

**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**

**Tribunal File Number: 17-005910/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:

**C. M.**

**Applicant**

and

**Aviva General Insurance**

**Respondent**

**DECISION**

**ADJUDICATOR: Derek Grant**

**APPEARANCES:**

Counsel for the applicant: Alex Nikolaev

Counsel for the respondent: Kimberley Tye and Amanda Fowler

**HEARD: In-person: May 10, 2018**

**OVERVIEW:**

- [1] On February 11, 2016, the applicant (“C.M.”) was involved in a motor vehicle accident (“the accident”). C.M. applied for and received an income replacement benefit (“IRB”) from the respondent, Aviva Insurance Canada (“Aviva”) under the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (O. Reg. 34/10)* (the “Schedule”).
- [2] While Aviva initially paid the IRB, the parties’ agree it was at an incorrect rate. Aviva corrected the rate, and paid it with interest. Aviva later discontinued the IRB effective November 9, 2016. C.M. appeals Aviva’s denial of the ongoing benefit to the Licence Appeal Tribunal – Automobile Accident Benefits Service, and also seeks an award for the amounts delayed relating to the incorrect rate.
- [3] I must now decide two issues. First, I must decide if C.M. is entitled to have his IRB continued after November 9, 2016 until he commenced other employment. Second, I must decide if, as a result of the miscalculation, any amount was “unreasonably withheld” – even if ultimately corrected. In support of his claim, C.M. testified on his own behalf and supplied various medical records. Aviva relied on the testimony of physician that conducted an insurer’s examination of C.M.
- [4] On the first question, I conclude that C.M. is not entitled to an ongoing IRB past November 9, 2016, but he is entitled to an award for amounts unreasonably delayed due to the miscalculation. My reasoning follows below.

**BACKGROUND AND TIMELINE:**

- [5] Beginning in June 2015 to November 2015, C.M. worked as a labourer for Concrete Construction & Restoration (“CCR”). The work was largely in the heavy construction division. It entailed lifting heavy building materials and equipment as well as manually transporting various types of equipment and materials.
- [6] In November 2015, due to the winter season and work slowdown with CCR, C.M. was laid off. He then applied for and began to receive regular employment insurance (“EI”). Thus, at the time of the February 11, 2016 accident, C.M. was receiving EI and continued to receive it until June 5, 2016. The parties agree that C.M.’s status of being on EI does not prevent him from receiving an IRB. C.M.’s receipt of EI did, however, cause some confusion about how to properly calculate the IRB.
- [7] There are four periods of time involved in this matter, only two of which are in dispute before me:
  - (i) First, from February 18, 2016 up to June 10, 2016, Aviva paid an IRB, but at an incorrect amount. While the amount was eventually corrected to the

maximum rate of \$400.00 per week and paid with interest, C.M. argues there was an unreasonable delay that warrants an award.

- (ii) Second, from June 11, 2016 to November 9, 2016, Aviva continued to pay the IRB at the correct rate of \$400.00 per week, so there is no dispute for this period.
- (iii) Third, from November 10, 2016 to May 31, 2017, Aviva did not pay an IRB at all. The IRB for this period is in dispute.
- (iv) Fourth, for the period from June 1, 2017 to date, C.M. stated that he sought other employment, and he subsequently found a position that offered lighter duties and returned to work in June 2017. The parties agree no IRB is due after his return to work.

#### **ISSUES IN DISPUTE:**

[8] The case conference order lists the following issues as in dispute:

- (i) Is C.M. entitled to an income replacement benefit in the amount of \$400.00 weekly for the period of November 9, 2016 to May 31, 2017, and denied by Aviva on November 9, 2016?
- (ii) Is C.M. entitled to interest on any overdue payment of the IRB?
- (iii) Is C.M. entitled to an award on grounds that Aviva unreasonably withheld or delayed payments to the applicant?

#### **RESULT:**

[9] For the reasons that follow, I find:

- (i) C.M. is not entitled to the income replacement benefit for the period of November 9, 2016 to May 31, 2017; or any interest for that period.
- (ii) C.M. is entitled to an award under s. 10 of *Ontario Regulation 664* for the period of February 18, 2016 to June 10, 2016 pursuant to the *Schedule*.

#### **ANALYSIS:**

[10] A one day in-person hearing was conducted. C.M., Dr. John Oryema, and the Unit Manager, Nader Kakish, all testified and were cross-examined. I have reviewed all the testimony, submissions and evidence led during the hearing and I have only summarized what I found relevant to my determination below.

