

**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: **Heather Verheye vs. Unifund Assurance Company, 2019 ONLAT 18-006019/AABS**

**Date: August 6, 2019
File Number: 18-006019/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:

HV

Applicant

and

Unifund Assurance Company

Respondent

DECISION

PANEL: Christopher A. Ferguson, Adjudicator

APPEARANCES:

For the Applicant: Vicki J. Edgar, Counsel

For the Respondent: Geoffrey L. Keating, Counsel

HEARD: In Writing on: November 19, 2018

OVERVIEW

- [1] The applicant, HV, was involved in a motor vehicle accident on May 19, 2017. As a result, she sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (“the Schedule”). She applied for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“the Tribunal”) when the respondent, Unifund, denied her claim.
- [2] Unifund paid HV income replacement benefits (IRBs) until February 8, 2018. IRBs are the sole issue to be determined in this matter.

ISSUES

- [3] The issues in dispute are:
1. Is HV entitled to an IRB of \$236.25 per week from May 1, 2018 to date and ongoing?
 2. Is HV entitled to interest on any overdue payment of benefits?

RESULT

- [4] HV is not entitled to IRBs. Her appeal is denied; accordingly, no interest is owing to her.

ANALYSIS

IRBs

- [5] The insurer’s obligation to pay IRBs, eligibility criteria and the method of calculating benefit amounts are set out in ss. 4-10 of the Schedule.
- [6] In this case, the relevant test for IRBs is prescribed by s.5(1)1.i. of the Schedule. Under this section, an insurer must pay IRBs to an insured person who was employed at the time of the accident, and who as a result of and within 104 weeks after the accident suffers a substantial inability to perform the essential tasks of that pre-accident employment. This is commonly called “the pre-104 test”.
- [7] The onus is on the applicant to prove his or her entitlement to IRBs.²

¹ O.Reg. 34/10

² *17-005910 v Aviva General Insurance*, 2018 CanLII 110920 (ON LAT), paragraph 15, submitted by Unifund

- [8] When the accident occurred, HV was a supply designated early childhood education educator (ECE) in a public elementary school, leading a large number of young children through lessons and educational exercises. She was responsible for monitoring their safety and for providing them with encouragement and support. HV describes her position as physically, psychologically, and emotionally demanding.
- [9] HV returned to her pre-accident job on January 22, 2018. She submitted no evidence of any shortfall in earnings after that date.

HV's Position

- [10] HV acknowledges that Unifund conducted insurer's examinations (IEs) in a number of areas, including psychiatry³, psychology⁴, functional abilities evaluation⁵ and neurocognitive⁶ reports. HV contends that they all noted various difficulties being experienced by her but concedes that all concluded that she did not meet the pre-104 test.
- [11] HV argues that Unifund has erred in assessing her by failing to adequately consider the impact of her injuries cumulatively on her ability to do her job. In this line of argument, HV contends that:
- i. The assessment methodology used by Unifund was "inherently flawed" because "while it assessed [HV's] function in isolation there was no effort made to assess the combined impact that all of her physical and psychological injuries were having on her ability to work."
 - ii. Multiple IE reports ended their assessments by saying that a number of HV's symptoms fell outside of their expertise and that they would have to defer to other experts with respect to those issues.
 - iii. Minimal reference was made to the ongoing psychiatric treatment that was occurring at the same time as the Insurer Examinations. For example:
 - a. On August 25, 2017, HV was seen by Dr. Alexandra Douglas at Cambridge Memorial Hospital, who opined that HV was suffering from a major depressive episode in the context of a post-concussive

³ Dr. Yuri Marchuk, psychiatrist, dated November 14, 2017

⁴ Dr. Rees Lewis, psychologist, dated November 14, 2017

⁵ Ms. Dawn Rodie, physiotherapist, dated November 14, 2017

⁶ Dr. Mark Watson, neuropsychologist, dated January 23, 2018

syndrome. It was noted that she was suffering from significant memory difficulties, significant irritability, decreased patience, weeping, going to bed early, feelings of guilt, decreased energy throughout the day, poor concentration and having passive suicidal thoughts of being overwhelmed and not wanting to go on.

- b. In August 2017, HV began attending weekly counselling sessions with Dr. Douglas. In addition to weekly counselling, HV was placed on Sertraline and began attending a Cognitive Behavioural Therapy group to treat her anxiety and depression.
- c. On November 6, 2017, Dr. Douglas noted that HV suffered from a slowly resolving major depressive disorder which was responsive to Sertraline and therapy and that weekly psychotherapy would continue along with her cognitive behavioural therapy and depression group therapy. HV continued to receive regular ongoing psychiatric treatment from Dr. Douglas until September 7, 2018.
- iv. There is no consideration of any psychological impact on HV's ability to function in her workplace setting in any of the assessments conducted by Unifund. This is despite the fact that at the time of the assessments HV was suffering from suicidal ideation, significantly increased irritability, decreased patience, poor concentration and feeling overwhelmed. Considering that HV was responsible to look after a number of young children, all of these psychological issues raise serious concerns about her ability to perform the essential elements of her pre-accident employment.
- v. HV reduced her weekly hours from a norm of 25 hours (and sometimes 40) to 11-12 hours per week. She submits that this constitutes a substantial inability to perform the tasks of her pre-accident employment.

Unifund's Position

- [12] Unifund submits that HV has failed to submit any medical evidence to support her IRB claim. It relies on the above-noted IEs as medical evidence that HV does not meet the pre-104 test. It notes information from HV's own psychiatrist, noted below, that undermines her claim. It notes a lack of evidence substantiating HV's claim to have reduced her working hours.

Findings

[13] I find that HV has not met the onus on her to prove that she is entitled to IRBs. My reasons are:

- i. Strikingly absent from HV's evidence is any finding by her treating psychiatrist that she is unable to work at her pre-accident employment. I find that progress notes from Dr. Douglas do not support HV's claims of psychological impairment that would prevent her from working at her pre-accident job. Those progress notes state that:
 - a. On February 8, 2018, HV's post-concussive syndrome and depression had largely resolved.
 - b. On April 25, 2018, HV reported that she was no longer having depressive symptoms, with Dr. Douglas indicating that HV's depression was in remission.
 - c. On July 4, 2018, HV reported her mood as "really good", that she was sleeping well and that she planned to start a veterinary assistant placement later that summer.
 - d. On September 7, 2018 HV reported completing a veterinary assistance program and was volunteering.

None of these notes, or any other evidence from Dr. Douglas submitted to me indicate a psychological impairment impeding HV's return to her pre-accident job.

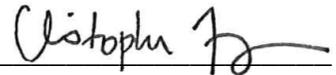
- ii. In the absence of any medical evidence of her own that she cannot work full-time at her pre-accident job due to accident-related impairments, HV's criticisms of the IEs conducted by Unifund's assessors are insufficient to undermine Unifund's denial. HV's submissions and evidence strongly stress her psychological, rather than physical impairments, along with cognitive challenges, and the IEs as noted included psychological and neuropsychological assessments. The IEs are convincing: HV is not impaired from performing her pre-accident employment tasks.
- iii. HV submitted no evidence from her employer to corroborate her claim that she sharply reduced her pre-accident work hours after her return to work. There is no evidence of a shortfall in pre-accident earnings before me. I dismiss this claim for lack of evidence.

[14] HV did not prove that she meets the pre-104 test for IRBs. Accordingly, I deny her appeal for IRBs.

CONCLUSION

[15] HV's appeal is denied, and the issue of interest on overdue payments extinguished.

Released: August 6, 2019



Christopher A. Ferguson
Adjudicator