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

Ontario

Tribunal File Number: 17-004564/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:

R. T.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant: Patrick Mazurek, Counsel

For the Respondent: Ramandeep Pandher, Counsel

HEARD: **In person on February 5, 2018 with written submissions on February 16, 2018.**

OVERVIEW

[1] The applicant, R. T., was injured in an automobile accident on February 21, 2013, and sought benefits from the respondent, Aviva Insurance Canada, pursuant to O. Reg. 34/10 Statutory Accident Benefits Schedule (the "*Schedule").* The respondent refused to pay for certain income replacement benefits and the applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of this dispute.

ISSUES

[2] The disputed claims in this hearing are:

a. Is the applicant entitled to receive an income replacement benefit (IRB) in the amount of $392.88 per week for the time period from February 28, 2013 to present and ongoing?

b. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed payments to the Applicant?

c. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

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

[4] The applicant is not entitled to an award under Regulation 664 because the respondent did not unreasonably withhold or delay payments to the applicant.

[5] The applicant is not entitled to interest because no payments went overdue.

BACKGROUND

[6] While working, the applicant was unbelted and seated in the driver's seat of a stationary transport truck which was struck on the driver's side by a pickup truck. The impact knocked the applicant into the passenger side of the cab. Shortly after the accident, the applicant attended Etobicoke General Hospital and was prescribed pain medication and discharged the same day. The applicant returned to the hospital about 2 days later and was given more medication and released. The applicant treated the injuries with a combination of over-the-counter and prescription medication and occasional massage or physiotherapy.

[7] The applicant advised the respondent of the accident within a few days. The respondent believed the applicant was entitled to benefits under the *Workplace Safety and Insurance Act, 1997* ("WSIB") because the accident

occurred while the applicant was working. The respondent refused to process any claims for benefits until the applicant provide evidence that the applicant was not claiming benefits under WSIB. On February 26, 2013, and several times after that, the respondent requested the applicant provide evidence to confirm the applicant was making a claim under the *Schedule* and not through the WSIB. The applicant only satisfied this request on November 27, 2017.

[8] About two years after the accident, the applicant's family doctor diagnosed the applicant with multiple herniated discs (L3-4, L4-5, & L5-S1) as a result of the accident.

BREACH OF ORDER DATED SEPTEMBER 21, 2017

[9] The parties to this hearing participated in a case conference on September 21, 2017. As a result of the case conference and with the consent of the parties an order was made, scheduling an in-person hearing for February 5, 2018 with written submissions in advance of the in-person hearing. The order also provided a deadline for the exchange of documents, which was December 17, 2017.

[10] The applicant did not provide evidence or initial written submissions in advance of the hearing as ordered by Adjudicator Bass. The respondent brought this issue to my attention at the commencement of the in-person portion of the hearing. The respondent submitted that the applicant's failure to provide written submissions in advance of the hearing has prejudiced the respondent and any further evidence or written submissions should be struck from the record. Alternatively, the respondent requested the hearing be dismissed as abandoned. The applicant argued that by attending at the hearing the applicant has demonstrated that the application is not abandoned. In addition, the applicant submits that the oral evidence at the hearing is imperative to the applicant's argument for entitlement to an income replacement benefit.

[11] After hearing the parties' submissions, I decided that the in-person hearing would proceed and that the parties may make written submissions after the witness testimony. I agree with the applicant that the application has not been abandoned by virtue of the applicant attending at the hearing. I allowed the parties to enter evidence during the in-person hearing and, if required, will address any concerns of prejudice accordingly.

INCOME REPLACEMENT BENEFIT

[12] For the first 2 years after the onset of disability, an IRB is payable to a person who sustains an impairment as a result of an accident and is unable to perform the essential tasks of their pre accident employment as a result of the impairment. After two years, the test to qualify for the benefit becomes stricter

and requires an insured to have a complete inability to engage in any suitable employment considering the insured's education, training or experience.

[13] The applicant's evidence is that the onset of disability occurred on the day of the accident. This is when the applicant suffered the injury and discovered the impairment which disabled the applicant from getting up from a sitting position to a standing position. The applicant's testimony at the hearing is that the immobility from the back injury prevented the applicant from working. The two disability certificates provided by the applicant also state February 21, 2013 as the onset of disability.

