Citation: Rahnema v. Unifund, 2023 ONLAT 21-013569/AABS

Licence Appeal Tribunal File Number: 21-013569/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:

Atoosa Rahnema

Applicant

and

Unifund

Respondent

DECISION

ADJUDICATOR: **Christopher Evans**

APPEARANCES:

For the Applicant: Adesina C. John, Paralegal

For the Respondent: Geoffrey Keating, Counsel

Court Reporter: Guido Riccioni

Heard by Videoconference: **July 5, 2023**

OVERVIEW

[1] Atoosa Rahnema, the applicant, was involved in an automobile accident on September 15, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* ("*Schedule*"). The applicant was denied benefits by Unifund, the respondent, and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal") for resolution of the dispute.

[2] At issue is whether the applicant is entitled to an income replacement benefit ("IRB"), the unapproved amount of a psychological assessment, interest, and an award under s. 10 of Regulation 664: *Automobile Insurance*.

ISSUES

[3] The issues in dispute are:

1. Is the applicant barred from claiming an IRB because the Tribunal has already decided this issue?
2. Is the applicant entitled to an IRB in the amount of $400.00 per week from September 22, 2019 to date and ongoing?
3. Is the applicant entitled to $703.90 ($2,400.00 less $1,696.10 approved) for a psychological assessment proposed by Baskakova Psychology Professional Corp. in a treatment plan/OCF-18 dated July 13, 2021?
4. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
5. Is the applicant entitled to interest on any overdue payment of benefits?

[4] The parties advised that substantive issues 1 and 3-5 in the Case Conference Report and Order are no longer in dispute because the respondent removed the applicant from the Minor Injury Guideline and approved the benefits in question.

RESULT

[5] The applicant is entitled to payment of an IRB from November 1 to December 2, 2019, less 70% of any gross employment income she earned during that period. She is otherwise not entitled to an IRB.

[6] The applicant is not entitled to the unapproved cost of a psychological assessment.

[7] The applicant is entitled to interest on the amount payable for an IRB.

[8] The applicant is not entitled to an award under s. 10 of Regulation 664.

IS THE APPLICANT BARRED FROM CLAIMING AN IRB BECAUSE THE TRIBUNAL HAS ALREADY DECIDED THIS ISSUE?

[9] This is the second application arising from the same accident. In the first, the Tribunal found that the applicant was not entitled to an IRB from February 4, 2020 onward: *Rahnema v Unifund Assurance Company*, 2021 CanLII 55213 (ON LAT). The respondent submits that the applicant's entitlement to an IRB is *res judicata* and that she may not relitigate it.

[10] I find that the applicant is barred from claiming an IRB from February 4, 2020 onward, but not from September 22, 2019 to February 3, 2020.

[11] The doctrine of *res judicata* prevents a party from relitigating an issue that has already been decided. Four preconditions must be met:

1. The parties must be the same in both applications;
2. The prior application must have been under the Tribunal's jurisdiction;
3. The prior decision must have been made on the merits; and
4. The prior decision must have been a final judgment: *Rosoli v Aviva General Insurance*, 2022 CanLII 114468 (ON LAT) at para 7.

[12] If those preconditions are met, the Tribunal must determine whether, as a matter of discretion, the doctrine ought to be applied: *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para 33.

[13] The applicant concedes that the first two preconditions are met, but argues that the third and fourth are not:

1. The first decision was not made on the merits because it was not based on the evidence as it applied to the applicable provisions of the *Schedule*. Namely:
    i. The Tribunal did not consider her entitlement to an IRB under ss. 36 and 37 of the *Schedule*;

ii. The Tribunal erred in finding that Disability Certificates (OCF-3s) did not support her claim because their anticipated periods of disability expired before February 4, 2020;

iii. The Tribunal erred in finding that evidence other than the OCF-3s was required to establish her entitlement to an IRB; and

iv. The Tribunal incorrectly found that she returned to work on unmodified duties.

2. The first decision was not a final judgment because it did not address her entitlement to an IRB before February 4, 2020.