## Is C.M. entitled to an IRB from November 9, 2016 to May 31, 2017?

### *Accident-related injuries and the Parties' positions*

- [11] Following the accident, Aviva accepted C.M.'s initial entitlement to an IRB, based largely on a Disability Certificate ("OCF-3") dated March 7, 2016 completed by Dr. Daniel Chan, the examining Chiropractor. That certificate indicated that C.M. sustained lumbago with sciatica, sprain/strain of lumbar and thoracic spine, whiplash associated disorder (WAD II) and chronic post-traumatic headache as a result of the accident. Dr. Chan also opined on the IRB entitlement by indicating that C.M. was substantially unable to complete the essential tasks of his employment and could not return to work on modified duties. According to the Disability Certificate, the duration of the disability was listed between 9-12 weeks post-accident. C.M. also stated that he was not able to return to modified work as it was not available. In addition, C.M.'s CCR Supervisor, Steve Powell, confirmed no modified duties or extended breaks are available.
- [12] The parties' dispute that is before me is whether C.M.'s disability continued past November 9, 2016, until he found new employment in June 2017. C.M. submits that the disability certificate, other medical records and his own testimony establish he continued to suffer a substantial inability to perform the essential tasks of his pre-accident employment for the time period in dispute, thus meeting the test for eligibility for IRBs under section 5 of the *Schedule*. Aviva contends that its' October 18, 2016 insurer examination ("IE") of C.M. shows that he doesn't meet the test.

### *Aviva's evidence*

- [13] C.M. attended an IE on October 18, 2016.<sup>1</sup> IE to assess the eligibility to IRBs. Based on the result of the IE, Aviva terminated the IRB payments. From a physical perspective, the assessor, Dr. John Oryema, General Practitioner, determined that as a result of the accident, C.M. has residual soft tissue injuries of the neck and low back. Dr. Oryema did not find objective signs of accident-related impairment that would render C.M. unable to perform the essential tasks of his employment.
- [14] Although Aviva is relying on this report, I find that Dr. Oryema's report is flawed. During cross-examination, Dr. Oryema was questioned whether he had reviewed the following records: family physician, Bodyworx (C.M.'s physical treatment service provider) and Mackenzie Richmond Hill Hospital (Emergency Room). Dr. Oryema testified that the medical records were not provided, nor did he request them as he did not find them relevant as the objective testing revealed no remarkable findings. It is unclear as to why these records were not included for Dr. Oryema to review. Furthermore, I could not find any commentary on any

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<sup>1</sup> Dr. John Oryema, General Practitioner – MIG Determination Disability Assessment report dated October 25, 2016.

testing that would reflect C.M.'s workload demands which are described as including heavy lifting duties. Thus, Dr. Oryema's report does not inform the reader of C.M.'s ability to perform the essential tasks of his pre-accident employment. Therefore, I place little weight on Dr. Oryema's report.

#### *C.M.'s evidence*

- [15] Although I found above that Aviva did not provide persuasive evidence to support their denial, the onus still lies with C.M. to prove his substantial inability to perform the essential tasks of his employment. I find that C.M. did not meet his onus. C.M. relied on a narrative of his physical limitations and general medical records but I did not find these persuasive for the reasons that follow.
- [16] Despite C.M.'s testimony regarding his back and neck pain complaints, I find that the medical evidence does not support the entitlement to IRB for the period of November 9, 2016 to May 31, 2017. C.M. has not provided me with persuasive evidence to show that his injuries were so limiting that he sought regular medical attention or treatment to deal with it. C.M. saw Dr. Oscar Lee, his Family Physician, on February 25, 2016, two weeks post-accident. There are no further visits to Dr. Lee until November 21, 2016, which was not an accident-related visit. Subsequent visits on December 12, 2016, then June 29, 2017, show no accident-related discussions or diagnoses.
- [17] The sporadic visits to Dr. Lee, most of which were not accident-related, in addition to the reduced visits to Bodyworx for treatment during the disputed IRB period, suggest that the back and neck pain complaints were in fact improving versus becoming worse. I find the medical evidence C.M. relies on to be in line with the OCF-3 that indicated a prognosis of 9-12 week recovery period for his accident-related injuries.
- [18] For the reasons stated above, I find that C.M. has not satisfied his onus to establish that he suffered a substantial inability to perform the essential tasks of his employment for the disputed period of November 6, 2016 to May 31, 2017, during which he has not received any IRB.

#### **Is C.M. entitled to an award because Aviva unreasonably withheld or delayed payments for the period of February 18, 2016 to June 10, 2016?**

- [19] I now turn to the disputed period of February 18, 2016 to June 10, 2016 regarding the claim for an award.
- [20] As noted above, during this period, Aviva first calculated the IRB at lower rate<sup>2</sup> but then corrected the rate, and paid the difference, with interest. The dispute is

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<sup>2</sup> Aviva paid C.M. a weekly IRB in the amount of \$24.10 for a total of \$285.83 for the period of February 18, 2016 up to May 10, 2016 on or about May 13, 2016. An additional lump sum payment of \$48.20

whether the “corrected amount” was unreasonably withheld or delayed for the purposes of an award.

