

**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**



Citation: Osawaru Irowa vs. RBC General Insurance Company, 2019 ONLAT 18-005774/AABS

Tribunal File Number: 18-005774/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:

Osawaru Irowa

Appellant

and

RBC General Insurance Company

Respondent

DECISION

PANEL: Ian Maedel, Adjudicator

APPEARANCES:

For the Appellant: Mateen Pourquoi, Counsel

For the Respondent: Surina Sud, Counsel

HEARD: In-Person on: June 17-18, 2019

OVERVIEW

- [1] The applicant was injured in an accident on June 10, 2016 and sought benefits from the respondent pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (Schedule).
- [2] The applicant received payment of an income replacement benefit (“IRB”) for almost six months. The IRB was suspended by the respondent on the basis of s. 44 Insurer’s Examinations (IE) that determined the respondent no longer met the criteria for an IRB. The applicant disagreed with the respondent’s decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal) for reinstatement of the IRB, an award pursuant to s. 10 of Ontario Regulation 664, and interest.
- [3] The parties participated in a case conference but were unable to resolve their dispute and eventually proceeded to this hearing.
- [4] As part of this hearing, the Tribunal heard viva voce evidence from three persons; the applicant, and two respondent witnesses, Dr. Ikejiani, Orthopaedic Surgeon, and Ms. Martha Cope, Clinical Nursing Supervisor, Georgian College.

ISSUES TO BE DECIDED

- [5] The following are the issues to be decided, on consent of the parties:
 - i Is the applicant entitled to receive a weekly income replacement benefit in the amount of \$400.00 per week for the period of December 19, 2016 to May 30, 2017?
 - ii Is the applicant entitled to interest on the overdue payment of benefits?
 - iii Is the applicant entitled to an award pursuant to Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

RESULT

- [6] I find the applicant is not entitled to an IRB in the amount of \$400.00 per week for the period in dispute.
- [7] As no IRB is payable, the applicant is not entitled an award pursuant to Ontario Regulation 664 or to interest.

¹ O. Reg. 34/10.

ANALYSIS

Is the applicant entitled to an income replacement benefit?

- [8] No, I find the applicant is not entitled to an income replacement benefit for the period in dispute, as he does not suffer a substantial inability to perform the essential tasks of his employment.
- [9] Entitlement to an IRB falls under s. 5(1)(1)(i) of the Schedule: an IRB is payable if the insured was working at the time of the accident and, within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of that employment. This inquiry is divided into two steps: 1) what are the essential tasks of employment; and, 2) is the insured substantially unable to perform the essential tasks of that employment? The onus to prove entitlement rests with the applicant.

The applicant's IRB entitlement

- [10] On the evidence, I find the medical documentation and testimony offered at the hearing does not satisfy the applicant's onus to prove that he suffers a substantial inability to perform the essential tasks of his employment.²
- [11] At the time of the accident, the applicant was employed as a Quality Inspector inspecting automobile parts at Phoenix Quality in Oshawa, Ontario.³ His work was full-time, five days a week, plus overtime. His position required him to stand for the majority of his shift, eight to nine hours a day. He was also often required to bend and lift objects weighing 22-25 pounds, often in a repetitive motion. The applicant had been employed at Phoenix Quality since April 2016 and did not return to this position following the date of the accident, June 10, 2016.
- [12] The applicant submits that, as a result of the accident, he suffers from headaches, lower back pain, pain in his right shoulder, neck stiffness, and anxiety while driving on highways or busy roads. All of which cumulatively prevent him from performing his essential work tasks. The applicant submits he now suffers from chronic pain. In response, the respondent contends that although he continues to suffer some pain in his right shoulder and lower back, he has normal range of motion. Thus, his injuries do not render him substantially unable to complete his essential work tasks. I agree with the respondent.

² In addition to his testimony, the applicant relies on the clinical notes and records of the Alliston Walk-In Clinic, the clinical notes and records from Stevenson Memorial Hospital including diagnostic imagery reports, clinical notes and records from Mackenzie Medical Rehabilitation Centre, an Employer's Confirmation Form (OCF-2) dated June 21, 2016, and two Disability Certificates (OCF-3's) dated November 17, 2016 and July 4, 2017 both completed by A. Russi (Chiropractor).

³ Employers' Confirmation Form (OCF-2), Applicant's Brief of Documents at Tab 21, p. 2.

The Medical Evidence

- [13] The applicant testified that his primary complaint was lower back pain. It prevented him from returning to work as a Quality Inspector, due to the physical nature of the employment. He knew he would be unable to stand for long periods of time, bend, and lift objects as required. The applicant referred to a series of clinical notes and records provided primarily by physicians who examined the applicant at the Alliston Walk-In-Clinic.⁴ Other than the OCF-2's provided by Dr. Russi, Chiropractor, the applicant has not adduced any other medical report into evidence that bears a nexus to the substantial inability test for income replacement benefits as per s. 5(1)(1)(i) of the Schedule.
- [14] Although both counsel referred to the Assessment Report of Dr. Joseph Wong, Physiatrist, the report was not made an exhibit before the Tribunal. However, pursuant to Rule 15(1)(b) of the SPPA⁵, I have reviewed the report found at Tab 19 of the Applicant's Brief of Documents. Dr. Wong did not appear as witness as part of this proceeding. Dr. Wong diagnosed a myofascial injury of the cervical spine and paraspinal muscles, cervicogenic headache, myofascial injury of the thoracic spine muscles with pain to the right shoulder, myofascial injury of the lumbosacral spine gluteal muscles, post-traumatic insomnia, and psychological problems.⁶ He also opines the applicant suffers with chronic pain syndrome, as he has not recovered from soft-tissue injuries within the normal recovery time of three to six months.⁷ Dr. Wong concludes that the applicant continues to suffer a substantial inability to perform his pre-accident work as a Quality Inspector.⁸
- [15] The respondent relied on the Orthopaedic Assessment Report and viva voce testimony of Dr. Charles Ikejiani, Orthopaedic Surgeon. As a result of the assessment conducted, Dr. Ikejiani found the applicant did suffer a cervical and thoracolumbar strain, right shoulder strain.⁹ He found the right shoulder strain was improving and noted the applicant continued to have lower back discomfort.¹⁰ However, he found that he had normal range of motion in the cervical spine and thoracolumbar spine.¹¹ He addressed the test for IRB directly, indicating that in his opinion, the applicant did not suffer a substantial inability to perform essential tasks of pre-accident employment.¹²
- [16] Dr. Ikejiani's evidence did not waiver upon cross-examination. He indicated that impairment without objective evidence was possible, but rare. Dr. Ikejiani did

