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: MG vs. Intact Insurance Company, 2020 ONLAT 17-008078/AABS

File Number:17-008078/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:

M.G.

Applicant

and

Intact Insurance Company

Respondent

DECISION

ADJUDICATOR: **Kimberly Parish**

APPEARANCES:

For the Applicant: Samia M. Alam, Counsel

For the Respondent: A. Sandy Williams, Counsel
Suzan Park, Counsel

Written Hearing: **Heard by way of written submissions**

OVERVIEW

[1] The applicant, M.G. was involved in an automobile accident on March 29, 2016 (the "accident") and he sought benefits pursuant to Ontario Regulation 34/10, known as the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"), from the respondent, Intact Insurance Company ("Intact").

[2] On August 16, 2016, the applicant submitted an Application for Accident Benefits ("OCF-1") and an Election Form (OCF-10) claiming entitlement to IRBs.

[3] This file has a long procedural history and the issues in dispute were noted in the order of Adjudicator Johal, dated August 16, 2019 as follows:

i. Is the applicant entitled to an income replacement benefit in the amount of $364.82 per week from February 15, 2019 to date and ongoing?

ii. Is the applicant entitled to $2,825.01 for the cost of preparing an accounting report by Great Oak VFA Inc.?

iii. Is the applicant entitled to an award under *Ontario Regulation 664* because the respondent unreasonably withheld or delayed the payment of benefits?

iv. Is the applicant entitled to interest on any overdue payment of benefits?

[4] The timeframe for entitlement for the income replacement benefit ("IRB") was amended within the order of Vice Chair Lester, dated August 23, 2019, and it also addressed other procedural matters. The applicant filed a motion with the Tribunal, dated October 28, 2019 requesting the issue of IRBs be withdrawn for this hearing and requested a written hearing on the sole issue of the IRB accounting report. The motion order of Vice Chair Hunter dated November 5, 2019 confirmed the withdrawal of the IRB and a written hearing was scheduled for December 13, 2019. The parties' written submissions for the hearing noted the cost of an accounting report was the sole issue in dispute.

ISSUES

[5] The disputed claims in this hearing are:

i. Is the applicant entitled to the cost of an accounting report prepared by Great Oak VFA Inc. ("Great Oak report") in the amount of $2,825.01, dated November 23, 2016, and denied by the respondent on February 17, 2017?

ii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[6] Based on the evidence before me, and on a balance of probabilities, I find that:

i. The applicant is not entitled to the cost of the Great Oak report in the amount of $2,825.01, dated November 23, 2016, and denied by the respondent on February 17, 2017.

ii. As no benefits are payable, no interest is therefore payable.

ANALYSIS

Is the accounting report reasonable and necessary?

[7] Section 7 (4) of the *Schedule* requires an insurer to fund an accounting report if three pre-conditions are satisfied as follows:

i. the insured person must be applying for an IRB that is based on the employment or self-employment considered in the report;

ii. the report must be prepared by a member of a designated body within the meaning of the *Public Accounting Act, 2004*; and

iii. the expense must be reasonable and necessary for the purpose of determining the insured person's entitlement to receive an IRB.

Section 7 (5) of the *Schedule* limits the amount an insurer is required to pay for an accounting report to $2,500.00. The onus remains with M.G. to prove these conditions based on a balance of probabilities.

[8] The submissions of both parties noted the first two conditions of s. 7 (4) are satisfied because M.G. applied for an IRB and at the time of the hearing was receiving an IRB payment from the respondent. In addition, the accounting report was prepared by Gural S. Gill, a member of a designated body within the meaning of the *Public Accounting Act, 2004.* The issue giving rise to this dispute is whether the Great Oak report was both reasonable and necessary in order to determine M.G.'s IRB entitlement.

