



Citation: Arhen v. Aviva Insurance Company of Canada, 2021 ONLAT 19-011560/AABS

Licence Appeal Tribunal File Number: 19-011560/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:

Juliana Arhen

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: Thérèse Reilly

APPEARANCES:

For the Applicant: Juliana Arhen, Applicant
Michael Lee, Counsel

For the Respondent: Christine Mansbridge, Litigation Specialist
Derek Greenside, Counsel

Interpreter: Emmanuel Nsha, (Twi)

Court Reporter: Michelle Gordon

Hearing by Videoconference: August 17, 18, 26 and 27, 2021

OVERVIEW

- [1] The applicant was injured in an automobile accident on April 26, 2017. She applied for and sought an income replacement benefit (IRB) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("Schedule").¹
- [2] The applicant disagreed with the respondent's denial of the income replacement benefit (IRB) claim. The respondent relies on its section 44 Insurer Examination's (I.E.) multidisciplinary assessment reports that the applicant does not meet either the pre-104 week nor post-104 week test for an IRB. The applicant then applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal") for dispute resolution.
- [3] At the hearing, evidence was heard from the applicant, Dr. Katherine Kosar, family doctor and Dr. Gina Bajaj, treating chiropractor, the insurer examiners, Dr. Victor Naumetz, orthopaedic surgeon and Robert Bullard, registered kinesiologist.

ISSUES

- [4] The following are the issues to be decided:
 - a. Is the applicant entitled to an income replacement benefit in the weekly amount of \$306.24 from November 1, 2017 to date and ongoing?
 - b. Is the respondent liable to pay an award under *Regulation 664, Automobile Insurance*² ("Regulation 664") because it unreasonably withheld or delayed payments to the applicant?
 - c. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] The applicant is entitled to an IRB from November 1, 2017 to December 31, 2017 but is not entitled to an IRB from January 1, 2018 to date and ongoing. The applicant is not entitled to an award for unreasonably withheld or delayed payments under section 10 of Regulation 664. Interest is payable on the overdue payment of benefits.

¹ O. Reg. 34/10.

² R.R.O. 1990, Reg. 664

PROCEDURAL MATTERS

Qualifying the Family Doctor and Treating Chiropractor as Expert Witnesses

- [6] The respondent raised a preliminary issue requesting a ruling that Dr. Kosar and Dr. Bajaj not be qualified as expert witnesses. The respondent submits no report or acknowledgement of expert duty was filed on their behalf. The applicant stated it agreed with this position. As such and after hearing submissions, I find that Dr. Kosar and Dr. Bajaj are not expert witnesses for the purposes of this hearing. They are allowed to testify as the treating practitioners. The respondent raised the argument initially that neither should be allowed to testify, but based on the submissions, I allowed both to testify as treating practitioners.

BACKGROUND

- [7] There are two statutory tests to meet to be entitled to an IRB. The applicant claims that because of her injuries she meets both statutory tests. For the period being sought by the applicant in the pre-104 week IRB being November 1, 2017 to April 26, 2019 (pre-104 week IRB), the applicant pursuant to section 5(1) of the Schedule has to establish that 1) she was employed or self-employed at the time of the accident and 2) during the 104 week period after the accident she suffered a substantial inability to perform the essential tasks of her pre-accident employment.
- [8] The statutory test to meet to be eligible for an IRB post 104 weeks is set out in Section 6 (1) of the *Schedule* which provides that for the period after the first 104 weeks of disability, the applicant must demonstrate that he or she suffers a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience. The applicant claims the IRB in the post-104 week IRB from April 27, 2019 to August 12, 2019.
- [9] IRBs were paid by the respondent until October 31, 2017 at which time the respondent denied the IRB claim based on a multidisciplinary assessment report of its IE insurers. On August 12, 2019, the applicant returned to work in a different occupation, as a personal support worker (PSW).³

WORK DUTIES

- [10] At the time of the accident, the applicant was employed as a general worker. In that role she testified that she performed tray set up for the airline industry. She was required to place packaged food items onto plates and trays as well as

³ Resume of the applicant, applicant document brief, tab A-12, exhibit 10.

cutlery and napkins. ⁴ She worked full time 8 hours a day, 5 days a week as a food packager which required her to stand continually and lift heavy boxes that were full of food which she then sorted onto food trays. She testified that the boxes she was required to lift throughout the day weighed 50 pounds. She testified that because of her injuries she was not able to stand and lift the boxes. She stopped working immediately after the accident and did not return to her pre-accident employment at any time after the accident. The OCF-2 dated May 31, 2017 completed by the employer,⁵ did not attach a job description.

