**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**



**Citation: Y.L. vs. Aviva Insurance Canada, 2019 ONLAT 18-007111/AABS**

**Tribunal File Number: 18-007111/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:

**Y.L.**

**Applicant**

**and**

**Aviva Insurance Canada**

**Respondent**

# DECISION

**ADJUDICATOR:** **Brian Norris**

**APPEARANCES:**

For the Applicant: Reynold Kim, Counsel

For the Respondent: Ramandeep K. Pandher, Counsel

**HEARD In writing on:** **April 29, 2019**

## OVERVIEW

[1] The applicant was injured in an automobile accident on May 26, 2016 and sought benefits from the respondent pursuant to Ontario Regulation 34/10, known as the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule").* The respondent refused to pay for certain benefits and the applicant has 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:

1) Is the applicant entitled to receive a weekly income replacement benefit (IRBs) in the amount of $400.00 per week for the period spanning December 1, 2016 to March 20, 2017?

2) Is the applicant entitled to interest on any overdue payments?

## RESULT

[3] The applicant is not entitled to income replacement benefits as claimed.

[4] No interest is owed.

## BACKGROUND

[5] The applicant was the front seat passenger of a vehicle which was struck from behind while stopped at a red light. The applicant went to the emergency room at [the Hospital] following the accident and complained of back and neck pain. The applicant was assessed at the hospital, and imaging was conducted, but no abnormalities were found. The applicant was then discharged with a diagnosis of a minor head injury. The applicant went to the hospital on the following day, with the same complaints, and was again discharged. The second hospital visit resulted in a diagnosis of "neck pain - soft tissue injuries". At that visit, the applicant was instructed to take over-the-counter pain medication and follow up with a family physician, which the applicant did on June 15, 2016.

[6] The applicant took a little over 2 weeks off work following the accident and returned to work with modified duties and hours on June 10, 2016. According to the Employer's Confirmation Form dated June 16, 2016, the applicant was employed full-time as an architectural staff member at the time of the accident.

[7] The applicant's family physician, Dr V. Park, endorsed the applicant's time away from work and, during the first visit following the accident, prescribed the applicant have a 10 minute break for every two hours of work. The applicant visited Dr. Park on July 13, 2016, who again recommended a 10 minute break every 2 hours, but this time adding that the applicant's workdays should be limited to 6 hours total.

[8] The applicant resigned from work on August 25, 2016. The applicant submits the resignation occurred because the applicant was unable to respond to overtime requests. The respondent does not contest that the applicant resigned from work however, it submits the applicant has not provided any evidence to substantiate this claim. Nevertheless, the respondent eventually paid IRBs to the applicant following the August resignation until September 12, 2016, when the applicant commenced work with a new company.

[9] The applicant's employment with the new company lasted until November 30, 2016, when the applicant's employment was terminated. The applicant claims the termination occurred as a result of an inability to work more demanding hours and complete physical employment tasks. The respondent contends there is no evidence to support this claim.

[10] For the purpose of this hearing, the applicant claims IRBs from December 1, 2016, the day after the applicant was terminated, until March 20, 2017, when the applicant gained employment at a new, third, company. The respondent has refused to pay IRBs for this period.

## INCOME REPLACEMENT BENEFITS

[11] The applicant submits physical injuries prevented the applicant from completing the essential tasks of employment during the period claimed. The respondent submits the applicant was able to meet the pre-accident employment demands during the period which IRB is claimed. Additionally, the respondent submits the applicant has wrongly considered the essential tasks of employment during the period from September 12, 2016 to November 30, 2016 and, instead, should only consider the essential tasks of employment at the time of the accident. For the reasons that follow, I agree with the respondent.

### What are the applicant's essential tasks of employment?

[12] During the first 104 weeks after an accident, an IRB is payable to an insured who is substantially unable to perform the essential tasks of employment as a result of an impairment. The applicant submitted an Employer's Confirmation Form dated

June 16, 2016 but it does not include a list of the applicant's essential tasks of employment.

[13] According to the Multidisciplinary Assessment Report dated September 20, 2016, the essential tasks of the applicant's employment at the time of the accident are; using architectural software on the computer, attend meetings, obtain reference materials (determined to be of negligible weight), and prepare sample boards of up to 7 kg. The applicant provided no evidence to contradict or dispute that these are the essential tasks of the applicant's employment at the time of the accident.

