LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards Tribunals Ontario

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

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

2020 CanLII 14424 (ON LAT)

Citation: [T.A.K.] vs. Aviva General Insurance Company, 2020 ONLAT 18-008232/AABS

Released Date: January 13, 2020
File Number: 18-008232/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:

[T.A.K.]

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

Adjudicator:	**Deborah Neilson**
APPEARANCES:	
For the applicant:	Lisa Bishop, Counsel
For the respondent:	Ramandeep Pandher, Counsel
Written Hearing on:	**May 6, 2019**

I. OVERVIEW

[1] The applicant was injured in an automobile accident ("the accident") on December 10, 2016 and sought insurance benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] *(the "Schedule").* He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("the Tribunal") when his claims for benefits were denied by the respondent, Aviva General Insurance Company.

[2] The respondent concedes that the applicant is entitled to income replacement benefits. However, the parties disagree about the amount of income replacement benefits that the applicant is entitled to. The respondent determined that the amount of income replacement benefits that the applicant is entitled to is $0 after allowable deductions. The applicant disagrees.

[3] The applicant is also seeking entitlement to attendant care benefits and a determination that he is deemed to have incurred the attendant care expenses claimed. The respondent denies that the applicant has incurred any attendant care expenses.

II. ISSUES

[4] What is the amount of income replacement benefits ("IRBs") that the applicant is entitled to?[2]

[5] Is the applicant entitled to an attendant care benefit in the amount of $1,190.43 per month from December 10, 2016 to date and ongoing (with entitlement capped at December 10, 2021) recommended by the Toronto Health Care Clinic from December 10, 2016 and denied April 28, 2017?

[6] What was the amount of attendant care incurred by the applicant or is the applicant deemed to have incurred the attendant care expenses claimed?

[7] Is the applicant entitled to an award for unreasonably withheld or delayed payments under section 10 of *Ontario Regulation 664*?

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

III. RESULT

[9] The amount of IRB payable is as follows:

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[1] O. Reg. 34/10.

[2] The case conference Adjudicator's order states the issue is entitlement to IRBs at the rate of $400.00 per week. The submissions are clear that entitlement to the benefit is not in issue. The issue is the amount of IRB that is payable.

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i. From December 17 to 31, 2016: $267.18 per week for 2 weeks.

ii. From April 20, 2017 to October 31, 2017: $67.51 per week for 27.4 weeks.

iii. From November 1, 2017 to December 16, 2018: $267.18 per week for 58.2 weeks.

iv. From December 17, 2018: $10.69 per week to date.

[10] The applicant's claim for attendant care is dismissed; and

[11] The applicant is entitled to an award under *O. Reg. 664* because the respondent unreasonably withheld the payment of IRBs.

IV. ANALYSIS

A. Income Replacement Benefits

[12] The weekly IRBs are calculated by using 70 percent of the base amount of a person's income minus the total other income replacement assistance received or available that week..[3] The base amount is the insured person's gross annual employment income divided by 52.[4] Other income replacement assistance includes long term disability benefits, short term disability benefits and Canada Pension Plan ("CPP") disability benefits, whether received by the insured person or available.[5]

[13] The parties agree that the applicant earned $19,847.96 gross annual employment in the 52 weeks before the accident.[6] The parties agree that 70 percent of the weekly base amount before deducting any income replacement assistance is $267.18. The applicant has received CPP disability benefits, but the parties disagree on what amount of CPP should be deducted, when and what amount of IRB is payable after deducting post-accident income. They also disagree on when the age 65 IRB adjustment applies to the applicant. Accordingly, I must determine the following:

1. Did the applicant earn post-accident income that is deductible from the IRB?

2. What amount of the applicant's CPP disability benefit is deductible from the IRB?

3. When does the age 65 adjustment apply to the applicant's IRBs?

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[3] Section 7(2) of the *Schedule.*
[4] Section 4(1) of the *Schedule*
[5] Section 4(1) of the *Schedule,* which defines "other income replacement assistance."
[6] This amount includes Employment Insurance Benefits in accordance with the definition of "gross employment income" in s. 4(1) of the *Schedule.*