[11] She testified that in January 2018 she started a program training as a PSW. Her study period was from January 25, 2018 to September 7, 2018. In July and August 2018, she testified she completed two working practicums⁶ and obtained her government certificate in October 2018. The certificate qualified her to work as a PSW. The applicant told her family doctor on February 16, 2018 that she began training as a PSW to upgrade her knowledge.⁷ She testified that due to her injuries from the accident she could not perform the lifting requirements of her work as a general worker and she also had difficulty standing. On cross examination, she was asked whether in her role as a PSW she would be required to lift patients as part of her duties. She responded that the facilities where she completed the practicums had equipment that assisted the PSWs with the lifting of patients. She started full time employment as a PSW in August 2019.⁸

[12] The applicant submits her physical impairments as a result of the accident are not limited to but include the following:

1. Neck Pain
2. Chronic Back Pain
3. Shoulder Pain
4. Knee Pain

[13] On the day of the accident, which occurred at around 5:45 pm after work, the applicant was taken to hospital by ambulance and kept overnight. X-rays taken at

⁴ Her duties as a general worker were summarized in the Physical Demand Analysis, by Robert Bullard, dated August 16, 2017, applicant document brief, tab A-16, exhibit 15.

⁵ OCF-2 from employer, dated May 31, 2017, tab A-14, applicant document brief, exhibit 12.

⁶ Resume of applicant indicates two practicums were completed in 2018, applicant document brief, Tab A-12, exhibit 10.

⁷ Clinical notes and records (CNRs) of the family doctor, Dr. Kosar, respondent's document brief, tabs 50 and 51, exhibit 19.

⁸ Offer of Employment, dated August 8, 2019, exhibit 10.

the hospital on the day of the accident of her neck and head did not reveal any bone abnormality or fractures⁹ Subsequent X-rays of the lumbar spine and knees on August 2, 2017 were normal.¹⁰ The lumbar spine X-ray did show a gentle scoliotic curve of the spine.

- [14] The applicant submitted two OCF-3s¹¹ in support of her injuries. The first OCF-3 completed by Dr. Kosar is dated June 7, 2017 and restricts the injuries to neck and back pain. This is consistent with Dr. Kosar's oral testimony as to the applicant's injuries and her clinical notes. The OCF-3 states the applicant cannot work due to her injuries, cannot perform her activities of daily living, cannot perform caregiver activities or house maintenance and housekeeping activities.
- [15] The second OCF-3 dated November 21, 2017 was completed by Dr. Bajaj. The injuries listed are neck and back pain, headaches, sprains and strains of the cervical, thoracic and lumbar spine, pain in the hips, wrists, ankles and feet as well as psychological impairments including memory and mood changes, nervousness, concussion and sleep disturbances. As Dr. Bajaj is a chiropractor, the claims in the OCF-3 for psychological impairments such as nervousness, concussion and sleep disturbances are beyond her expertise. The medical evidence presented including the clinical notes of the family doctor, and the reports IE assessors discussed below of Dr. Naumetz and Robert Bullard, I find do not provide medical evidence to support the statements in the November 21, 2017 OCF-3 that the injuries from the accident include injury to the hips, wrists, ankles and feet.
- [16] The applicant testified that her injuries sustained from the accident prevent her from engaging in the pre-accident employment. She testified she was required to lift 50 pounds continually during her shifts as the boxes she lifted weighed 50 pounds. Her work was physically demanding. She was unable to return to work due to her injuries.
- [17] The applicant saw Dr. Kosar on a regular basis after the accident. She saw the family doctor for the first time after the accident on May 1, 2017. Dr. Kosar's notes from May 2017 to August 2017 refer to the applicant having sustained sprains and strains.¹² It is not until September 2017 that the clinical notes and records ("CNRs") refer to the applicant suffering chronic pain in the back and legs. Dr. Kosar testified that the applicant suffers from chronic back pain, which

⁹ CNRs of the Brampton Civic Hospital, exhibit 2, applicant document brief, tab A-4.

¹⁰ X-rays dated August 2, 2017, tab A-5 applicant document brief, exhibit 3.

¹¹ OCF-3 dated June 7, 2017 was completed by Dr. Kosar and the OCF-3 dated November 21, 2017 was completed by Dr. Bajaj, tab A-15, applicant document brief, tab A-15, exhibit 13.

