Drew Bednar's, the applicant's treating orthopedic and spine surgeon, CNRs show that the applicant was diagnosed with L5-S1 disc herniation, right S1 radiculopathy and WAD I/II cervical spine strain. Dr. Dhillon referred the applicant to Dr. Bednar for treatment and management. On May 23, 2019, Dr. Bednar noted that as part of the applicant's pain management, she should stop her prescribed physiotherapy that was irritating her back, continue to regularly use her Advil which is a good anti-inflammatory, and if necessary, she could supplement with some Tylenol extra-strength for incremental analgesic benefit. The applicant was also advised to avoid flexion/twisting of the trunk to off-load her lumbar spine and possibly decrease the risk of incremental herniation. Dr. Bednar also indicated that there is very good probability that the applicant's pain will settle down once the physiotherapy that was irritating her back is discontinued.
- [24] A follow up note on June 19, 2019, from Dr. Bednar indicates that the applicant's symptoms are not settling down but are holding at now approximately two months post-onset, she is controlling pain with regular Advil limping a bit but functional enough to do all of her routine activities of daily living – albeit with some pacing and post activity pain that requires rest. Dr. Bednar also suggested that the applicant consider surgery and keep a symptoms diary to help with her very subjective decision that she is struggling with about having surgery or not. In addition, Dr. Bednar suggested that the applicant review her symptoms diary in a couple of weeks and if she wanted to go ahead with surgery, she should let him know. In the end the applicant decided not to go ahead with surgery. I find Dr. Bednar's CNRs persuasive because they show that, despite the applicant not going ahead with the suggested surgery, with the appropriate non-surgical medical treatment and intervention the applicant's degree of pain impairment improved somewhat and her functional abilities were not significantly impeded.
- [25] Given the above, I find the records of Dr. Dhillon and Dr. Bednar do not support the applicant's position that from either a physical or psychological perspective she is unable to engage in any employment for which she is reasonably suited by education, training or experience.
- [26] Dr. Fern, in his s. 25 CAT orthopedic report, stated that the applicant presented with chronic mechanical back problems, chronic pain disorder, ongoing signs of right leg radiculopathy and that her pains remain significant and worsened with

activities and prolonged static postures. Dr. Fern noted that the second MRI dated November 06, 2020, documented the continued presence of a right L5-S1 disc herniation impinging on the right S1 nerve root and did reference the disc herniation being somewhat smaller than on the first MRI dated April 20, 2019. The result of the second MRI showed that the applicant's condition didn't worsen and possibly improved with the passage of time.

- [27] Dr. Fern noted that the applicant would have difficulties with activities requiring repetitive bending, lifting, twisting of the neck and back, pushing, pulling, carrying or overhead use of her arms. However, Dr. Fern also stated that an up-to-date functional abilities evaluation and an in-home occupational therapy assessment would help to document these impairments further. Dr. Fern also concluded that the applicant would be a potential candidate for a right L5-S1 posterior spinal decompression and discectomy. This is consistent with both Dr. Bednar and Dr. Rusen's findings. In addition, Dr. Fern in his s.25 CAT report did not render an opinion on whether the applicant meets the post-104-week IRB test.
- [28] In his s. 44 orthopedic report, Dr. Rusen noted that the applicant reported being able to cook, wash her own dishes, load and unload the washing machine and grocery shop. She reported being unable to mop as well as carry laundry or heavy bags of groceries. The applicant also indicated that she is able to participate in sedentary activities such as sitting and fishing but not performing any higher intensity pre-accident recreational activities due to pain. The applicant also reported ongoing complaints of low back pain and right leg radicular pain that results in ongoing impairment related to prolonged walking, prolonged standing, repetitive forward bending, twisting, crouching, kneeling and lifting from floor to waist of greater than five to ten pounds. Dr. Rusen opined in his s. 44 report that at this point in time he would consider the disability mentioned to be permanent and suggested that the applicant may benefit from surgical management although surgery would deal with her radicular pain but probably not her lower back pain.
- [29] Dr. Rusen also mentioned that the applicant should consider following up with her treating spine surgeon regarding further discussion surrounding surgical management of her L5-S1 disc herniation and that she may benefit from referral to a pain clinic. Dr. Rusen testified that the type of surgery that was suggested by the applicant's treating spine surgeon has a success rate of 80% to 90%. Dr. Rusen concluded that following assessment of the applicant, she does not meet the complete inability test for post 104-week IRB. I agree with Dr. Rusen that the applicant would be able to resume any employment alternatives with restrictions