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1. Post-Accident Employment Income

[14] The applicant declared $17,087 in gross income on his 2017 tax return. The respondent submits that it should be deducted in calculating the applicant's IRBs because it is employment or T4 income. The respondent submits that because the applicant has not provided a breakdown of where he got the income it from, it should be treated as post-accident employment income. The respondent submits that it should all be deducted. Even if I were to accept that the applicant earned $17,087 as gross employment income in 2017, the most that is deductible from an IRB is 70% of the gross employment income earned post-accident.[7]

[15] The applicant has provided evidence that he received CPP disability benefits in the amount of $884.27 per month from April 2017 to October 22, 2017 for a total of $6,189.89. He had received an early CPP pension after the accident. He then applied to CPP for CPP disability benefits. His CPP pension was converted to CPP disability benefits for the period from April 2017 to October 2017, when the applicant turned 65 years old. From November 2017 onward, the applicant has received a CPP pension and Old Age Security.

[16] I find that the applicant received $6,189.89 in CPP disability benefits in 2017, which is deductible in calculating the IRB.[8] He received a total of $2,416.06 in CPP pension, Old Age Security and Guaranteed Income Supplements in 2017, which are not deductible in calculating the IRB. This means $8,605.95 of the income he declared on his 2017 tax return is accounted for. The applicant has not explained where the remaining $8,481.05 in 2017 income came from. He reported to one of the insurer's assessors that he was living off his RRSP of $430.00 per month. However, that only adds up to $5,160.00. For the following reasons, I find that the respondent is entitled to treat it as post-accident income.

[17] The applicant produced a copy of his 2016 tax return, his 2016 Notice of Assessment and his 2016 T4 form. He did not produce his 2017 tax return, only his 2017 Notice of Assessment. There is no explanation for why he did not produce his 2017 tax return and the T4 forms that he filed for 2017. The 2017 tax return was filed after the accident and the T4 forms would have explained where all his 2017 income was from.

[18] The applicant was suspended from work from April 2016 to October or December 2016. He took a medical leave of absence from his employment starting April 19, 2017, which is when his CPP disability benefits started being paid. He should have been aware by the time that he filed his 2017 tax return (in 2018) that the quantum of his IRB was in issue and that the T4 forms and his 2017 tax return were relevant for calculating his income. These had to have been in the possession of the applicant as he could not have received his 2017 Notice of Assessment without

[7] Section 7(3) of the *Schedule.*
[8] Letter from Employment and Social Development Canada dated April 15, 2019.

filing his tax return along with his T4 forms. He produced his 2018 T4 form from CPP. Accordingly, I draw an adverse inference from the failure to produce the 2017 tax return with his T4 forms.

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[19] The applicant's employment file states his last day worked or paid was April 19, 2017 and that he went on a leave of absence effective January 13, 2018. Therefore, I draw an adverse inference from the failure of the applicant to produce his 2017 tax return and T4 forms and conclude that it is because the unexplained portion of the 2017 income was income earned from employment from January 2017 to April 19, 2017. That outstanding amount is, therefore, deductible from the IRB. I find that the applicant stopped working in April 2017 and, therefore, seventy percent of the $8,605.95 income from 2017 is deductible from the IRB payable from January 1, 2017 to April 17, 2017.

[20] I find that the applicant earned a weekly gross income of $521.57[9] from January 1, 2017 to April 19, 2017. The respondent is entitled to deduct 70% of the weekly gross income of $521.57, or $365.10 per week, from the weekly IRB of $267.18 payable from January 1, 2017 to April 19, 2017. This means no IRB was owed from January 1, to April 19, 2017.