¹² Clinical notes and records of Dr. Kosar, tabs 50 and 51, respondent document brief, exhibits 19 and 20.

she stated is pain that is ongoing pain for longer than 6 months despite treatment. The applicant also saw a second doctor at the same medical clinic, Dr. Patrick Safieh, physician on various occasions from December 2017 to at least early 2018. The applicant testified she saw Dr. Safieh when Dr. Kosar was not in the office. The notes indicate Dr. Safieh provided the applicant with a doctor's note on December 2, 2017 stating that she could not return to work due to her injuries.

[18] The CNRs of the family doctor¹³ refer to and include but are not limited to the following visits:

- a. May 1, 2017: Dr Kosar states that at the time of the accident the applicant had immediate neck pain. The CT scan of the neck and head taken at the emergency department on April 26, 2017 did not reveal any fracture. The applicant complained of neck pain, whole body pain, pain in the back and knees. It was noted she could not stand properly. The doctor stated she had a mild whiplash and headaches with bruising from the seat belt. Her concentration and memory were normal. She had sustained sprains and strains. Physiotherapy was suggested for treatment of the painful areas.
- b. May 24, 2017 Dr. Kosar noted pain continues to the neck and back. She looked well. She had strains and sprains, tenderness in the low back and some spasms and decreased range of motion.
- c. June 7, 2017 and July 12, 2017 the applicant was still not working as she could not stand and was going for physiotherapy treatment. The bruises from the seat belt had resolved. The neurological exam was normal.
- d. The August 2, 2017 Dr. Kosar noted the right knee ultrasound and X-ray were normal. The X-ray of the lumbar spine showed a gentle scoliotic curve and no signs of degenerative changes. No fractures were noted.
- e. September 27, 2017 Dr. Kosar noted chronic pain in the back and legs. She stated the applicant appears well and was using a cane in the right hand. There were tender points on the spine. She reviewed chronic pain management with the applicant.
- f. November 9, 2017 Dr. Basil Al-Saigh noted chronic pain in the back ("no red flags") and legs. The notes state the applicant had ADL's [activities of daily living] limited ability. She was prescribed physiotherapy for painful

¹³ Clinical Notes and records of Dr. Kosar, exhibits 19 and 20, respondent document brief, tabs 50 and 51, pages 493 to 511 and tabs 52 and 53, pages 530 to 579.

soft tissue areas and Tylenol 3 for pain.

- g. December 1, 2017 Dr. Kosar noted the applicant had difficulty sleeping and mood issues. The applicant stated she can't go to work. Dr. Kosar noted she had ongoing pain in low back. She had ongoing difficulty doing usual home activities. She was not working. There was low back tenderness, some spasm and decreased range of motion.
- h. December 2, 2017 Dr. Safieh noted the applicant is currently unable to work due to chronic pains which prevents her from doing her ADLs. There is low back tenderness, some spasm and decreased range of motion. A note for work is provided to the applicant.
- i. January 27, 2018 Dr. Safieh noted the applicant has left shoulder and low back pain. The applicant had had physiotherapy and is not working. She is taking a PSW course and is well.
- j. February 5, 2018 Dr. Safieh writes the applicant has "right low back pain x years" "is on and off/gets worse".
- k. February 16, 2018 ¹⁴ Dr. Kosar notes the applicant came in for forms to be completed for school. She is taking a PSW course.
- l. October 3, 2018 The doctor is not named in this progress note. The applicant it is noted has persistent chronic back pain without development of red flags. She has trouble sleeping and headaches but is doing range of motion stretching.
- m. March 13, 2019 The notes refer to a consulting report received from Dr. Andany, Sunnybrook Hospital. The report is not accident related.
- n. March 28, 2019 the progress note indicates the applicant is travelling to Ghana and tablets required for travel. There is no reference to the motor vehicle accident or pain from the accident.
- o. June 5, 2019 The notes state the applicant travelled to Ghana in March 2019. There is no reference to the motor vehicle accident or pain from the accident.

[19] The CNRs of the family doctor outlined above indicate a 13 month gap in the visits to the family doctor between February 16, 2018 and March 13, 2019 with

¹⁴ The notes for a visit in May 2018 and November 2018 are unrelated to the accident.

the exception of the one visit in October 3, 2018 which references pain from the accident. As noted above the author of the progress note is not named. The visit on February 16, 2018 refers to requirements and forms needed for the PSW training and the visits on March 28, 2019 and June 5, 2019 refer to the planned travel to Ghana. There is no mention of accident related pain complaints.