[14] The respondent argues that the first decision was made on the merits and final, and that the applicant cannot relitigate her entitlement to an IRB because she omitted to lead certain evidence or make certain arguments in the first application. It argues that *res judicata* bars her claim for an IRB before February 4, 2020 because the first decision found that she did not meet the pre- and post-104 week tests for an IRB. It relies on *DT v Wawanesa Mutual Insurance Company*, 2019 CanLII 110124 (ON LAT) ("*DT*") at para 38 in support of that argument.

The applicant is barred from claiming an IRB from February 4, 2020 onward

[15] I find that the applicant's entitlement to an IRB from February 4, 2020 onward is *res judicata*.

[16] The first decision was made on the merits. The Tribunal considered whether the applicant's injuries caused her to suffer a substantial inability to perform the essential tasks of her employment. It reviewed the evidence tendered by the parties, including OCF-3s, the applicant's medical records, and independent assessments commissioned by the respondent. Even if it erred as the applicant claims—a finding I do not make—it still decided the application on the merits. *Res judicata* applies regardless of whether a decision is right or wrong.

[17] The first decision was final. The Tribunal found that the applicant was not entitled to an IRB from February 4, 2020 onward, and dismissed the first application. It makes no difference that the second application also concerns her entitlement to an IRB before February 4, 2020.

[18] The applicant argues that even if this issue is *res judicata*, I should exercise my discretion to consider it for the following reasons:

1. She is entitled to an IRB because the denials did not comply with s. 36(4)(b) of the *Schedule*;

2. The respondent commissioned an independent assessment regarding her entitlement to an IRB after the first decision was released, which implies that her entitlement to an IRB was still a live issue; and

3. Her income tax documents show that she did not work for certain periods of time.

[19] In exercising my discretion, I must ensure that the operation of *res judicata* promotes the orderly administration of justice, but not at the cost of real injustice in this case: *Danyluk* at para 67. In *Danyluk*, for example, the Court chose not to apply issue estoppel because the first decision was made without providing the appellant the other party's submissions or an opportunity to respond to them. No such injustice would arise from applying *res judicata* in this case:

1. The applicant makes additional arguments as to why she is entitled to an IRB. Those are not valid reasons for declining to apply *res judicata*. Accepting them as such would defeat the purpose of the doctrine by inviting unsuccessful parties to re-argue their cases.

2. The fact that the respondent commissioned an independent assessment after the first decision, does not make it unfair to apply *res judicata*. If the Tribunal found that it did, insurers would be dissuaded from commissioning such assessments for fear that they would invalidate decisions in their favour. That would poorly serve both insurers and insured persons.

The applicant is not barred from claiming an IRB from September 22, 2019 to February 3, 2020

[20] The applicant's claim for an IRB from September 22, 2019 to February 3, 2020 is not *res judicata*. This is not a matter of whether the first decision was final, but whether it determined the applicant's entitlement to an IRB for this period. I find that it did not.

[21] Section 5(1)(i) of the *Schedule* provides that an insured person must suffer a substantial inability to perform the essential tasks of their pre-accident employment within 104 weeks after the accident. Section 6(1) provides that an IRB is payable for the period in which the person suffers such a substantial inability.

[22] Had the Tribunal found that the applicant did not meet the test under s. 5(1)(i), then her entire claim for an IRB would be *res judicata*. In my view, however, it found only that she did not suffer a substantial inability from February 4, 2020 onward:

1. Finding that the applicant did not suffer a substantial inability during the period in dispute was sufficient to decide the application. It was not necessary for the Tribunal to determine whether she had suffered a substantial inability before February 4, 2020. Even if she had, the outcome would have been the same.

2. As the first decision was released less than 104 weeks after the accident, it would have been impossible to find that the applicant did not suffer a substantial inability within 104 weeks after the accident.

3. The Tribunal noted evidence indicating that the applicant had missed some work after the accident, but found that she returned to work "prior to the start of her claim for IRBs": *Rahnema* at para 26. This shows that its focus was on whether the applicant suffered a substantial inability during the period in dispute, and not before.

[23] As the Tribunal did not decide whether the applicant was entitled to an IRB from September 22, 2019 to February 3, 2020, this issue is not *res judicata*.

