

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

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

Date: 2017-12-07

Tribunal File Number: 17-001274/AABS

Case Name: 17-001274 v Unifund Assurance Company

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:

G. K.

Applicant

and

Unifund Assurance Company

Respondent

HEARING DECISION

ADJUDICATOR:

Ian Maedel

APPEARANCES:

For the Applicant:

Adam Somogyi, Counsel

For the Respondent:

Geoffrey L. Keating, Counsel

Heard in writing on:

June 29, 2017

OVERVIEW:

- [1] The applicant was injured in a motor vehicle accident on November 5, 2014. He applied for benefits under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010 (the “Schedule”)*. Including an income replacement benefit (“IRB”).
- [2] The parties agreed that the applicant is entitled to IRB, however they disagree about the amount. The quantum of the benefit is at issue, the applicant claims he is entitled to \$400, the respondent submits he is entitled to \$172 per month. The parties further disagree on the definition of “other income replacement assistance” pursuant to sections 4(1) and 7(1) of the *Schedule* and whether that applies to the taxable gross or net amount paid for short term disability (“STD”) and long term disability (“LTD”) in the calculation of the IRB.

ISSUES IN DISPUTE:

- [3]
- a. Is the applicant entitled to receive income replacement benefits in the amount of \$400.00 week for the period of March 29, 2015 to March 31, 2015?
 - b. Is the applicant entitled to receive income replacement benefits in the amount of \$120.43 per week from April 1, 2015 to September 29, 2015?
 - c. Is the applicant entitled to receive income replacement benefits in the amount of \$196.87 per week for the period September 30, 2015 to December 31, 2015?
 - d. Is the applicant entitled to receive income replacement benefits in the amount of \$210.82 per week for the period January 1, 2016 to December 31, 2016?
 - e. Is the applicant entitled to receive income replacement benefits in the amount of \$207.20 per week for the period January 1, 2017 to date and ongoing?
 - f. In order to determine the correct IRB amount for the periods claimed I must determine whether the definition of “other income replacement assistance” pursuant to sections 4(1) and 7(1) of the *Schedule* applies to the gross or net amount paid for short term disability and long term disability benefits when calculating IRB.
 - g. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT:

[4]

- i. The applicant is entitled to \$172.00 in income replacement benefits for the period of March 29, 2015 to March 31, 2015. The definition of “other income replacement assistance” at section 4(1) and section 7(1) of the *Schedule* refer only to the gross amount of short term and long term disability benefits.
- ii. Any income replacement benefits with regard to the issues in dispute shall be calculated by deducting the gross amount of short term and long term disability benefits paid before taxes. Any outstanding income replacement benefit not paid utilizing this formula shall be paid forthwith.
- iii. The applicant is not entitled to interest on any of the issues in dispute.

FACTS:

- [5] The applicant was injured in a motor vehicle accident on November 5, 2014. He was a pedestrian struck by a motor vehicle. At the time of the accident he was employed at Brewer’s Retail Inc. and returned to work immediately following the accident. He worked until he was unable to complete the essential tasks of his employment and has not returned to work since March 2015.
- [6] Since April 1, 2015 the applicant has received both short term disability (“STD”) and long term disability (“LTD”) benefits from his employer.
- [7] The parties agree that the applicant is entitled to income replacement benefits. There is also no question that the STD and LTD are collateral benefits pursuant to section 267.8(1) of the *Insurance Act* and can be deducted from the applicant’s weekly IRB as “other income replacement assistance” pursuant to sections 7(1) and 4(1) of the *Schedule*.¹
- [8] The applicant applied for income replacement benefits September 8, 2016. The insurer provided an Explanation of Benefits (OCF-9) and an IRB Calculation Report on April 26, 2017. These documents set out the quantum of IRB payable from March 28, 2015 to April 26, 2017. Payments were made according to the Respondent’s calculations on April 26, 2017 plus interest.
- [9] Given the disparity in the calculation of the IRB, the applicant filed an Application by an Injured Person for Auto Insurance Dispute Resolution under the *Insurance Act* with the Licence Appeal Tribunal (LAT) dated March 2, 2017.
- [10] The applicant served a report prepared by Ian Wollach, Chartered Professional Accountant, of Collins Barrow Toronto, and dated April 27, 2017. The report calculated the quantum of IRB by deducting STD and LTD benefits from the IRB

¹ Ontario Regulation 34/10 Statutory Accident Benefits Schedule - Effective September 1, 2010.

net of taxes, (“Wollach Report”).² In other words, the applicant asserts that it should be the net amount of STD/LTD benefits and not the gross amount that should be deducted from his IRB payment.