⁴ Applicant's Brief of Documents at Tab 11.

⁵ Statutory Powers Procedure Act, R.S.O. 1990, c. S 22.

⁶ Physiatry Assessment Report, Applicant's Brief of Documents Tab 19, pg. 8

⁷ Ibid. pg 9.

⁸ Ibid. pg. 10.

⁹ Orthopaedic Assessment Report, Respondent's Index Brief Tab 3N pg. 7.

¹⁰ Ibid pg. 7.

¹¹ Ibid pg. 6.

¹² Ibid. pg. 9.

admit that he couldn't adequately test the applicant's ability to perform the same repetitive movements over a ten-hour work shift. I prefer the medical evidence of the respondent's medical assessor, Dr. Ikejiani. I do believe the applicant experienced pain during the period in dispute. However, I do not find this pain led to a substantial inability to perform the essential tasks of his employment as a Quality Inspector.

- [17] I do not find the applicant suffers from chronic pain syndrome pursuant to the report filed by Dr. Wong. After reviewing Dr. Wong's report, Dr. Ikejiani's opinion remained unchanged. I also note there is no psychological or pain specialist report before me to support a diagnosis of chronic pain syndrome. I am mindful that Dr. Wong is a physiatrist and in the absence of any additional evidence, I place little weight upon his finding of chronic pain syndrome.
- [18] I am further unconvinced due to the preponderance of evidence provided by the applicant. The applicant testified that he completed a four-year Bachelor of Science in Nursing Program at Georgian College in April of 2019. During his studies he was required to attend clinical placement every week for fourteen weeks. This placement required the applicant to undertake physical tasks with patients that required standing, bending, lifting and performing repetitive movements.¹³ It is clear from the applicant's learning logs, he performed these duties, assisting patients in getting out of bed and assisting with their ambulation during the period in dispute.¹⁴
- [19] Perhaps most telling, was the applicant's failure to inform the College of Nurse of Ontario ("CNO") or his clinical nursing supervisor, Ms. Martha Cope, of any physical or mental limitations that otherwise may have affected his ability to complete the requirements of the program. In fact, the applicant was required to inform the College of Nurses of any physical or mental condition that otherwise made it desirable in the public interest that he or she not practice.¹⁵ In his viva voce evidence the applicant indicated he was reticent to inform anyone or ask for accommodation during his placement, as he feared it would reflect poorly upon him.
- [20] From this lack of disclosure, I can infer one of two things; either the applicant did not suffer pain that prevented him from undertaking the physical aspect of his duties as a nursing student, or that he deliberately failed to disclose his physical limitations to the nursing staff or CNO for fear that it may have somehow

¹³ Requisite Skills and Abilities for Nursing Practice in Ontario, College of Nurses of Ontario, at pg. 3. Made Exhibit 6 during the hearing.

¹⁴ Learning Log, February 2017, Respondent's Index Brief, Tab 4K, pg. 14. Learning Log, January-February 2017, Respondent's Index Brief Tab 4J at pg. 13. Learning Log March 2017, Respondent's Index Brief Tab 4M, pg. 12.

¹⁵ Bachelor of Science in Nursing (BSCN) Collaborative Program Outline, pg. 2-3, Respondent's Index Brief at Tab 4F, pp. 2-3.


affected his standing in the program. Either way, it has a detrimental effect on my assessment of the applicant's credibility.

- [21] I am not otherwise equating the completion of one clinical nursing placement day per week over a fourteen-week period to full-time employment as a Quality Inspector, working more than forty hours per week, plus overtime. However, I do note that both require a level of physicality that otherwise would have been very difficult for someone debilitated by pain or chronic pain syndrome.
- [22] The applicant has further submitted the notice of stoppage was deficient pursuant to s. 37(6)(d) of the Schedule. I disagree. When I examine the respondent correspondence dated December 16, 2016, it is clear the IRB has been stopped as of December 19, 2016 due to failure to attend at a s. 44 assessment. Respondent correspondence dated January 23, 2017 indicates the IRB has been stopped due to the medical opinion provided by Dr. Ikejiani in his assessment report. Thus, the December 19, 2016 stoppage date is maintained.
- [23] On the medical evidence and credibility issue noted, I find no reason to interfere with the respondent's determination to stop the IRB. I find the applicant failed to meet his onus to prove that he is entitled to an IRB for the period in dispute. I prefer the medical evidence provided by the respondent, demonstrating he does not have a substantial inability to perform the essential tasks of his pre-accident employment.

CONCLUSION

- [24] For these reasons, I find the applicant is not entitled to an income replacement benefit for the period of December 19, 2016 to May 30, 2017, as he does not suffer a substantial inability to perform the essential tasks of his pre-accident employment. Accordingly, no award or interest is payable.

Released: November 5, 2019



Ian Maedel
Adjudicator