Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Garvey v. Economical Insurance Company, 2022 ONLAT 20-009618/AABS

Licence Appeal Tribunal File Number: 20-009618/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:

Crystal Garvey

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: **Deborah Neilson**

APPEARANCES:

For the Applicant: Crystal Garvey, Applicant
Mikolaj Grodzki, Counsel

For the Respondent: Courtney Sparks, Claims Representative
Mai Nguyen, Counsel
Ainslay Shannon, Counsel

Court Reporter: Guido Riccioni, Network North

Heard by Videoconference: **January 10 to 14, 2022**

REASONS FOR DECISION

BACKGROUND

[1] The applicant, Crystal Garvey, was involved in an automobile accident on August 23, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"). Ms. Garvey was paid income replacement benefits ("IRBs") by the respondent, Economical Insurance Company, up to February 7, 2020. After the respondent refused to pay further IRBs, the applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] Ms. Garvey has an extensive pre-accident psychological medical history that she submits was exacerbated by the accident. She claimed that she sustained numerous objective injuries resulting in an inability to engage in her pre-accident occupation or any occupation for which she is reasonably suited. She also claimed a Reg.664 award on the basis the respondent unreasonably withheld the payment of IRBs. The respondent claimed that the applicant's alleged impairments are based on her subjective complaints and that her evidence is not reliable. The respondent claimed that the applicant has, therefore, not satisfied her onus to prove her entitlement to IRBs.

[3] I find that the applicant is entitled to IRBs up to August 23, 2020, and interest on overdue payments as set out below. However, I find that the applicant has failed to prove that she is entitled to IRBs from August 23, 2020 to date, nor is she entitled to a Reg.664 award.

PRELIMINARY PROCEDURAL ISSUES

[4] The issue of whether there should be an order excluding witnesses was raised. The applicant submitted that the respondent's claims representative, Courtney Sparks, should be excluded. I declined to exclude her.

[5] The applicant sought to have Dr. Christopher Cooper's report struck and have Dr. Cooper excluded as a witness. Dr. Cooper is a psychologist who conducted an insurer's examination of the applicant under s.44 of the *Schedule* ("IE"). The applicant's request to strike the report and exclude Dr. Cooper from testifying was denied.

1. Exclusion of Witnesses

[6] The exclusion of witnesses from a hearing is a discretion the Tribunal has as part of its power to control its own process. Witnesses may be excluded to

ensure that the Tribunal hears testimony from each witness that has not been tailored or influenced by hearing the testimony of other witnesses. Under s.5.2(4) of the *Statutory Powers Procedure Act* ("*SPPA*"),[1] all the parties participating in a hearing must, in an electronic hearing, be able to hear any witnesses throughout the hearing. Under s.10.1 of the SPPA, a party may call and examine witnesses, present evidence and submissions and conduct cross-examinations of witnesses. In order to do so, the party must know what the evidence and representations of the opposing party are. That means each party should be able to attend the hearing and hear the evidence and arguments, and this does not require the consent of the opposing party. If the party is represented by counsel, they are unable to instruct counsel if they are excluded from the hearing and do not know what the evidence is. To exclude such a party would result in limiting their counsel's effectiveness by being unable to get instructions during the hearing.

[7] The Divisional Court decision in *Narayan et al. v. Dhillon*[2] is directly on point. In that case, the corporate defendant's employee attended the hearing as its representative and to instruct counsel. The employee had been personally named as a defendant in the action and noted in default. The employee was going to testify on behalf of the corporate defendant. The trial judge excluded the employee representative from the Court because he was going to be testifying. The Divisional Court held that the exclusion was a miscarriage of justice. The trial judge had a broad discretion to exclude witnesses at the request of a party, but that discretion did not extend to a witness whose presence was essential to instruct the lawyer for the party calling the witness. I found no reason to reject the submissions from the counsel for the respondent that she was taking instruction from Ms. Sparks as the representative for the respondent. I therefore accepted the respondent's submissions that Ms. Sparks presence was required to instruct the respondent's counsel. For these reasons, I refused to exclude Ms. Sparks from the hearing.