[11] The parties do not dispute that 70 per cent of the applicant’s gross pre-accident earnings equal \$728.85 per week (weekly base amount).

[12] Based on the Wollach Report, the applicant is seeking the following in IRB:

- i. \$400.00 per week for the period March 29, 2015 to March 31, 2015;
- ii. \$120.43 per week for the April 1, 2015 to September 29, 2015;
- iii. \$196.87 per week for the period September 30, 2015 to December 31, 2015;
- iv. \$210.82 per week for the period January 1, 2016 to December 31, 2016; and
- v. \$207.20 per week for the period January 1, 2017 to date and ongoing.

[13] The respondent calculated the quantum of the IRB payable differently. It deducted, STD and LTD benefits on a gross basis as follows;

- i. March 28, 2015 to September 29, 2015 -- \$728.85 (weekly base amount) less STD benefits of \$715.00 = \$13.85 weekly income replacement benefit quantum (\$368.01 total);
- ii. March 28, 2015 to September 29, 2015 -- \$728.85 (weekly base amount) less LTD benefits in the amount of \$670.45 = \$58.40 weekly income replacement benefit quantum (\$4,797.14 total);

[14] The respondent issued payment in these amounts on April 26, 2017 plus applicable interest. The respondent approved an ongoing weekly income replacement benefit of \$58.40.

[15] The respondent relies on a report prepared by Robert Pellegrini, Chartered Professional Accountant, of Williams & Partners, Forensic Accountants dated June 6, 2017. In this report the quantum of IRB was calculated by deducting STD and LTD benefits from the IRB gross of taxes, (“Pellegrini Report”).³

[16] Upon receiving the report, the respondent conceded that an additional \$172.00 was payable for IRB for the period of March 29, 2015 to March 31, 2015 and is owing to the applicant.

² Ian Wollach, Income Replacement Benefit Report, April 27, 2017. Applicant’s Submissions, Tab 3.

³ Robert Pellegrini, Income Replacement Benefit Report, June 6, 2017. Respondent Submissions, Tab C.

ANALYSIS

- [17] The applicant bears the onus to prove their case on a balance of probabilities.
- [18] The *Schedule* applicable in November 2014, examined the issue of income replacement benefits at sections 4-11. According to section 7(2), IRB is based on 70 per cent of the insured person's gross weekly employment income. The parties do not dispute the applicant's weekly gross pre-accident earnings.
- [19] Central to the ultimate determination of the issues in dispute is the interpretation of section 4(1)(a) of the *Schedule*. The *Schedule* from November 2014 states that:
- “other income replacement assistance” means ...
- (a) the amount of any gross weekly payment for loss of income that is received by or available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, other than...
- [20] The applicant submits that the phrase “received by” is key for interpreting the quantum of IRB benefits with regard to the tax applied to STD and LTD benefits.
- [21] The applicant submits that because the gross amount of disability benefits were taxed upon release by the insurer and remitted directly to the Canada Revenue Agency, the monies were never “received by” the applicant. The applicant only “received” the net amount of the benefit after tax.
- [22] The applicant submits, the *Schedule* and the principles therein constitute remedial legislation. However, this section, and the whole of section 4 of the *Schedule* is replete with references to “gross employment income”, “gross weekly employment income” and “gross weekly payment”. The language is clear.
- [23] Sections 4(5) and 4(6) of the *Schedule* speak directly to taxation and the duty of an individual to report their income and adjustments that may be made for the amount of taxation imposed on an individual's gross annual employment income.
- [24] Nowhere in section 4 of the *Schedule* does it describe or define any terms like “net employment income” or “net weekly employment income”. One must infer that the absence of these terms is purposeful. Simply, if the legislature had intended these terms to be included, they would be defined therein.
- [25] There is nothing in the *Schedule* indicating that gross weekly payments in section 4(1) are to be reduced by taxed net amounts. Had the legislature intended for

taxes to be included in the calculations of deductions for income replacement benefits, the *Schedule* would explicitly express it therein. It does not.