2. CPP Disability Benefits

[21] The applicant received the $6,189.89 in CPP disability benefits from April to October 2017 for a total of 31 weeks or $199.67 per week. The CPP disability benefit was not paid after October 31, 2017. I note that the applicant turned 65 on October 22, 2017, but the CPP disability benefit was paid for the entire month of October and, therefore, is deductible from 70% of the base amount in calculating IRB from April 1 to October 31, 2017. Therefore, the IRB payable from April 1, 2019 to October 31, 2017 is $67.51 per week. The respondent did not pay IRBs because it claimed that the applicant earned income after April 19, 2017 that was in excess of the weekly IRB. This means the respondent owes the applicant IRB from April 19, 2017 to October 31, 2017 at the rate of $67.51 for 28 weeks for a total of $1,890.28.

3. Age 65 Ramp Down

[22] Under s. 8(1) of the *Schedule*, if a person is receiving an income replacement benefit immediately before his or her 65th birthday, the weekly amount of the benefit is adjusted on the later of the day of the person's 65th birthday and the second anniversary of the day the person began receiving the benefit, to the amount determined in accordance with the following formula:

$$C \times 0.02 \times D$$

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[9] $8,605.95 divided by 16.5 weeks from January 1 to April 19, 2017

where "C" is the IRB before deducting post-accident income and "D" is the number of years during which the applicant qualified for IRBs before the adjustment is made.

[23] The applicant submits that because he was not receiving an IRB immediately before his 65th birthday on October 22, 2017, the age 65 adjustment does not apply until he does start receiving his IRB. According to the applicant's submission, this would provide incentive to insurers not to delay the payment of IRBs. I find that the applicant's interpretation is not born out by the *Schedule.* The interest payable for late payments and the risk of an award under *O. Reg. 664* are enough incentive to keep insurers from delaying the payment of IRBs to a person who is approaching their 65th birthday at the time of an accident.

[24] I agree with the respondent's submission that the term "receiving an IRB" means "entitled to receive an IRB." The respondent relies on the Financial Services Commission of Ontario ("FSCO") decision of *Hamilton and Dominion of Canada.*[10] In that case, the Arbitrator determined that "C" is the IRB the insured person is entitled to receive immediately before age 65. Although I am not bound by FSCO case law, I agree with the analysis in *Hamilton and Dominion of Canada*. Otherwise, the interpretation offered by the applicant would encourage insured persons who are close to age 65 at the time of an accident to create delays for the payment of IRBs. For these reasons, I find that the age 65 adjustment occurs on the later of the applicant's 65 birthday or the second anniversary of the day he was entitled to receive the IRB.

[25] In this case, the later date is the second anniversary of when the applicant was entitled to receive the IRB. He was first entitled to receive an IRB on December 17, 2016, which means the second anniversary was December 17, 2018. The applicant was not receiving any collateral benefits by December 16, 2018, so his IRB should have been $267.18 per week. Accordingly, the age 65 adjustment is as follows:

$267.18 x .02 x 2 = $10.69

[26] I find the applicant is entitled to an IRB of $267.18 per week from November 1, 2017 to December 17, 2018. The applicant's IRB after December 17, 2018 is $10.69 per week.

4. IRB Payable

[27] The IRB payable is as follows:

(i) From December 17 to 31, 2016: $267.18 per week for 2 weeks = $534.36

[10] *Hamilton and Dominion of Canada General Insurance Co.*, 2017 CarswellOnt 11782

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(ii) From January 1 to April 19, 2017: $0

(iii) From April 20, 2017 to October 31, 2017: $67.51 per week for 27.4 weeks = $1,849.78

(iv) From November 1, 2017 to December 16, 2018: $267.18 per week for 58.2 weeks = $15,549.88

(v) From December 17, 2018: $10.69 per week

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B. <u>Attendant Care Benefits</u>