in place as suggested by the vocational assessor Ms. Billet and could work jobs which allow her to shift between positions to alleviate tension in her lower back.

- [30] The applicant argues that the conclusions of Dr. Rusen with respect to her employability should not be given any weight because Dr. Rusen under cross-examination could not recall the employment alternatives he was referring to in his report. The applicant also argues that Dr. Rusen could not commit to whether she could for certain work the jobs suggested by Ms. Billet. In addition, the applicant submits that Dr. Rusen refused to answer if she was competitively employable, saying it was outside the scope of his practice.
- [31] I do not agree with the applicant's position that Dr Rusen report should be given no weight. In my view, I find that Dr. Rusen's report is consistent with the bulk of the medical evidence and is corroborated with the CNRs of the applicant's family physician and treating spine surgeon. The fact that Dr. Rusen deferred questions on employment and symptoms and injuries that were outside of his expertise is not reason to assign no weight to his report.
- [32] I agree with Dr. Rusen that from an orthopedic perspective the applicant does not suffer a complete inability to engage in any employment for which she is reasonable suited by education, training or experience, although she does require restrictions, which would be considered permanent. Also, it is important to note that because an impairment is deemed permanent it does not necessarily correlate that it will have a severe impact on one's functional abilities. Someone can have permanent back pain, but the pain may not be of a severity that it causes suffering and distress accompanied by significant functional impairment or disability. The permanency of an impairment speaks to the duration or length of the impairment, while the level or degree of impairment, whether mild, moderate or severe, relates to the severity of the impairment on one's functional abilities. The bulk of the medical records does not support the applicant's position that her impairments are severe such that it would significantly impede her functional abilities resulting in a complete inability for her to perform any employment for which she is reasonable suited by education, training or experience.
- [33] I agree with the respondent that the applicant failed to lead medical evidence that speaks to the specific question of whether she meets the complete disability test for post-104-weeks IRB. All the s. 25 experts' report the applicant relies on focus on CAT impairment. In fact, the s. 25 CAT reports found that the applicant did not meet the definition of CAT impairment for Criterion 6, 7 or 8. With regards to Criterion 7 the applicant was found to have a whole person impairment (WPI) of

26% and for Criterion 8 her impairments were all felt to be Class 2 mild under the four domains. No medical evidence was provided by the applicant that speaks to her impairments in conjunction with her capacity to work in any job that she is reasonably suited by education, training or experience.

[34] Given all of the above, I assign more weight to the reports of Ms. Billet, Dr. Mandel and Dr. Rusen dated May 06, 2021, Dr. Dhillon's CNRs and Dr. Bednar's CNRs. As such from the totality of the medical and documentary evidence provided and the testimony of the applicant, I find that on a balance of probabilities the applicant has not demonstrated entitlement to post 104-weeks IRBs.

Interest

[35] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. The applicant has not demonstrated entitlement to post 104-weeks IRBs. As no benefits are payable, no interest is payable under s. 51.

ORDER

[36] The applicant has not demonstrated entitlement to post 104-weeks IRBs. As such, a determination of IRB quantum is not required.

[37] Given that there is no overdue payment of benefits, the applicant is not entitled to any interest pursuant to s. 51 of the *Schedule*.

[38] The application is dismissed.

Released: April 5, 2023



**Clive Forbes
Adjudicator**