- [26] The calculation of income replacement benefits is based on the gross employment income and not the net employment income of an individual. This gross employment income includes benefits like STD and LTD before tax.
- [27] To parse out specific phrases like “received by” and “available to” in isolation is contrary to a harmonious reading and interpretation of the legislation as a whole. These phrases are constituent parts of a section that should not be read contrary to the spirit and tone of the entire section with regard to the calculation of income replacement benefits.
- [28] Although not binding, the decision by Senior Arbitrator S. Naylor of the Ontario Insurance Commission in *Dray and Royal* provided by the respondent is directly on point with regard to taxation and deductions:

The withholding of tax is an administrative act by a third party, that is intended to secure payment of tax found to be owing. Ultimately, the individual whose tax is withheld in advance is in the same position as other tax-payers. To distinguish between people entitled to taxable benefits on this basis does not seem equitable. Moreover, it ignores the fact that, for some people, the amount deducted may not truly represent their tax liability. If the Legislature intended to achieve this result, in my view, it is more likely that it would have done so in clear language.⁴

- [29] I agree with the applicant’s submission that the *Schedule* is remedial in nature and should be read with the over-arching goal of reducing the economic dislocation of victims of motor vehicle accidents. To infer that the *Schedule* is ambiguous regarding net employment income is more than an inferential leap. The wording of sections 4-11 are clear and unambiguous. In my view, there is no contradiction between the words “gross” and “received” in the language of section 4(1)(a) of the *Schedule*.

The Applicability of *Anand v. Belanger*

- [30] The applicant relies on the decision of *Anand v. Belanger* to bolster their argument that “received by” means net proceeds after deductions qualified as payments received.⁵
- [31] This was a tort matter heard before Justice Stinson of the Ontario Superior Court of Justice in 2010. The subject of this litigation was whether the tort defendant was

⁴ *Sion Dray and Royal Insurance Company of Canada*, Ontario Insurance Commission, File No. A-000025, January 31, 1992, at page 14. Written Submissions of the Respondent at Tab F.

⁵ *Anand v. Belanger*, 2010 ONSC 5356. Written Submissions of the Applicant, Tab 7.

entitled to deduct lump sum income replacement benefits paid to the plaintiff for the plaintiff's loss of income. The main contention was the net benefit after legal fees were paid. Net taxable benefits were not directly addressed.⁶

[32] Justice Stinson ultimately ruled that the defendant was required to credit the lump sum income replacement benefit payment, net of legal fees and disbursements.

[33] The *Anand* decision is distinguishable from the current case before me, because *Anand* was a tort case that makes no reference to the *Schedule* whatsoever. The case was in regards to collateral benefits as laid out in section 267.8(1) of the *Insurance Act*. Unlike section 4(1) of the *Schedule*, there is no reference in section 267.8(1) of the *Act* specifying that payments received by a claimant were to be deducted on a gross basis. *Anand* dealt with the specific issue of a lump sum income replacement payout, and did not address STD or LTD payments.

Double Recovery

[34] The most compelling argument advanced by the respondent is in relation to the potential of double recovery. An employer is required to deduct or withhold taxable amounts from any amounts paid to an employee for salary or wages. As such, employees only receive a salary or wages net of taxes.

[35] The applicant has acknowledged and even quoted the Financial Services Commission of Ontario ("FSCO") decision of *Allstate Insurance Co. v. Da Rosa*, in which Director Delegate Makepeace set forth the following with respect to collateral benefits:

In my view, the collateral benefits rules in the *SABS* are intended to achieve the same legislative purposes as the deduction from damages rules in the *Insurance Act* – to prevent double recovery, give effect to rules about priority of payer, ensure appropriate relief for accident victims, and minimize litigation.⁷

This is a perfect encapsulation of why collateral benefits are calculated using gross employment income in the *Schedule*.

[36] Section 7(3)(a) of the *Schedule* allows the insurer to deduct 70 per cent of any gross employment income received by the insured person. If I were to accept the applicant's submissions regarding section 4(1), an insurer would be able to deduct 70 per cent of post-accident income net of taxes under 7(3)(a). This is clearly not what was intended by the legislature in the wording of these sections.