[28] The applicant claims he is entitled to attendant care benefits of $1,190.43 per month from December 10, 2016 to date and ongoing.[11] In order to receive attendant care benefits, the applicant is also required to show on a balance of probabilities that he incurred the attendant care expenses claimed, or that he is deemed to have incurred the expense. The applicant claims he is deemed to have incurred the expense. The respondent claims that no attendant care benefit is payable for any period before the applicant submitted an assessment of attendant care needs Form 1 (the "Form 1"). This means that for me to determine whether the applicant is entitled to an attendant care benefit, I must determine the following:

1. What is the reasonable and necessary monthly amount of attendant care expenses required by the applicant as a result of the accident;
2. What amount of attendant care has been incurred or deemed to be incurred by the applicant; and
3. Is the attendant care payable only from the date the applicant submitted a Form 1?

1. Reasonable and Necessary Attendant Care

[29] Under s. 19 of the *Schedule*, attendant care benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of the applicant as a result of the accident for services provided by an aid or attendant. Those needs are determined by way of the Form 1, which lists the minutes per week required for various activities and provides a method for calculating the monthly amount based on the hourly fees charged for three different levels of care. The applicant relies on the report and Form 1 of Pravin Kedar, occupational therapist, who assessed the applicant on March 14, 2017. Her recommended care in the Form 1 was for a total of $1,190.43 per month.

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[11] The claim for attendant care benefits is capped at December 10, 20121. Only insured persons who sustain catastrophic impairments are entitled to attendant care benefits for more than 260 weeks or 5 years post accident.

[30] The respondent relies on the report of Robert Compos, occupational therapist, who assessed the applicant at the request of the respondent in an insurer's examination ("IE")[12] on July 28, 2017 to determine his attendant care needs. I prefer his report over that of Ms. Kedar because Ms. Kedar recommends attendant care for activities the applicant is able to do and for care that he routinely received before the accident. Ms. Kedar observed that the applicant dressed himself with some difficulty, but he was capable of doing it slowly. However, she recommended 5 minutes per day of assistance for dressing and 5 minutes for undressing. The applicant was able to shave himself, yet she recommended 30 minutes per week of assistance for shaving. He had nail and toe care prior to the accident,[13] yet Ms. Kedar recommended 10 minutes per week for nail and toe care.

[31] The applicant also relies on the disability certificate (OCF-3) of Dr. Domenic Minnella, chiropractor, dated September 22, 2017. Dr. Minnella diagnosed the applicant with chronic pain and chronic lumbar, cervical and thoracic and bilateral shoulder strain as a result of the accident and stated that the applicant was limited in all aspects of his activities of daily living. Although he mentioned that the applicant had pre-existing conditions that affect his activities of daily living, Dr. Minnella reported that he had no knowledge of any post-accident diseases or conditions that affect his disability. I do not give much weight to the disability certificate because Dr. Minnella did not know that the applicant suffered a number of strokes and falls, nor is he qualified to comment on causation.

[32] The applicant also relies on the disability certificate of Dr. M. Haddad, physician dated February 27, 2018, who indicated she did not know of any post-accident conditions affecting the applicant. Because she is the applicant's family doctor, I would expect her to know of his strokes and falls and record those on the disability certificate. In fact, they are recorded in her clinical notes. Therefore, I give Dr. Haddad's disability certificate little weight.

[33] The respondent relies on the report of Dr. Oshidari, physiatrist, who conducted an IE of the applicant on August 14, 2017. The applicant reported a pre-accident history of diabetes, hypercholesterolemia, glaucoma, cataract, advanced osteoarthritis, minor back pain, numb fingers and toes, and depression that was treated with Cipralex. He reported having fainted the day after the accident and striking his chest. He has had about five falls and has had a few minor strokes since the accident. Dr. Oshidari's opinion was that the applicant sustained a sprain/strain of the cervical spine and the lumbar spine and bruising to his legs and arms as a result of the accident. He noted that the applicant had sensory deprivation on his entire upper and lower left extremities due to stroke. He determined that the applicant's functional abilities were not affected by the accident and that the applicant did not require attendant care.