[14] In initial submissions, the applicant claimed entitlement to IRBs on the basis the applicant is unable to complete the essential job tasks at the second place of employment, where the tasks were more physically demanding. The applicant submits the essential job duties at the second employer involved the use of a laser cutter and assembling models, which the applicant submits included repetitive movements such as looking down, bending over, and lifting

[15] The respondent disagrees and submits the test for entitlement to IRBs is based on the applicant's job tasks at the time of the accident, which the respondent submits the applicant was able to complete. The respondent further submits the job tasks at the applicant's second employer are irrelevant. I agree.

[16] The applicant was employed at the time of the accident. Pursuant to section 5(1)(1)(i), IRBs are payable by the respondent if the applicant suffers a substantial inability to perform the essential tasks of that employment. I find the reference to "that employment" specifically refers to the applicant's employment at the time of the accident and not at any other time following the accident.

[17] The applicant agreed with this interpretation by way of reply submissions. However, in the same submissions, the applicant claimed difficulty completing the pre-accident demands of working at a computer for 9 to 11 hours a day. The applicant submits this inability caused the applicant to eventually resign from work at both the first and second places of employment.

**Is the applicant impaired from completing the essential tasks of employment?**

[18] The applicant claims limited range of motion in the neck as well as ongoing back, neck, and shoulder pain impair the applicant's ability to perform computer work for 9-11 hours a day, as required by the applicant's two different employers. The applicant submits this inability to complete work tasks caused the applicant to resign from the first employer and be terminated by the second.

[19] The respondent submits the applicant has not provided any evidence to show an inability to work long hours, nor has the applicant established that long hours or overtime are essential tasks of the applicant's pre-accident employment. Further, the respondent submits there is no evidence to suggest the applicant had to resign from the first employer as a result of accident-related injuries, nor is there evidence to suggest the applicant was terminated for any accident-related issues.

[20] I agree with the respondent and find no evidence the applicant is impaired from completing the essential tasks of employment. My reasons are as follows.

[21] As noted above, the applicant's entitlement to IRBs is measured by an inability to perform the essential tasks of employment for which the applicant was engaging in at the time of the accident. For this matter, the essential tasks of the applicant's employment at the time of the accident include using architectural software on the computer, attending meetings, and lifting up to 7 kg.

[22] There is no evidence before me to conclude overtime is an essential task of the applicant's employment, nor is there evidence showing the applicant is unable to work overtime during the period when IRBs are claimed but not paid. Similarly, there is no evidence the applicant cannot do the tasks outlined in the Multidisciplinary Assessment Report.

[23] The evidence provided by the applicant, notably the CNRs of Dr. Park and Focus Physiotherapy, fail to support the applicant's claim. For instance, Dr. Park's records show only 3 accident-related visits on June 15, 2016, July 13, 2016, and December 19, 2016. During the first visit, Dr. Park recommended the applicant refrain from work in the acute phase of recovery and then return on a modified work schedule. During the second visit, Dr. Park extended the duration of the modified work schedule when the applicant continued to complain of work-related issues resulting from accident-related injuries. During the third visit, the applicant complained of pain and claimed to have been working a lot and doing heavy lifting at work but had recently quit that employment. During this visit on December 19, 2016, Dr. Park recommended the applicant engage in home exercises, continue with pilates, and try yoga. Notably, Dr. Park makes no recommendation for modified duties upon a return to work, nor does Dr. Park recommend the applicant abstain from any activities.

[24] Like Dr. Park's CNRs, the CNRs form Focus Physiotherapy are similarly unhelpful. The CNRs show the applicant attended for treatment for a total of 4 times between October 22, 2016 and March 4, 2017. While the CNRs show that the applicant complained of soreness and difficulties at work the CNRs do not

show that the applicant cannot complete the essential tasks of an architectural staff member. Likewise, the records are absent any recommendation the applicant refrain from work or any other activities.

[25] Considering the submissions and evidence before me, I find the applicant is not entitled to IRBs for the period claimed.

**INTEREST**

[26] Interest accrues on overdue payment of benefits in accordance with section 51 of the *Schedule*. Having found no benefits to be overdue, I find no interest is payable as a result.

**CONCLUSION**

[27] The applicant is not entitled to IRBs for the period claimed. No interest is payable.

**Released: December 5, 2019**

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**Brian Norris**

**Adjudicator**