[9] I find the Great Oak report commissioned by the applicant was not reasonable and necessary for the following reasons and I will elaborate further below within my analysis:

i. The delays which occurred with the file while the respondent was conducting an investigation as to whether the applicant was involved in an accident does not establish that the Great Oak report was reasonable and necessary;

ii. At the time the accounting report was commissioned, there was no quantum dispute with respect to the IRB; and

iii. I find the applicant's IRB calculation was straightforward and it was not necessary to commission the services of a professional accountant who issued the Great Oak report.

Delay while Respondent was Conducting Investigation

[10] I do not find the delay which resulted from the respondent conducting its investigation into whether the applicant was involved in an accident supports the applicant's position that Great Oak report was reasonable and necessary. I will provide my analysis below.

[11] M.G.'s argues that the Great Oak report was reasonable and necessary because the respondent did not formally deny M.G.'s claim for IRBs. This was because the respondent was conducting an investigation to determine whether M.G.'s injuries were as a direct result of the accident as defined within the *Schedule*. M.G. further argues that the delay the respondent took in its investigation to determine whether the applicant was involved in an accident combined with the lack of continuing to adjust his file warranted the applicant invoking s. 7 (4) of the *Schedule* and obtaining the Great Oak report to assist in computing his entitlement to IRBs. The applicant further argues that s. 7 (4) equally applies to employed and self-employed individuals and that it is a shall-pay provision.

[12] It is the respondent's submission that it advised the applicant through a Reservation of Rights Letter, dated September 1, 2016 that the respondent was restricting coverage of benefits until it had completed its investigation and the respondent could not confirm entitlement to any benefits arising out of the incident. The respondent also refuted the applicant's allegation that it failed to continuously adjust the file during the time period in which it was conducting its investigation.

[13] The Reservation of Rights letter was a contentious issue between the parties in this hearing. The applicant submitted the first time it received this letter was with the respondent's written preliminary issue hearing submissions dated May 22,

2018. The respondent refutes the applicant's submission and argues the letter was produced to the applicant prior to May 22, 2018.

[14] Based on the evidence before me, I am not persuaded that the applicant was unaware of the Reservation of Rights letter or that the respondent was conducting its investigation into whether the applicant was involved in an accident.

[15] I base this finding on the documentation produced within the respondent's submissions noting correspondence to the applicant.[1] The applicant denies receiving the Reservation of Rights letter prior to May 22, 2018 but remains silent regarding other correspondence sent to the applicant in which the respondent references the Reservation of Rights letter and its investigation. Therefore, on a balance of probabilities, I accept that the applicant was aware prior to May 22, 2018 that the respondent was exercising its reservation of rights and restricting coverage of benefits while it was conducting its investigation.

[16] I also do not accept the applicant's submission that the respondent failed to continuously adjust the file during this time. I have based my conclusion on the following: First, correspondence letters to the applicant prior to May 22, 2018 advised the applicant that the respondent was still exercising its reservation of rights to deny coverage until its investigation was completed. Second, the correspondence also noted documents requested by the respondent pursuant to s. 33 of the *Schedule,* and the respondent's requests to schedule an examination under oath ("EUO").[2] I find this evidence supports the respondent continued to adjust the file.

[17] A written Preliminary Issue Hearing was held before the Tribunal. The decision *M.G. and Intact Insurance Company*[3] determined that the applicant was involved in an accident as defined by the *Schedule*. On October 31, 2018 the respondent issued a letter to the applicant advising him of his entitlement to IRBs.

IRB quantum not in dispute

[1] Included with the respondent's written submissions and surreply of the respondent at the following Tabs: Tab 1 (reservation of rights letter dated September 1, 2016), Tab 4 b (letter from respondent to applicant dated November 13, 2017). Surreply of respondent at page 2; including screen shot from adjuster's log notes for September 1, 2016 noting phone call to applicant's counsel advising reservation of rights letter is being sent and manual creation of reservation of rights letter.
[2] Tabs 9 - 15 of the respondent's submissions. Correspondence letters from respondent to applicant for the time period December 9, 2016 to November 15, 2017
[3] Tab 6 of the respondent's submissions *17-008078 M.G. and Intact Insurance Company,* dated October 18, 2018, unreported case on CanLII

[18] I do not find there was a dispute over the IRB quantum at the time which the applicant commenced the Great Oak accounting report which I will address further below.