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[12] An insurer's examination under s.44 of the *Schedule.*
[13] Respondent's brief Tab 19, page repo25, report of Robert Campos.

[34] I prefer the evidence of Dr. Oshidari over that of Dr. Minnella's and Dr. Haddad's disability certificates because Dr. Oshidari addressed the applicant's pre-accident health and the subsequent falls and strokes. There is no evidence that the strokes or falls have any relation to the accident.

[35] I give more weight to the evidence of Dr. Oshidari over that of Ms. Kedar for the following reasons.[14] None of the applicant's pre-accident pain and numbness complaints or his post-accident falls, strokes and hand contractures[15] were reported by Ms. Kedar. She reported that the applicant's pre-existing and concurrent conditions were barriers to his recovery but did not list what those were or what limitations were due to non-accident related health issues. She stated that the limitations in the applicant's daily activities were due to pain or aggravation of pain complaints. She did not disclose that the applicant used Tylenol Extra Strength to control his pain or that his neck and shoulder pain were intermittent. Nor did she discuss what caused the pain, whether it was accident related or due to the applicant's pre-accident arthritis and post-accident falls. Dr. Oshidari reported on the applicant's pre-accident health and his falls and strokes after the accident. As a physiatrist, Dr. Oshidari is qualified to provide an opinion on the causation of the applicant's condition. Ms. Kedar is an occupational therapist and is not, therefore, qualified to provide an opinion on causation. Further, the applicant reported to Dr. Oshidari that he was completely independent in his activities of daily living except for tying his shoe laces.

[36] The applicant also told his treating psychiatrist, Dr. Linda Mah, on March 30, 2017 that he was independent in his activities of daily living. Dr. Mah opined that the applicant's recurring depressive disorder may contribute to his memory problems, which started three years pre-accident. However, she suspected they were likely vascular in origin.

[37] There is no evidence that the applicant's strokes, mobility issues, falls or memory issues are accident related. The assistance the applicant submits he requires as a result of his back complaints is housekeeping assistance and grocery shopping, which are not available under the applicant's policy. He is able to do his self care with some pain but there is no evidence that he has pain as a result of the accident that is functionally disabling. Therefore, based on the evidence, I find that any limitations that the applicant has are from his pre-existing problems and/or his unrelated post-accident falls and strokes and not as a result of the soft tissue injuries he sustained in the accident.

2. Incurred or Deemed Incurred

[14] The applicant also relies on the disability certificate (OCF-3) of Dr. Domenic Minnella, chiropractor, dated September 22, 2017. He did not know that the applicant suffered a number of strokes and is not qualified to comment on causation. The applicant also relies on the disability certificate of Dr. M. Haddad, physician dated February 27, 2018, who also did not know the applicant suffered strokes.

[15] Applicant's brief Tab 2, Dr. Haddad's note of September 13, 2017. There is no evidence the contractures are accident related.

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[38] The applicant submits that the attendant care benefits he is claiming should be deemed to have been incurred because the respondent failed to notify the applicant that he qualified for attendant care benefits because he was taken out of the Minor Injury Guideline (the "MIG"). The applicant submits that the respondent did not inform him that he was out of the MIG until April 13, 2018. At that time, the respondent advised that he was taken out of the MIG in May 2017. The applicant submits that the earliest information he received of that was when he was provided with IEs in August 2017, one of which recommended that he qualified to be out of the MIG.

[39] I need not determine whether the applicant is deemed to have incurred the attendant care expenses because the applicant failed to show on a balance of probabilities that attendant care is reasonable and necessary as a result of the accident.

3. Date Payable

[40] I need not determine whether attendant care is payable from the day the Form 1 was submitted to the respondent or whether it is payable from the date of the accident because I have determined that the applicant is not entitled to attendant care benefits as a result of the accident.