[24] *DT* does not assist the respondent. In that case, the applicant brought a second application claiming an IRB for a period with a later end date than the period claimed in the first application. The Tribunal held that changing the end date did not create a new issue because the first decision had established that the applicant did not meet the pre- and post-104 week tests under ss. 5 and 6 of the *Schedule*. *DT* is distinguishable for two reasons:

1. In *DT*, the Tribunal found in its first decision that the applicant did not meet the test under s. 5. In this case, the Tribunal did not make that finding in the first decision.

2. In *DT*, the Tribunal found in its first decision that the applicant was not entitled to a post-104 week IRB. Because the second application was for a post-104 week IRB later in time, it could not succeed. In this case, the period in dispute precedes the period considered in the first decision.

IS THE APPLICANT ENTITLED TO AN IRB FROM SEPTEMBER 22, 2019 TO FEBRUARY 4, 2020?

[25] The applicant did not call any witnesses or tender any evidence about her injuries in the accident, the essential tasks of her pre-accident employment, or what other employment she would be reasonably suited for by education, training, or experience. She makes two arguments:

1. Because none of the denials were valid, the respondent must pay an IRB pursuant to s. 36(6) of the *Schedule*; and

2. The OCF-3s are sufficient to establish that she is entitled to an IRB.

1. Entitlement under s. 36(6)

[26] The respondent denied an IRB five times over a period of more than two years. The applicant argues that none of the denials complied with s. 36(4)(b) of the *Schedule* because the first three were not provided within 10 business days and none provided medical reasons. She submits that because the respondent has not complied with s. 36(4)(b), she has been and continues to be entitled to payment of an IRB.

[27] The relevant provisions of the *Schedule* are as follows:

1. Section 36(2) provides that an applicant for an IRB shall submit an Application for Accident Benefits (OCF-1) and a completed OCF-3.

2. Section 36(4)(b) provides that within 10 business days of receiving those documents, the insurer shall give the applicant a notice explaining the medical and any other reasons why it does not believe the applicant is entitled to an IRB and, if it requires an independent assessment, advising the applicant of same.

3. Section 36(5)(b) provides that the insurer shall give a notice described in s. 36(4)(b) within 10 business days after the applicant complies with a request for information under s. 33(1).

4. Section 36(6) provides that if the insurer fails to comply with subsections (4) or (5) within the applicable time limit, it shall pay an IRB for the period starting on the day it received the OCF-1 and OCF-3 until it gives a notice described in section 36(4)(b).

[28] I find that the respondent did not comply with s. 36(5)(b) of the *Schedule* from November 1 to December 2, 2019, and that the applicant is therefore entitled to payment of an IRB for that period. The respondent otherwise complied with s. 36.

a. The October 21, 2021 denial

[29] The applicant submitted an OCF-1 on September 30, 2019, and an Employer's Confirmation Form (OCF-2) and an OCF-3 on October 18, 2019. In an Explanation of Benefits dated October 21, 2019, the respondent stated that it had not received an OCF-3 and therefore could not consider her entitlement to an IRB or a non-earner benefit ("NEB").

[30] I find that the respondent complied with s. 36(4)(b):

1. The respondent provided the denial one business day after receiving the OCF-3. The applicant argues that the reason for denying an IRB was incorrect because she had provided an OCF-3. That does not change the fact that the respondent provided the denial within 10 business days. The respondent's reasons for denying an IRB need not be correct for the denial to be a notice within the meaning of s. 36(4)(b).

2. The respondent was not required to provide medical reasons because it did not deny an IRB on medical grounds. I agree with the respondent that this case is analogous to *Varriano v Allstate Insurance Company of Canada*, 2023 ONCA 78. In that case, the insurer discontinued an IRB because the insured person had returned to work. The insured person argued that the notice did not comply with s. 37(4) of the *Schedule* because the respondent did not provide medical reasons. Like s. 36(4)(b), s. 37(4) requires that an insurer provide the medical and any other reasons for its determination. The Court held at paragraph 31 that if an insurer relies on a non-medical ground for terminating a benefit, it need only provide the non-medical reasons for that determination.

b. The November 5, 2019 denial

[31] The applicant submitted a second OCF-3 on November 1, 2019. In an Explanation of Benefits and letter dated November 5, 2019, the respondent stated that the applicant may qualify for an IRB and an NEB, and that it required her to submit an OCF-10 form electing between those benefits.