2. Exclusion of Dr. Cooper's Testimony and Evidence

[8] The respondent advised, after Dr. Cooper was sworn, that his IE report filed with the Tribunal was not his final report and contained errors. Upon hearing that, the applicant sought to have both the report and Dr. Cooper's testimony excluded. The applicant submitted that it was not fair to be presented with a different opinion from Dr. Cooper at the hearing.

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[1] *Statutory Powers Procedure Act*, RSO 1990, c S.22
[2] *Narayan et al. v. Dhillon*, 2020 ONSC 7273 (CanLII)

[9] The respondent submitted that Dr. Cooper's opinion did not change and the errors in his report were minor.

[10] I accepted that the errors were clerical errors in the reasons that supported Dr. Cooper's opinion and that any prejudice to the applicant was outweighed by the prejudice to the respondent. I found as Dr. Cooper's opinion did not change, there was no prejudice to the applicant. She was able to make submissions on the weight to be given to the report in light of the errors. For these reasons I denied the applicant's request to exclude Dr. Cooper's report and testimony.

ISSUES

[11] The issues for me to determine are as follows:[3]

1. Is the applicant entitled to receive a weekly income replacement benefit ("IRB") in the amount of $362.22 per week for the period from February 8, 2020 to-date and ongoing?

2. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed payments to the applicant?

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

ANALYSIS

A. ENTITLEMENT TO IRBs

[12] To be entitled to IRBs, the applicant must prove on a balance of probabilities that as a result of the accident, she suffered a substantial inability to perform the essential tasks of her employment as a gas bar attendant. The test for entitlement to IRBs changes after 104 weeks of disability.[4] Neither party provided any submissions or case law on when 104 weeks of disability in this case started or ended. I have determined that the disability started on the day of the accident because the applicant applied for IRBs shortly after the accident and received IRBs from one week post-accident.

[13] The respondent submitted that the applicant has not satisfied her onus to prove on a balance of probabilities that she meets either the pre-104 week test or the post-104 week test as she has no medical opinions commenting on her

[3] The other issues in the case conference Adjudicator's order dated June 17, 2021 were withdrawn either prior to the hearing or at the hearing.

[4] Section 6(2)(b) of the *Schedule*

entitlement and she was the only witness who testified on her behalf. It submits that the applicant provided no medical opinions and called no experts to testify in support of her claims.

[14] The applicant relied on her testimony, the reports of the IE assessors, disability certificates and medical records to prove entitlement. The applicant testified that she can no longer work as she did at Canadian Tire as a gas bar attendant and cashier. She testified that she returned to work after the accident, but only because her employer could not find anyone to open the gas station. She then booked off the weekend following the accident and tried to return to work the following Monday but was unable to continue. She sought modified work from her employer who advised he did not have any available.

[15] The applicant testified that she suffered from depression and anxiety for years, since she was about four years old. She denied that this had any affect on her ability to grocery shop, socialize, do the laundry or work.

[16] The respondent submitted that the applicant's reliance on the IE reports is problematic, considering the respondent denied her entitlement to IRBs based on the IE reports. The applicant submitted that the respondent obtained IE reports that do not directly address IRBs but support her entitlement to those benefits. She submitted that her testimony was corroborated by the medical records and her attempts to return to work.

[17] The respondent submitted that the impairments that allegedly prevent the applicant from working are subjective complaints. It submitted that where the impairments are from subjective complaints such as pain, I must be satisfied that the applicant's evidence of those complaints and their effect on her abilities is reliable. The respondent submitted that the applicant's evidence is not reliable. Accordingly, I must address the following:

1. Objective evidence;
2. The reliability of the applicant's testimony and evidence;
3. Entitlement to pre-104 week IRBs; and
4. Entitlement to Post-104 week IRBs

1. Objective Evidence

[18] The respondent relied on *Jeyakumar v. Aviva General Insurance*[5] for support that the applicant must provide objective medical evidence that she meets the test to receive IRBs. I am not bound by that decision. However, I find the decision somewhat persuasive.