C. Interest

[41] The applicant is entitled to interest on the outstanding IRBs. If the parties are unable to reach an agreement on the amount of interest that is payable within 30 days of the release of my decision, they may serve and file written submissions with the Tribunal within 45 days of the release of this decision.

D. O. Reg. 664 Award

[42] The applicant submits that the he ought to have been paid IRBs back in 2016 and that the delay in the payment in IRBs was unreasonable and was because of the respondent's inaction. If I find that the respondent unreasonably withheld or delayed the IRB, I may award a lump sum of up to 50% of the IRB owed to the applicant together with interest on the IRB.[16] I find that the respondent's delay up to August 2018 was reasonable but was unreasonable after August 2018 for the following reasons.

[43] The applicant advised on his application for accident benefits (OCF-1) that he was unemployed at the time of the accident but had worked 26 out of the 52 weeks preceding the accident. He also advised that he was still employed by the company up to the date he signed his application.[17] The respondent denied that the applicant was entitled to IRBs because an OCF-3 stated he was unemployed and the applicant's employer indicated he was no longer employed at the time of

[16] Section 10 of *O. Reg. 664*
[17] Applicant's brief Tab 1

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the accident.[18] The respondent has since accepted that the applicant was employed at the time of the accident but was under suspension. I find that respondent's initial denial was reasonable because of the conflicting information.

[44] The applicant submits that by November 2017, the respondent knew or ought to have known that he was employed at the time of the accident. The applicant submits that the respondent should have contacted the applicant's employer in November 2017 after it received the resubmitted Employer's Confirmation of Income form (OCF-2), at which time the respondent would have learned of the applicant's employment status.[19] I disagree. Although the conflicting information in the application for accident benefits may have had a more prudent person calling the employer, it was not unreasonable for the respondent to rely on the overwhelming documentation that suggested that the applicant was unemployed. There is nothing in the OCF-2 to indicate that the applicant's status was other than unemployed at the time of the accident. The onus is always on the applicant to prove entitlement to a benefit. The applicant ought to have provided information to the respondent to clarify his employment status in a timelier manner.

[45] By February 23, 2018, the respondent had unsubstantiated information that the applicant was employed but had been under suspension for about six months at the time of the accident.[20] This information was substantiated by August 2018 when a copy of the applicant's employment file was provided to the respondent. The file contained an email from the employer to the applicant sent a month before the accident telling him about a pay raise. Further corroboration was provided on March 18, 2019, when the applicant provided the respondent, at the respondent's request, with a January 11, 2017 email from his employer confirming that he was no longer suspended.[21] This information could have been provided to the respondent by the applicant immediately after the respondent denied the applicant IRBs on the basis that he was not employed at the time of the accident.

[46] By August 2018, the respondent had the applicant's 2017 Notice of Assessment that showed that the applicant had received employment income in 2017. The respondent calculated that the IRB, after deductions, was $0.[22] I find that because only 70% of post-accident income, not 100%, is allowed under the *Schedule*, this was an unreasonable calculation. If the $17,087 in income the applicant declared on his 2017 tax return was gross employment income, 70% of that amount on a weekly basis is $230.02, not the $328.60 the respondent submits is deducted. The

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[18] Respondent's brief Tab 5, letter of January 30, 3017 enclosing the disability certificate (OCF-3) dated December 21, 2016 of Dr. Minnella and respondent's letter dated February 13, 2017; respondent's brief Tab 6, Employer's Confirmation of Income form (OCF-2) dated February 17, 2017; respondent's brief Tab 8, letter from the respondent dated March 13, 2017.
[19] The applicant resubmitted the February 17, 2017 OCF-2 on November 30, 2017.
[20] Respondent's brief Tab 12, page 4, report of Helen Ilios, psychotherapist, dated April 20, 2017, sent to the respondent on February 23, 2018.
[21] Applicant's brief Tab 29. Other emails from the employer at Tab 28 sent to the respondent on April 5, 2018 do not prove that the applicant was employed at the time of the accident.
[22] Paragraph 13 to 16 of the respondent's submissions.