PHYSIOTHERAPY TREATMENT

[20] The applicant completed 5 months of physiotherapy treatment after the accident.¹⁵ The OCF-23 completed by Physio Fix states her injuries are minor.¹⁶

PRE-EXISTING MEDICAL CONDITIONS

[21] The applicant testified about pre-existing medical conditions involving injury to her back, neck and shoulders. The cross examination and medical records submitted revealed that the applicant was in a motor vehicle accident in 2010 and a second accident in December 2013. As a result of these accidents she sustained injuries to her neck and back.¹⁷ The applicant was questioned about an assessment completed by the Toronto Poly Clinic dated February 23, 2016 which indicated the applicant had sustained numerous injuries to her back and neck from an accident in December 2013. The diagnosis by Dr. Dao was chronic neck and low back pain. The CNRs dated January 28, 2016 from the family doctor indicate at that time the applicant had mechanical backache. The clinical notes of November 5, 2015 refer to back pain and the applicant needed physiotherapy treatment.¹⁸

[22] The respondent cross-examined the applicant and Dr. Kosar at length about her pre-existing injuries to her neck and back. These prior injuries were documented in the CNRs. Despite this, Dr. Kosar stated on cross examination that she was not aware of these prior injuries, however, in her view she believed any pre-existing injuries were resolved by the time of this accident.

IE ASSESSORS

[23] The applicant was examined by Dr. Naumetz, orthopaedic surgeon, who completed an orthopaedic surgery paper review regarding the IRB claim on August 17, 2017.¹⁹ In his report he noted the applicant showed no spasms or

¹⁵ Clinical records of Physio Fix, tab A-7, applicant document brief, exhibit 5.

¹⁶ OCF-23, respondent document brief, tab 9.

¹⁷ Toronto Poly Clinic report letter dated February 23, 2016 by Dr. Dao, tab 56, respondent document brief, exhibit 23.

¹⁸ Exhibit 21, clinical notes of Dr. Ferase Rammo, from February 12 2015 to March 25, 2021. Exhibit 21, tab 56.

¹⁹ Orthopaedic Surgery Paper review, dated August 17, 2017, tab 12, applicant document brief, exhibit 29.

tenderness in any one particular area. In his opinion the applicant sustained strains and sprains of the cervical, thoracic and lumbar spine and some bruising from the seatbelt. She also had largely recovered from her injuries. In his opinion she had sustained a Minor Injury as defined in the Schedule.

- [24] Dr. Naumetz with Robert Bullard, kinesiologist, also completed an independent insurer multidisciplinary assessment. In the assessment report, Dr. Naumetz noted the applicant appeared generally well but was pain focussed. Dr. Naumetz found no reproducible musculoskeletal evidence of a substantial motor vehicle accident impairment.²⁰ He found no evidence of any accident-related disability and, based on these findings, found no substantial inability to perform her pre-accident employment. Dr. Naumetz testified that the injuries sustained were soft tissue injuries which were consistent with the family doctor clinical notes at that time. In his testimony he stated that although the applicant had been using a cane, in his opinion there was no reason for her to use a cane. He testified the applicant sustained strains and sprains of the cervical, thoracic and lumbar spine, had some bruising from the seatbelt and had largely recovered. With reference to the lumbar spine X-ray that showed a gentle scoliotic curve of the spine, Dr. Naumetz testified this would be normal in most individuals over 40.
- [25] A functional ability evaluation ²¹ was also to be completed by Robert Bullard, kinesiologist, however, he was unable to complete this part of the assessment as the applicant's blood pressure was too high on the day of the proposed examination. He did complete a physical demand analysis. In the physical demand analysis report, he noted the applicant's work lifting food items was negligible and less than 5 pounds.
- [26] The respondent questioned Robert Bullard in cross examination about his statement in his report that the lifting requirements in her duties were about 5 pounds. He testified he was never advised by the applicant that she had to lift 50 pounds. He testified he would have asked her how many pounds she had to lift. Robert Bullard report states she was required to lift 5 pounds and this is what he was advised on lifting requirements by the applicant.
- [27] Robert Bullard testified about the National Occupation Classification (NOC) which is an accepted reference on occupations in Canada in which the applicant would be classified as a labourer in food and beverages. He testified the statement in the classification that described the duties as involving heavy lifting

²⁰ Multidisciplinary Assessment Report, Dr. Naumetz, dated August 24, 2017, respondent document brief, tab 28, exhibit 15.