[19] In *Jeyakumar*, the adjudicator held that there was limited evidence to support the insured's belief that his accident impairments met the test for IRBs. Instead, the insured submitted that his psychological and/or cognitive impairments suggested that he was prevented from working and that he believed that those impairments prevented him from working. The insured's submissions were based on suggestion and belief, not on any objective medical opinion stating that his impairments prevented him from engaging in his essential tasks. For example, he believed that he was terminated from his employment due to accident related impairments. However, the evidence before the Adjudicator was that the insured was let go from his employment because he was not a good fit.

[20] I agree with the adjudicator's determination in *Jeyakumar*, that it is not enough for an insured to simply believe that they cannot continue to work in order to receive an IRB. There must be objective evidence that the insured person has a substantial inability to perform their essential tasks to corroborate the insured's self report. I also agree with the Adjudicator's reasoning that, while there is no actual requirement for what that type of evidence should be, at a minimum it should come in the form of an objective medical opinion, or imaging or an occupational therapy report, etc. that supports an insured's subjective reporting that they cannot perform these work tasks as a result of the accident.

[21] In this case, I found that there was objective evidence that corroborated the applicant's subjective belief of her ability to work, which I will discuss in more detail below.

2. Reliability of the Applicant's Testimony

[22] An adjudicator may accept some, all or none of a witness' evidence. An adjudicator should look at the totality of the evidence from all sources. Credibility is not a static or all or nothing situation. A person may tell the truth on one day but not on another. A person may be truthful about one subject while being untruthful or mistaken on another. I found that the applicant was an honest

[5] *Jeyakumar v. Aviva General Insurance* 2021, 2021 CanLII 18924 (ON LAT) (*Jeyakumar*)

witness and that her testimony, for the most part, was reliable for the following reasons.

[23] Dr. Tilak Mendis, neurologist, Dr. Christopher Cooper, psychologist, and Dr. Andrew Gwardjan, physiatrist, testified on behalf of the respondent. They all conducted IE assessments of the applicant. Dr. Mendis and Dr. Gwardjan testified that they had no reason to believe the applicant was dishonest or a malingerer, otherwise they would have noted inconsistences in their physical assessments of her.

[24] Dr. Cooper administered some psychological tests that contained validity measures in them. In his opinion, the applicant responded in an open and candid fashion. The respondent relied on Dr. Cooper's comment that the applicant's response style might be consistent with symptom exaggeration in support of its submission that the applicant's evidence was not reliable. However, Dr. Cooper's opinion was that the applicant's response style was more consistent with her experiencing significant, acute emotional disturbance and being psychologically overwhelmed.

[25] The applicant's family doctor, Dr. Lise-Anne Robillard, referred the applicant to a psychologist, Dr. Mohamed Bekkari. The respondent relied on Dr. Bekkari's report dated January 7, 2020 that the applicant completed a psychological test called the MMPI-2 that showed elevated validity scales.[6] Therefore, Dr. Bekkari was unable to rely on the test. He also reported that on the BHI-2, the applicant's profile did not suggest any issues with validity. I am unable to give much weight to Dr. Bekkari's comment about the validity of tests results on the MMPI-2 because it was not included in the list of assessments that he stated he administered. Further, he did not provide the result of the Personality Assessment Inventory which was in his list, and which also includes validity scales.

[26] The applicant relied on the report of Dr. Payne, psychologist, who assessed the applicant at her lawyer's request. Dr. Payne reported that the applicant's test profile on the PAI was of questionable validity. The applicant may have attempted to portray herself in a negative manner . However, Dr. Payne's opinion was it was at a level that did not render the results uninterpretable,[7] which is consistent with Dr. Cooper's opinion.

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[6] Ex. 4 Tab 38 p.645
[7] Ex. 4 Tab 37 p.367

[27] The respondent submitted that the treatment providers are probably the best for determining her functionality. The respondent submitted that the following are examples of why the applicant's testimony was unreliable:

a The clinical notes and records show the applicant was trying to get pregnant, which the applicant denied; and

b She did not report her employment as a parking attendant to the respondent.