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respondent is sophisticated and ought to have known that the *Schedule* does not allow the total gross post-accident income to be deducted from IRBs.

[47] The respondent had a copy of the applicant's CPP file by March 12, 2018 and was aware that the applicant had received CPP disability but was receiving CPP pension and had been since his 65th birthday. Although the respondent was not provided with the CPP disability payments until the applicant's submissions were due, there is no reason for why the respondent did not pay the applicant the IRBs it admits were owed up to December 31, 2016 and from January 2018 to date. Although I find that the delay up to August 2018 was reasonable, [23] after that there is no reason for the IRBs owed to be withheld. The respondent had enough information to determine that some amount of IRBs was payable, but did not pay any IRBs. The respondent has not provided an any explanation for its failure to pay the IRBs that it admits were owed, other than the initial confusion about the applicant's employment status. There is no evidence to suggest that the respondent believed the applicant was still working or earning income in 2018 that would be deductible from the IRB. For these reasons, the failure of the respondent after August 2018 to pay any IRBs was an unreasonable delay deserving of an award under *O.Reg.664.*

[48] The respondent's failure to pay any IRBs combined with its delay in notifying the applicant that he was taken out of the MIG and failure to advise of the increased policy limits, merits an award under *O. Reg 664* of 35% of the benefits owing to the applicant including outstanding interest, plus 2% interest. I do not find that an award of 50% is appropriate given the initial conflicting information that the applicant and his counsel gave the respondent, which could have been clarified earlier by the applicant. However, the initial confusion does mean that the respondent was entitled to just not pay IRBs. I find that a 35% award recognises that there is no evidence to support that a delay from August 2018 to date to pay any IRBs is reasonable.

[49] If the parties are unable to reach an agreement on the calculation of the award amount within 30 days of the release of my decision, they may serve and file written submissions with the Tribunal within 45 days of the release of this decision.

V. ORDER

[23] Respondent's brief Tab 9, IE report of Dr. Arpita Biswas, psychologist, dated August 23, 2017, page 9 the applicant stated he was on EI at the time of the accident; March 10, 2017 by the respondent's legal representative that the applicant had received EI benefits up to November 2016, but he was not on EI at the time of the accident; March 10, 2017 by the respondent's legal representative that the applicant had received EI benefits up to November 2016, but he was not on EI at the time of the accident; applicant's brief Tab. 1 OCF-1 states the applicant was unemployed but worked 26 out of the 56 weeks prior to the accident and also states he worked for the applicant up to the date of signing the OCF-1; the employment file notes in November 2016 that the applicant was entitled to a pay increase; a letter from the Employment Insurance Commission dated July 22, 2016 refers to the applicant as COTA's former employee and discusses his separation from employment.

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

a) The amount of IRB payable is as follows:

(i) From December 17 to 31, 2016: $267.18 per week for 2 weeks = $534.36

(ii) From January 1 to April 19, 2017: $0

(iii) From April 20, 2017 to October 31, 2017: $67.51 per week for 27.4 weeks = $1,849.78

(iv) From November 1, 2017 to December 16, 2018: $267.18 per week for 58.2 weeks = $15,549.88

(v) From December 17, 2018 to date: $10.69 per week

b) The applicant's claim for attendant care is dismissed;

c) The applicant is entitled to interest on the outstanding IRBs;

d) The applicant is entitled to an award of 35 percent of the benefits owing to the applicant together with interest on all amounts then owing (including unpaid interest) at the rate of 2 percent per month, compounded monthly, under *O. Reg. 664*; and

e) If the parties are unable to reach an agreement on the calculation of the award and interest within 30 days of the release of my decision, they may serve and file written submissions with the Tribunal within 45 days of the release of this decision.

Released: January 13, 2020

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Deborah Neilson
Adjudicator

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