- [21] Aviva concedes that it wrongly calculated C.M.’s IRB and reduced the quantum based on the EI payments C.M. received. For the reasons that follow, I find that an award under section 10 of Ontario Regulation 664, R.R.O. 1990 (“O. Reg. 664”) is warranted.
- [22] Entitlement to IRB is governed by ss. 4 through 11 of the *Schedule*. The applicable provisions with respect to the current matter are those that address the calculation of entitlement where an injured person receives EI at the time of the accident.
- [23] In a letter dated May 10, 2016, Aviva calculated the IRB at \$24.10 per week based on the last 52 weeks of income prior to the accident. Aviva specifically indicated that the IRB was calculated based on C.M.’s “pre- and post-accident earnings (including Employment Insurance)” and was made in accordance with Sections 4(1) and 7(3)(a) of the *Schedule*.
- [24] Section 4(1)(a)(i) of the *Schedule* provides a definition of “other income replacement assistance” excluding:
- (i) A benefit under the *Employment Insurance Act (Canada)*...
- [25] Section 7 of the *Schedule* allows the insurer to deduct certain payments from an amount of an IRB. However, section 4(1)(a)(i) *excludes*, not includes, deducting post-accident EI income from an IRB. Thus, EI payments are not deductible.
- [26] On May 13, 2016, Nader Kakish, Unit Manager – Accident Benefits at Aviva sent another letter to C.M. In its letter, Aviva stated it correctly calculated the IRB entitlement with the deduction of EI based on sections 7(1), (3) and 4(1) of the *Schedule*. In addition, Aviva made a request for details of the reasons C.M. applied for EI prior to the accident and the reasons he continued to receive EI to date. On August 29, 2016, in a letter to Aviva, C.M. provided confirmation of the EI payments being terminated on June 5, 2016. On September 9, 2016, Aviva provided correspondence to C.M. indicating that a new calculation of IRB was conducted resulting in a calculation of \$400.00 per week for the period of June 11, 2016 to September 27, 2016. As a result of the recalculation, Aviva paid C.M. \$5,785.52 in retroactive IRB but this payment does not address the February 18, 2016 to June 10, 2016 period that is the subject of this award claim.
- [27] Section 10 of O. Reg. 664 states that if the Tribunal finds that an insurer had unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled, may award a

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was made for the period of May 11, 2016 to May 24, 2016 on or about May 24, 2016.

lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award with interest.

- [28] C.M. submitted that Aviva unreasonably withheld or delayed payment regarding the IRB. I agree that the payment for IRB was unreasonably withheld for the reasons that follow.
- [29] C.M. is only claiming an award for the period during which the IRB payment was delayed, February 18, 2016 to June 10, 2016. C.M. calculated the amount owed to be \$6,246.65. Aviva did not dispute this calculated amount. C.M. testified Aviva agreed to pay this amount after the Tribunal application was filed. Aviva did not dispute this argument. Thus the issue before me is whether that amount was unreasonably delayed, and whether an award is warranted.
- [30] I have decided that C.M. is entitled to the award because Aviva should have paid C.M. at the \$400.00 weekly amount from February 18, 2016 to June 10, 2016 when it conceded that they made an error in the September 9, 2016 letter. Aviva did not do so, and waited until C.M. filed an application to the Tribunal. I find this resulted in an unreasonably withheld payment of the benefit.
- [31] According to section 10 of O. Reg. 664, the adjudicator has the discretion to award up to 50 per cent of the disputed amount, including interest, for amounts unreasonably withheld or delayed. I award 50 per cent of the disputed amount of \$6,246.65, including interest, for the reasons below.
- [32] In my opinion, there was no ambiguity regarding whether or not C.M. was receiving EI and what the *Schedule* states about excluding EI payments and how to calculate the IRB in such a circumstance. Regardless, Aviva insisted on the accuracy of its calculation.
- [33] Mr. Kakish, who described himself as an experienced Adjuster, as well as an Aviva Unit Manager, conceded that Aviva misinterpreted the regulation and made a mistake. He did not offer an explanation as to the delay in correcting this mistake. As a result, I find that Aviva has unreasonably delayed the payment of the IRB related to the relevant time period. C.M. was not able to return to work, was entitled to an IRB payment, and did not receive this payment due to Aviva's error and insistence that it was correct. As a result, I award 50 per cent of the disputed amount (\$6,246.65), pursuant to the Schedule.

**ORDER:**

- [34] C.M. is not entitled to an income replacement benefit in the amount of \$400.00 weekly for the period covering November 9, 2016 to May 31, 2017 or any interest for that period.
- [35] C.M. is entitled to an award in the amount of 50% of the amount of the income replacement benefit for the period of February 18, 2016 to June 10, 2016 pursuant to the *Schedule*.

**Released: July 18, 2018**



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**Derek Grant, Adjudicator**