[32] I find that the respondent complied with s. 36(4)(b):

1. The respondent provided the denial two business days after receiving the OCF-3. The applicant argues that it was unnecessary to require an election because she could only qualify for an IRB. Again, however, that does not change the fact that the denial was provided within 10 business days. The respondent need not have been justified in requiring the election for the denial to be a notice within the meaning of s. 36(4)(b).

2. The respondent was not required to provide medical reasons because it did not deny an IRB on medical grounds.

c. The December 3, 2019 denial

[33] The applicant submitted an OCF-10 on November 5, 2019. The respondent did not respond until December 3, 2019. I find that it breached s. 36(5)(b) of the *Schedule* by failing to issue the denial within 10 business days, and that it must therefore pay an IRB from November 1, 2019 (the submission date of the second OCF-3) to December 2, 2019.

[34] I find that the respondent requested the election under s. 33(1)1 of the *Schedule*, which provides that an insurer may request "any information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit." The parties did not specifically address under what section of the *Schedule* the respondent requested the election, but implicitly took it to be s. 35. Section 35(1) provides that if an OCF-1 indicates that the applicant for accident benefits may qualify for two or more of an IRB, NEB, and caregiver benefit, the insurer shall, within 10 business days after receiving the OCF-1, give a notice to the applicant advising that they must elect, within 30 days after receiving the notice, the benefit they wish to receive.

[35] I find that s. 35(1) did not apply for two reasons:

1. An insurer can only request an election under s. 35(1) within 10 business days of receiving an OCF-1. The respondent did not do so. It requested the election in response to the second OCF-3. By that time, more than a month had passed since the applicant submitted the OCF-1.

2. The *Schedule* does not place a time limit on insurers to approve or deny an IRB after receiving an election pursuant to s. 35(1). Because there is no time limit, there is no requirement that an insurer pay an IRB if it fails to comply with that time limit. That result would be inconsistent with the scheme and purpose of the *Schedule*. The intent of s. 36(6) and analogous provisions such as s. 38(11) is to ensure that insurers respond

promptly when insured persons apply for benefits and provide supporting information. The underlying purpose of the *Schedule* is to provide injured persons timely access to benefits.

[36] As s. 33(1)1 of the *Schedule* applied to the respondent's request for an election, s. 36(5)(b) required the respondent to provide a notice within 10 business days of receiving the election on November 5, 2019. As it failed to do so, s. 36(6) required it to pay an IRB starting on the submission date of the OCF-1 and OCF-3. I find that this obligation ran from November 1, 2019, the submission date of the second OCF-3. The respondent requested the election in response to the second OCF-3 and issued a valid denial in response to the first.

[37] I find that the December 3, 2019 Explanation of Benefits complied with s. 36(4)(b). The respondent gave its medical reasons for denying an IRB. It noted that more than two months had passed since the accident and the second OCF-3 stated that the applicant could return to work.

[38] Because the respondent provided a notice compliant with s. 36(4)(b) on December 3, 2019, its obligation to pay an IRB ended on December 2, 2019.

d. The February 3, 2020 denial

[39] The respondent commissioned two independent assessments regarding the applicant's entitlement to an IRB. The reports are dated January 24, 2020. The respondent maintained the denial in an Explanation of Benefits dated February 3, 2020. It stated that the applicant was not entitled to an IRB "[a]s per" the independent assessment reports and attached copies of them.

[40] Section 36(7) of the *Schedule* provides that if an insurer commissions an independent assessment, it must, within 10 days after receiving the report, give a copy of the report to the applicant and the author of the OCF-3, and provide the applicant with a notice indicating what amounts it agrees to pay or not pay and the medical and any other reasons for its decision.