²¹ Physical Demand Analysis, Robert Bullard, dated August 16, 2017, applicant document brief, tab A-16, exhibit 15.

is not accurate. In his view, the job requirements of the applicant as described to him as a general worker for placing and sorting food onto food trays involved lifting of less than 5 pounds. He confirmed in cross examination that his statement about lifting 5 pounds reflects what was reported to him by the applicant.

PSYCHOLOGICAL IMPAIRMENT

- [28] On December 15, 2017, the applicant was assessed by Dr. Tenenbaum, psychologist. The doctors report indicated the applicant was suffering from anxiety, was irritable, had low back and shoulder pain.²² She was diagnosed with depression, anxiety and chronic pain symptoms. The report is dated December 15, 2016 (which is incorrect as the assessment occurred in December 2017) and the applicant reported pains in her neck, low back and right leg. Her sleep difficulties continued, and she avoided driving. Doctor Tenenbaum concluded her injuries from a psychological perspective were not within the Minor Injury Guideline. Doctor Tenenbaum recommended 12 psychological sessions. The applicant testified she only used 4 visits.
- [29] The applicant was also assessed by Dr. Marino, psychologist, who found in his opinion of October 13, 2017, that the applicant had not sustained a psychological impairment as a result of the accident. In his report, he stated that the applicant had advised him that she had no psychological impairments that prevented her from working and that she had not returned to work due to physical restrictions.²³ He concluded the applicant did not sustain a substantial inability to return to work due to a psychological impairment.
- [30] A psychiatry assessment was also completed by Dr. Boulias, psychiatrist on December 29, 2017, who reported ²⁴ the applicant had low back and right knee pain. He stated the applicant had soft tissue injuries (he was not clear if these were due to the accident), and due to ongoing symptoms had not reached full recovery.
- [31] The ODSP ²⁵ file introduced as an exhibit during the closing submissions of the respondent indicates the applicant applied in 2017 and was approved for ODSP which she started receiving in January 2017, with payments that continued

²² Psychological Assessment, Dr. Tenenbaum, dated December 15, 2017, applicant document brief, tab A-11, exhibit 9.

²³ Psychological Assessment Report, Dr. Morano dated October 13, 2017, written submissions of the applicant, Tab A-18, Exhibit 17.

²⁴ Psychiatry Assessment dated October 13, 2017, applicant document brief, tab A-17, exhibit 16.

²⁵ ODSP files introduced during the closing were entered as exhibits 30 and 31.

throughout 2017 and 2018. Although the documents were admitted as exhibits, and as the applicant did not have an opportunity to question any witnesses about the ODSP file, I assign these documents little evidentiary value. In cross examination the respondent asked several questions of the applicant regarding her receiving disability payments and raised the suggestion that one reason she did not return to work was that she was receiving these disability payments. The applicant denied this.

ANALYSIS

- [32] I find there is sufficient evidence to support the claim of ongoing injuries and pain that prevented the applicant from working in the pre-104 week period, but only up until December 31, 2017. I find and accept the testimony of the family doctor that the applicant's ongoing pain was noted as minor. On September 27, 2017, the family doctor noted chronic pain in the back and legs. This reference in the notes is not a diagnosis of a chronic pain syndrome, but a reference by the family doctor to chronic pain defined by her as pain ongoing beyond 6 months despite treatment.
- [33] The CNRs of the family doctor on January 27, 2018 refer to the applicant taking PSW training.
- [34] I find the applicant was able to begin training as a PSW early in January 2018 and was able to work in July and August 2018 when she testified she completed two practicums for her work as a PSW in a position where the applicant was likely required to lift more than 5 pound boxes of food. Although this is not her pre-accident employment, she was able to train and work.
- [35] Moreover, the CNRs of the family doctor reflect a 13 month gap in the applicant visiting the family doctor. The applicant did not attend at the clinic to see her family doctor for accident related injuries between February 16, 2018 up to March 13, 2019 with the exception of the one visit on October 3, 2018. The notes of October 3, 2018 do not identify who made the notes. Further, the CNRs from March 2019 forward do not refer to accident related injuries.
- [36] I find the evidence establishes the applicant had pre-existing back and neck pain from previous accidents, and the cross examination of the Toronto Poly Clinic indicates the applicant was referred to a specialist for chronic pain. However, the family doctor testified that she believed these prior injuries had resolved by the time of this accident. I find based on the totality of the medical evidence, that the back pain although pre-existing, was aggravated by the April 26, 2017 accident. Dr. Naumetz concluded in his paper review however that the applicant was

mostly recovered from the injuries.