[28] Although I found the applicant was honest, most of her testimony was led by her counsel, despite a number of objections from the respondent and my caution that less weight would be given to evidence that was led by her counsel. Despite that, where her evidence was not led, the applicant was forthright with very few inconsistencies from the medical records. About the only inconsistency was the applicant's denial that she was trying to get pregnant after the accident and particularly in February 2019. Her explanation for why the emergency personnel recorded she was trying to get pregnant made no sense and is inconsistent with the other records that support that she was trying to have another child.[8]

[29] Otherwise, when the applicant was cross-examined, she provided explanations that were logical and reasonable for explaining what initially appeared to be inconsistencies between her testimony and the documentary evidence. For example, the respondent made submissions that the applicant failed to tell it that she started working as a parking lot attendant. It also submitted that she was not credible because she failed to advise the Ontario Disability Support Program ("ODSP") that she received accident benefits. The applicant testified that she told ODSP that she was in an accident and that she told an adjuster over the phone that she started working after the accident. The applicant testified that at least she told all of the respondent's IE assessors that she was working. The applicant's testimony is supported by the IE reports. The only IE assessor who did not report that she worked after the accident was Dr. Mendis. He testified that he asked the applicant if she worked elsewhere, and she said no. However, he was unable to locate his clinical notes taken at the time of his assessment. He also would have been aware of the applicant's post accident employment because he reviewed Dr. Cooper's report.

[8] Ex. 3 p.1136, February 25, 2019 note from the Ottawa Hospital; Ex.3, p.390, June 11 and June 26, 2019 clinical notes of Dr. Robillard

[30] Dr. Bekkari reported that the applicant was not employed. The applicant explained that he probably reported that because she was not scheduled for any hours with Impark at the time. She worked on an on-call basis and, therefore, did not have any regular hours. When she was not scheduled to work, because her employment was casual/on call, she did not think of herself as being employed. Her testimony was that one had to work for years on a casual basis with Impark before being considered an employee. I was not provided with any evidence to show whether this was company policy or merely the applicant's belief. However, I do not find that it matters. The applicant is not sophisticated. Whether it was company policy or she believed that she had to work years before being considered an employee, the applicant's explanations are reasonable. Accordingly, I accept that she was truthful and credible and accept her explanation that she did not believe she was working or employed when she did not have any hours scheduled.

[31] The respondent relied on surveillance evidence. I do not find it discredits the applicant or supports the respondent in its denial of IRBs. Surveillance is at a moment in time and is not illustrative of the overall picture of how the applicant may really be. I found that the applicant's explanations of what she was doing in the surveillance or on social media were cogent and reasonable.

[32] The respondent submitted another area of concern about her credibility was the applicant's denial of any improvement in her headaches. Her headache physician recorded that the applicant had a 50% improvement in her headaches on Topamax.[9] I do not agree with the respondent that the applicant's denial of an improvement in the face of a report of improvement is fatal to the applicant's credibility. When asked about the applicant's denial in light of the headache physician's report of improvement, the applicant testified that she had to stop Topamax shortly after due to side effects. Therefore her headaches continued to be a problem. I accept that the applicant would not understand that a short term improvement is still an improvement or that she did not remember any improvement.

[33] The applicant testified that she had a left shoulder injury from June 2017 that lasted about thee to four months. She did not recall being referred by Dr. Lalonde for physiotherapy for her left shoulder in February 2018. She explained that her attendance at Dr. Lalonde's office on February 26, 2018 for an ultrasound was a follow up. Her OHIP funded physiotherapist, Alena Petrie recommended on February 13, 2018[10] that she undergo four weeks of

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[9] Ex.3 p.421, report of Dr. Vanessa Doyle, neurologist, dated May 19, 2020.
[10] Ex.4 p.766

physiotherapy, one to two times per week. The applicant attended twice and was discharged after for non-attendance.[11] She was provided with home exercises, education and self management strategies. The applicant testified she had no recall of this and did not believe she had shoulder issues because, according to her best recollection, she was very active before the accident with sports.