Entitlement to income replacement benefits and non-compliance

[14] The applicant claims entitlement to an IRB from February 28, 2013. The applicant submits that entitlement to an IRB is supported by two disability certificates provided to the respondent dated June 11, 2015 and October 21, 2015.

[15] The respondent's argues that the applicant is not entitled to any IRBs during the period spanning February 26, 2013 to November 24, 2017 because the applicant did not comply with the respondent's request for additional information regarding the election to claim benefits under the *Schedule* and not under the WSIB. Pursuant to section 61 of the *Schedule*, the respondent is not required to pay benefits to an insured person who is entitled to receive benefits under WSIB.

[16] The respondent submits that on February 26, 2013 it first wrote to the applicant to request a signed assignment of WSIB benefits and confirmation of the legal action against the third party driver, pursuant to section 61 of the *Schedule*. Further, the respondent's position is that the applicant did not meet the test to qualify for an IRB at the time the applicant satisfies the section 33 request in November 2017.

[17] Section 33(1) provides that, within 10 business days, an applicant shall respond to an insurer's request for information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit. Section 33(6) states that an insurer is not liable to pay a benefit for any period during the time when the applicant is not compliant with section 33(1).

[18] The applicant submits that the respondent was provided with an executed assignment form on May 15, 2013, that satisfies the respondent's February 26, 2013 request for additional information. The respondent did not address this position and maintained that the applicant did not comply with the section 33 request until November 24, 2017. Neither party provided the Tribunal with a copy of the executed assignment.

[19] After reviewing the evidence before me, I agree with the respondent that that applicant is not compliant with the section 33 request for the period from February 26, 2013 to November 24, 2017. Although section 33 was not expressly referenced, the respondent made a reasonable request for information in the February 26, 2013 letter. The applicant advised that the accident occurred while working and it is reasonable for the respondent to request that the applicant clarify whether a claim under WSIB was made, which would disentitle the applicant from receiving the benefit under the *Schedule*. From the evidence, it appears that the applicant did not satisfy the respondent's request until November 24, 2017, when the applicant participated in an examination under oath.

[20] The applicant's evidence at the hearing confirmed a return to full duties at work as of June 2016 and the applicant testified that there were no physical restrictions impeding the return to work at that time or thereafter. Considering this evidence that the applicant was able to return to work without any restrictions I find that the applicant does not qualify for an IRB for any period after June 2016. Additionally, as a result of not providing the executed assignment, the applicant is in a period of non-compliance from February 26, 2013 to November 24, 2017, when the applicant complied with the respondent's section 33 request.

Alternative entitlement to an income replacement benefit

[21] As previously mentioned, the applicant claims to have provided an executed assignment on May 15, 2013, but did not provide the document to the Tribunal. If the applicant provided the executed assignment, the respondent's position that the applicant is not entitled to the benefit due to non-compliance of section 33 would be moot. Considering the importance of this argument to the applicant and despite my finding above, I have contemplated this scenario and my analysis on the applicant's entitlement in the absence of the non-compliance is as follows.

[22] Pursuant to section 36(3), the applicant is not entitled to an IRB for any period before a completed disability certificate (OCF-3) is provided to the respondent. In this case, the earliest possible date of entitlement is June 22, 2015, the date when the first disability certificate was provided to the respondent.

[23] The evidence shows that the respondent first replied to the disability certificates on December 10, 2015 when it requested the applicant participate in an examination under oath pursuant to section 33 of the *Schedule*. The respondent's reply is more than 10 business days from the receipt of the disability certificates as prescribed by section 36(4). Failure to comply with the timelines in section 36(4) renders the benefit payable from the date of receipt of the disability certificate to the date response was made. The response occurred on December 10, 2015 when the respondent requested an

examination under oath. The examination under oath did not occur until November 24, 2017.

[24] If I were to accept that the executed assignment was provided and that the applicant was compliant with the respondent's section 33 request and according to section 36(6), I find that the applicant would qualify for an IRB from June 22, 2015 to December 10, 2015. This is when the respondent first replied to the disability certificates provided by the applicant. This finding is moot for two reasons. First, as mentioned above, the applicant did not provide a copy of the executed assignment to corroborate the position and is found to be incompliant as a result. Secondly, as expanded on below, the applicant did not report income in accordance with the *Income Tax Act*.