[19] M.G. submitted the following documentation to the respondent to determine entitlement to IRBs: payroll information from February 2015 to January 2016, time card reports and a copy of M.G.'s Record of Employment ("ROE") dated January 29, 2016. M.G. submits that, after the respondent received this information, it failed to calculate the IRB benefit.

[20] Further, M.G. argues that the Employer's Confirmation Form ("OCF-2") is not required to calculate the IRB and it could not capture all the additional sources of income received by the applicant. The OCF-2 dated November 16, 2017 was produced to the respondent upon their request of November 13, 2017. The applicant filed an application with the Tribunal disputing entitlement to IRBs on November 20, 2017.

[21] The respondent argues the accounting report commissioned by the applicant was premature as neither the IRB quantum or entitlement was in dispute. The respondent submitted this was because it had not yet determined whether the applicant was involved in an accident as defined within the *Schedule*. Further, the respondent argued that no specified benefits are payable by an insurer until it receives a copy of a disability certificate ("OCF-3") pursuant to s. 36 (3) of the *Schedule* and one was not received by the respondent until October 19, 2017.[4]

[22] I find the Great Oak report was commissioned prematurely by the applicant. I agree with the respondent and the evidence supports that at the time the Great Oak report was commissioned, there was no dispute surrounding the IRB quantum. I do not accept the applicant's submission that the delays that occurred with the file necessitated the applicant commissioning the Great Oak report. The respondent did not receive an OCF-1 until nearly five months following the accident on August 16, 2016. The applicant argues it never received the Reservation of Rights letter dated September 1, 2016 prior to obtaining the Great Oak report. However, I do not find this submission supports that there was an IRB quantum dispute at the time the applicant commissioned the Great Oak report. Further, the applicant obtained the Great Oak report 11 months prior to submitting an OCF-3 to the respondent and pursuant to s. 36 of the *Schedule,* no specified benefits are payable until an OCF-3 is received by the respondent. The applicant produced no explanation why it took 11 months to produce the OCF-3. I

[4] Tab 16 of the respondent's submissions – Fax confirmation dated October 19, 2017 enclosing copy of OCF-3 dated October 13, 2017

find this evidence further supports the Great Oak report was commenced prematurely. As a result, I do not find the commissioning of the Great Oak report was reasonable and necessary on this basis.

Straightforward calculation of IRBs

[23] I find the IRB calculation was straightforward and that the IRB calculation noted within the Great Oak report was based on two income sources which I will address further below.

[24] M.G. argues that his income history was complex, and his IRB calculation was not straightforward as he received employment income, employment insurance ("E.I.") and worker's compensation benefits. M.G. also submits that when the respondent finally calculated the IRB benefit, the calculation differed from what was reflected within the Great Oak report and that this supports that M.G.'s IRB calculation was not straightforward.

[25] The respondent argues that the IRB calculation was straightforward and that an accounting report was not required.

[26] The applicant relies on the Financial Services Commission of Ontario ("FSCO") decision *Michael Mawugbe and Certas Direct Insurance Company*[5] to support its position that the applicant is free to obtain its own accounting report in accordance with ss. 7 (4) and (5) of the *Schedule*. The applicant further submitted it is the applicant's obligation to prove entitlement to IRBs by providing a report prepared by a member of a designated body within the meaning of the *Public Accounting Act, 2004,* and when exercised, this invokes the shall-pay provision. While I agree in part with the applicant's submission, that the onus remains with the applicant to prove entitlement to an IRB and that the applicant is free to obtain its own accounting report, I disagree that when exercised that this automatically invokes the shall-pay provision. I find that the applicant must still satisfy the necessary pre-condition of s. 7 (4) of the *Schedule* that the Great Oaks report is reasonable and necessary, and I do not find the applicant has established this.