⁶ *Anand v. Belanger*, 2010 ONSC 5356. Written Submissions of the Applicant, Tab 7.

⁷ *Allstate Insurance Co. v. Da Rosa*, as quoted in *Stepien and Security National*, FSCO A13-002839. January 18, 2016 at para. 40.

- [37] To interpret these sections in such a way, would lead to a potential double recovery in the event there was any post-accident income. The maximum amount payable in this case for an IRB on a weekly basis is \$400.00. If the applicant obtained employment and 70 per cent of the net weekly post-accident earnings were calculated, this would lead to a recovery of more than \$400.00 per week in most cases, thus resulting in a double recovery.
- [38] Even though the applicant is not employed in this matter, the potential for double recovery is still possible. This would be contrary to the spirit of the legislation. Therefore, the calculation of IRB utilizing net calculation of employment income must be rejected.
- [39] Again, I agree with the reasoning of Arbitrator Naylor in *Dray and Royal* when she indicated that the overall purpose of weekly income replacement benefits included quick and efficient compensation for victims, and a no-fault system that was fair, equitable and reasonably predictable in treatment of insured parties covered by multiple insurance plans. When directed to examine net versus gross value of payments she indicated that calculating the net value of payments would be more complex and result in inconsistent and unfair treatment of insured parties.⁸

The Accounting Reports

- [40] I have reviewed both the Wollach and Pellegrini accounting reports submitted. Given the conclusions reached above, I do not place any weight upon the Wollach report given the calculation of IRB utilizing the net portion of the benefits received. This a fundamental flaw in the Wollach report and is contrary to the wording and the legislature's intention in the *Schedule*.
- [41] I place more weight on the Pellegrini report and the calculation of IRB therein not only because it was calculated by deducting the gross amount of STD and LTD as per section 4(1)(a) of the *Schedule*, but because of the documents relied upon. It is clear that Mr. Pellegrini had a full picture of the applicant's financial situation given the income tax documents, payroll documents and documentation from the collateral insurer. The applicant has chosen not to provide any responding submissions to refute the findings of the Pellegrini report.
- [42] When I read sections 4-11 of the *Schedule* as a whole, I can come to no other conclusion, than the legislative intent is to calculate income replacement benefits utilizing the gross employment income of an individual. This gross employment includes the receipt of any STD and LTD benefits before taxes.

⁸ *Sion Dray and Royal Insurance Company of Canada*, Ontario Insurance Commission, File No. A-000025, January 31, 1992, at pages 13-14. Written Submissions of the Respondent at Tab F.

- [43] Upon review of the totality of evidence presented, the applicant has not met their burden on a balance of probabilities standard.
- [44] The parties agree that the applicant is entitled to IRB. The respondent continues to pay a weekly IRB amount of \$58.40. Any calculation of IRB quantum shall be calculated by deducting the gross amount of short term and long term disability benefits paid before taxes. This includes calculations for the periods in dispute between April 1, 2015 to September 29, 2015, September 30, 2015 to December 31, 2015, January 1, 2016 to December 31, 2016 and January 1, 2017 to date and ongoing.
- [45] Given the conclusion regarding the calculation of the amount of IRB owed, I find that that there is no interest outstanding or owed to the applicant with regard to this matter. Any claims of interest with regard to the issues in dispute are hereby dismissed.

CONCLUSION

- [46] For the reasons outlined above, I find that:
- i. The applicant is entitled to \$172.00 in income replacement benefits for the period of March 29, 2015 to March 31, 2015, as conceded by the respondent at the outset.
 - ii. The definition of “other income replacement assistance” at section 4(1) and section 7(1) of the *Schedule* refer only to the gross amount of short term and long term disability benefits.
 - iii. Any income replacement benefits with regard to the issues in dispute shall be calculated by deducting the gross amount of short term and long term disability benefits paid before taxes. Any outstanding income replacement benefit not paid utilizing this formula shall be paid forthwith.
 - iv. The applicant is not entitled to interest on any of the issues in dispute.

Released: December 7, 2017

Ian Maedel, Adjudicator