- [37] The IE assessors found the injuries sustained by the applicant were minor injuries. Both IE assessors were qualified as experts for the hearing. The respondent argues that as such their evidence must be given greater weight. I agree, but also find the report of Dr. Naumetz and his paper review which are both dated August 2017, are limited in that they reflect the state of the applicant's injuries in August 2017 which was several months before the IRB benefit was terminated. The report of Robert Bullard is also limited in that he never completed the functional abilities evaluation. It was noted in the report and Dr. Naumetz testified he found the injuries sustained were minor and did not support the claim for the IRB.
- [38] The applicant in her oral submissions at the hearing, stated the evidence will show the repetitive lifting of 50 pounds and standing requirements meant the applicant could not work at her pre-accident employment in the pre-104 weeks period. I do not accept the applicant's evidence that as a general worker she was required to lift 50 pounds on the basis that other than her testimony at the hearing, she never mentioned this lifting requirement to her family doctors, chiropractor or any other treating practitioners, or IE assessors. Robert Bullard noted in his report that her lifting requirements were only 5 pounds. I accept his testimony that he was never advised by the applicant that she had to lift 50 pounds. As well, the requirement to lift 50 pounds was not reflected in her resume nor the OCF-2. I find that the evidence does not support her testimony that as a general labourer she was required to lift 50 pounds, and that this prevented her from working. In essence, the applicant's job duties were not as physically demanding as claimed.
- [39] I find that for the pre-104 week IRB period from January 1, 2018 to April 26, 2019, the applicant pursuant to section 5(1) of the Schedule has failed to establish that she suffered a substantial inability to perform the essential tasks of her pre-accident employment.
- [40] The evidence establishes the applicant became qualified to work as a PSW in October 2018. The family doctors' notes on March 28, 2019 and June 5, 2019 indicate a planned trip to Ghana, which was taken in March 2019. I find this indicates the applicant's condition had improved early in 2019 to a point where she could and did travel internationally. There is no evidence this trip was for medical reasons or treatment.
- [41] I find the applicant does not meet the more stringent post-104 week test for an IRB. The statutory test to meet to be eligible for an IRB post-104 weeks is set out

in Section 6 (1) of the *Schedule* which provides that for the period after the first 104 weeks of disability, the applicant must demonstrate he or she suffers a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.

[42] The applicant testified that despite obtaining her certificate in October 2018 and being qualified to work as a PSW, she did not start looking for work in her new field until July 30, 2019. The applicant claims this is due to continuing pain from her injuries. I find there is no medical evidence including from her family doctor or other medical doctor to substantiate her claim that in 2019 she is unable to work due to her injuries. The evidence indicates that in the post-104 weeks to August 2019, the applicant had completed training as a PSW, had completed two required practicums as a PSW, and thus, the applicant could engage by that time in any employment or self-employment for which she is reasonably suited by education, training or experience.

[43] The applicant bears the onus and did not present evidence to support a claim for the IRB for the post-104 week period. I find the applicant has failed to establish that she suffers a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.

Claim for an Award for Unreasonably Withheld or Delayed Payments

[44] Section 10 of Regulation 664 permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. the applicant) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer (i.e. the respondent) has “unreasonably” withheld or delayed payments.

[45] The applicant claims she is entitled to an award for unreasonably withheld or delayed payments. Based on my findings, the only withheld payments are an IRB claim between November 1, 2017 to December 31, 2017. There is no evidence to support an award claim for unreasonably withheld or delayed payments.

[46] The respondent relied on the reports of its IE assessors which did not support a claim for an IRB. The family doctor initially noted the injuries as minor and did not refer to the back and leg pain as chronic until September 2017. The notes on October 3, 2018 refer to chronic back pain however the doctor is not identified and this is the only note for a 13 month period. I find there is no evidence or basis on which to make such an award and the request for an award is therefore is dismissed.

CONCLUSION

[47] For the reasons outlined, I find that:

- i. The applicant is entitled to a claim for an income replacement benefit from November 1, 2017 to December 31, 2017. The applicant is not entitled to a claim for an income replacement benefit from January 1, 2018 to date and ongoing. The applicant is not entitled to an award for unreasonably withheld or delayed payments under section 10 of Regulation 664.
- ii. Interest is payable on the overdue payment for the pre-104 week IRB from November 1, 2017 to December 31, 2017.

Released: December 6, 2021



Thérèse Reilly
Adjudicator