[41] The applicant argues that the respondent did not provide medical reasons for the denial. The respondent argues that the independent assessors' findings were the medical reasons. I agree. It was clear from the Explanation of Benefits that the respondent denied an IRB based on the reports. I also note that s. 36(6) of the *Schedule* does not apply if an insurer fails to comply with s. 36(7).

e. The October 14, 2021 denial

[42] As I have found that the applicant's entitlement to an IRB after February 3, 2020 is *res judicata*, I need not decide whether the October 14, 2021 denial was valid.

2. The OCF-3s

[43] The applicant argues that the OCF-3s are sufficient to establish that she is entitled to an IRB because s. 36(2) of the *Schedule* only requires an insured person to submit an OCF-1 and an OCF-3 to apply for an IRB. I disagree. There is a difference between applying to an insurer for an IRB and proving entitlement to an IRB in an application before the Tribunal. In the latter case, it is well-established that an OCF-3 on its own is insufficient to meet an applicant's burden of proof. As the applicant did not tender any evidence that corroborates the OCF-3s, she has not proved that she meets the test for an IRB.

Deduction of employment income

[44] I have found that the applicant was entitled to payment of an IRB from November 1 to December 2, 2019. The parties agreed that the amount of an IRB is $400.00 per week.

[45] Section 7(3)(a) of the *Schedule* provides that the respondent may deduct 70% of any gross employment income received by the applicant as a result of being employed after the accident and during the period in which she was eligible to receive an IRB.

[46] The applicant's biweekly pay stubs show that she earned employment income during the following periods:

1. From October 20 to November 2, 2019, she worked 34 hours and took 41 hours of unpaid sick leave;

2. She worked from November 17 to 30, 2019 except for taking one day of unpaid sick leave; and

3. She worked from December 1 to 14, 2019 except for taking one vacation day.

[47] The applicant's income from November 17 to 30 is deductible from the amount payable for an IRB. I cannot determine whether any deduction should be made for November 1 or 2 or December 1 or 2 because the pay stubs do not show whether she earned income on those days.

IS THE APPLICANT ENTITLED TO $703.90 FOR A PSYCHOLOGICAL ASSESSMENT?

[48] I find that the applicant is not entitled to the unapproved cost of a psychological assessment.

[49] The applicant requested $2,400.00 for a psychological assessment in a treatment plan dated July 13, 2021. The respondent commissioned an independent assessment from Dr. K. McCutcheon, a psychologist. Dr. McCutcheon opined that a psychological assessment was reasonable and necessary, but the proposed amount was excessive. In an Explanation of Benefits dated October 14, 2021, the respondent partially approved the treatment plan for $1,696.10, the amount Dr. McCutcheon recommended.

[50] The *Schedule* provides that an insurer shall pay benefits for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of an accident for the goods and services enumerated in ss. 15 and 16, including the costs of assessments prepared in connection with those benefits.

[51] The applicant tendered no evidence showing that the unapproved services were reasonable and necessary. She argues that the denial was unjustified because the respondent did not provide medical reasons. I do not accept that submission. The onus is on her to establish that the unapproved services were reasonable and necessary. She cannot meet that onus by arguing that the denial was unsupported by medical reasons. In any event, Dr. McCutcheon's opinion was the medical reason.

IS THE APPLICANT ENTITLED TO INTEREST?

[52] The applicant is entitled to interest on the amount payable for an IRB in accordance with s. 51 of the *Schedule*.

IS THE APPLICANT ENTITLED TO AN AWARD?

[53] Section 10 of Regulation 664 states that in addition to awarding the benefits and interest to which an insured person is entitled under the *Schedule*, the Tribunal may award a lump sum of up to 50 percent of the amount to which the person was entitled at the time of the award with interest if the insurer unreasonably withheld or delayed payments.

[54] The applicant made no submissions on this issue. She has therefore not established that she is entitled to an award.

ORDER

[55] The applicant is entitled to payment of an IRB from November 1 to December 2, 2019 less 70% of any gross employment income she earned during that period. The applicant is otherwise not entitled to an IRB.

[56] The applicant is entitled to interest on the amount payable for an IRB.

[57] The applicant is not entitled to the unapproved cost of a psychological assessment.

[58] The applicant is not entitled to an award.

Released: August 25, 2023

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Christopher Evans
Adjudicator