The requirement to report income

[25] In addition to the dispute over the applicant's entitlement to an IRB, the respondent submitted that any amount of an IRB would be zero because the applicant's claim for an IRB is based on income which has not been reported in accordance with the *Income Tax Act* and pursuant to section 4(5) of the *Schedule*.

[26] The applicant's position is that section 4(5) is not clear enough to support the penalty imposed by the respondent – the total denial of the benefit because the income was not reported to the appropriate authority. The applicant acknowledges to not filing a tax return for 2012 or any year after that, which according to the applicant, is different than failing to report as the latter would involve a misrepresentation. The applicant highlights section 4(6) that indicates income conclusions should be adjusted to reflect "… any subsequent change in the amount…" as evidence that the quantum of an IRB can change pursuant to updated filings or reassessments from the appropriate authority.

[27] The applicant provided copies of cheques from the applicant's employer as evidence of income to determine the IRB quantum and submits that the weekly IRB should be $392.88 per week. The applicant confirmed that the income received from employment was not declared as income pursuant to the *Income Tax Act*.

[28] I agree with the respondent that pursuant to section 4(5) of the Schedule, any amount of an IRB would be zero because the applicant did not report the payments from the applicant's employer as taxable income. My interpretation of section 4(5) is that an IRB is calculated on income declared in accordance to the *Income Tax Act*.

[29] I am not convinced that the reference to adjusted income in section 4(6) allows me to consider the payments made to the applicant that were not declared according to the *Income Tax Act*. My interpretation of section 4(6) is

that an IRB can be adjusted in the event that a person reports further or additional income that was accidentally omitted from the initial filing(s). Alternatively, section 4(6) can be applied when an applicant erroneously overstates income or claims deductions. These scenarios are distinguishable from the applicant's situation because the applicant did not file tax returns so the applicant did not make any errors in reporting income.

AN AWARD

[30] The applicant submits that the respondent has failed to properly respond to the applicant's claim for benefits for more than two years and requests an award as a result. The respondent did not provide any submissions on this argument.

[31] An award may be granted when the Tribunal finds that the respondent has unreasonably withheld payment of a benefit. It is unclear whether the applicant is making the request for an award pursuant to Section 10 of Regulation 664 of the *Insurance Act* (special award) or referring to rule 19 of the *Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1* ("the rules").

[32] Regardless of the section which the applicant relies on, I find that the applicant is not entitled to an award because the respondent did not unreasonably withhold or delay payment of a benefit. Additionally, in the event the applicant is making the submission under rule 19, I find that no costs are payable to the applicant because the respondent acted reasonably during the proceedings.

COSTS

[33] The respondent, seeking costs in the amount of $5,011.50 plus HST, submits that the applicant has acted unreasonably, frivolously, vexatiously, or in bad faith by refusing to comply with Adjudicator Bass' Order and for not serving and filing submissions and evidence as ordered.

[34] Costs may be awarded in the event that a party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.

[35] I agree with the respondent that the applicant has acted unreasonably by failing to serve and submit written arguments in advance of the in-person hearing, disregarding Adjudicator Bass' Order. The Order had specific deadlines for the production of documents and written submissions which the parties were to follow but the applicant did not. A breach of an order by the Tribunal is serious in that it can impact the Tribunal's ability to carry out a fair, efficient, and effective process and can prejudice the other party.

[36] Although I have found that the applicant acted unreasonably, I find that no costs are payable for the following reasons. The failure to serve and submit

written submissions according to the agreed-upon timeline was a breach of the Tribunal's order however, the impact on the respondent was minimal. The respondent was initially ordered to make written submissions in advance of the hearing, but because of the applicant's breach of the order, it was allowed to make submissions after the in-person hearing. The in-person component of the hearing proceeded as scheduled. No party had to attend at the hearing any more than anticipated at the case conference. The prejudice to the respondent is minimal because the applicant, at the hearing or in written submissions following the hearing, did not introduce new arguments or evidence in support of a new argument. Lastly, the evidence at the hearing shows that the applicant is of humble means and the impact of a financial penalty in the form of a cost award against the applicant would be disproportional to the impact the breach had on the respondent.

INTEREST

[37] The applicant seeks interest on overdue payments. I find that no interest is payable because no benefits are payable and therefore, there are no overdue payments or interest.

ORDER

[38] The application is dismissed.

Released: May 17, 2018

Brian Norris, Adjudicator