[27] I do not find *Mawugbe* persuasive as the facts are distinguishable. The applicant in *Mawugbe* was self-employed and was a 50% owner of two businesses, he failed to produce the proper financial documentation to the insurer to calculate his IRB, and there was an IRB quantum dispute between the parties. In the case before me, the applicant was not self-employed, and there was no IRB quantum

[5] Tab 11 of the applicant's submissions - *Michael Mawugbe and Certas Direct Insurance Company,* FSCO File No. A13-009558 dated February 29, 2016.

dispute. Further, I find that in the case before me, M.G.'s IRB calculation was straightforward, and I provide my reasons below.

[28] Both parties referenced the Tribunal decision *16-004674 v. The Co-operators.*[6] In that case, the adjudicator found the cost for the IRB report was not reasonable and necessary as the applicant only missed 3.5 weeks of work, sustained no income loss, the calculation for the IRB was straightforward and there was no dispute regarding the IRB quantum. The applicant argues that his case is distinguishable from *16-004674 v. The Co-operators* because he was off work and receiving E.I. benefits at the time of the accident, he did not return to work after the accident, it remained unknown when he would be returning, and he sustained an income loss. The respondent relies on the adjudicator's finding in that decision and submitted this case is similar as the IRB calculation was straightforward and there was no dispute relating to the IRB quantum or entitlement at the time the Great Oak report was commissioned. While I agree that the circumstances surrounding the applicant in *16-004674 v. The Co-operators* are distinguishable, I concur with the respondent's submission as it relates to the case before me.

[29] I find the IRB calculation was straightforward. The Great Oak report calculated the IRB for the period of April 6 - October 27, 2016 at the rate of $328.50 per week. A break-down of how the IRB was calculated was contained within Schedule 2[7] of the report. The applicant's income from two sources was added together. The employment income was confirmed by an employment income summary and the amounts paid through E.I. were confirmed by the applicant's bank statements. The sum of these two income sources was divided by 52 weeks to arrive at the weekly IRB rate. There was no WSIB documentation contained within the Great Oak report. I do not agree with the applicant's submission that a difference between the IRB quantum calculated in the Great Oak report and the IRB quantum calculated in the respondent's letter dated October 18, 2018[8] establishes that the IRB calculation was not straightforward. The respondent did not rely on a forensic accounting report. The IRB was calculated at a higher rate of $364.82 per week and the respondent based its calculation on the documentation produced by the applicant.

[6] Tab 12 of the applicant's submissions - *16-004674 v. The Co-operators*, 2017 CanLII 77361 (ONLAT)
[7] Tab 3 of the applicant's submissions – Schedule 2 contained within the Great Oak report, dated November 23, 2016, at 9
[8] Tab 10 of the applicant's submission – letter dated October 18, 2018 from respondent to applicant advising applicant of entitlement to IRBs and the quantum calculated

[30] The applicant submitted the Tribunal decision *B.H. and Certas Home and Auto Insurance Company*[9] is distinguishable from this case. In that case there were multiple IRB calculations done by the applicant. The applicant had argued the IRB calculation was complicated and obtained its own IRB report. The adjudicator found the accounting report was not reasonable and necessary. I agree that case is distinguishable as multiple IRB calculations were necessary on the part of the insurer as the applicant failed to produce complete and accurate information to the insurer. However, the adjudicator found the applicant was a salaried employee and her IRB calculation was very simple. I am persuaded with the adjudicator's finding which is analogous to the case before me that M.G. was also a salaried employee. I have also determined his IRB calculation to be straightforward based on two income sources which did not necessitate the commissioning of the Great Oak report.

CONCLUSION

[31] For the reasons which I have noted above, the Great Oak report is not reasonable and necessary, and no interest is payable. The applicant's claim is therefore dismissed.

Released: April 24, 2020

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Kimberly Parish
Adjudicator

[9] Tab 13 of the applicant's submissions - *17-006692 v Certas Home and Auto Insurance Company,* 2018 CanLII 95551 (ONLAT)