[34] There was no evidence to corroborate the applicant's testimony that she was active with sports just before the accident. However, the fact that she did not complete her shoulder physiotherapy and that there is no further record of any shoulder complaints until post-MVA corroborates her testimony of having no problems with her shoulder for a reasonable period of time before the accident.

[35] For these reasons, I find the applicant was truthful, but that her memory was poor, which is consistent with her neuropsychological assessment.[12] Where she has no recall of events, I rely on the medical records. They, for the most part, consistently record the complaints the applicant testified she had as a result of the accident.

3. Entitlement to IRBs Pre-104 Weeks

[36] I find that the applicant is entitled to IRBs from February 8, 2020 to August 23, 2020 for the following reasons. Section 5(1) of the *Schedule* provides that the respondent shall pay an IRB if the applicant was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. The applicable causation test in making this determination is the "but for" test: whether the applicant would have had the impairments but for the accident. The accident is not required to be the sole cause or have been sufficient in itself to have caused the impairments at issue. Rather, the accident need only to have been a "necessary cause."[13]

[37] The *Schedule* contemplates that a person may attempt a return to work without compromising the person's entitlement to IRBs. Section 11 of the *Schedule* states that a person receiving an IRB may return to or start employment or self-employment at any time during the first 104 weeks for which she is receiving the benefit without affecting her entitlement to resume receiving IRBs if, as a result

[11] Ex.4 p.765
[12] Ex.4 Tab.36 p.220, IE report of Dr. Diana Garcia, neuropsychologist, dated January 7, 2020
[13] *Sabadash v State Farm et al.*, 2019 ONSC 1121 (CanLII), *KY v Aviva Insurance,* 2022 CanLII 151, *Polis v. Aviva General Insurance*, 2021 CanLII 50787, *Afriat v Aviva Insurance Canada*, 2020 CanLII 94793 (ON LAT), *M.T. v Aviva Insurance Canada,* 2021 Canlii 2053.

of the accident, she is unable to continue the employment she was engaged in at the time of the accident.

[38] To determine entitlement to IRBs for the first 104 weeks of disability, I must first identify the applicant's essential tasks of her employment at the time of the accident. Based on the applicant's testimony and the IE reports, I find that the essential tasks of the applicant's employment as a cashier at a gas bar for Canadian Tire include the following:

a opening the station, opening the pumps, wiping them down, sweeping around them;

b opening the containers with wiper fluid, restocking the oil and wiper fluid;

c opening the lottery machine, count lotto tickets, do lotto and tobacco inventory at the beginning and end of the day;

d prepare inventory orders and receive inventory orders;

e open the cash, learn and operate the computer system for making change and for the pumps;

f get food ready for lunch counter;

g restock coolers and shelves at the end of the shift; and

h serve customers and deal with angry customers on a regular and daily basis.

[39] The applicant testified that the injuries she sustained as a result of the accident were exacerbation of her depression, balance difficulties, nausea, vision problems, breathing difficulty, neck, shoulder and head pain.

[40] The applicant was required to lift washer fluid boxes that weigh about 32 lbs. each and to reach above her head to restock coolers and shelves. She was assessed at a functional capacity IE assessment as having the capacity for doing a light capacity job. She could lift no more than 20 lbs despite giving maximal effort. The IE assessor, Dr. Anthony Aiello, chiropractor, determined that the applicant's job at Canadian Tire was a light capacity because of the National Occupation Classification (NOC) for cashiers categorised handling loads no more than 22 lbs. Dr. Aiello claimed that his assessment was based on the applicant's description of her tasks. However, he did not list what the

applicant described, only what is listed in the NOC.[14] Despite this, the respondent relied on the IE report.

[41] Both Dr. Cooper and Dr. Mendis testified that a substantial inability to engage in the essential task of her pre-accident employment means that the applicant must have a severe impairment. The applicant submits this is not the test. I agree. I was provided with no authority that the test has varied. Regardless of the severity, if the impairment or combination of impairments causes a substantial inability to engage in the essential tasks of the insured's employment, the insured will meet the test for IRBs. Given Dr. Cooper's and Dr. Mendis' mistaken understanding of the test for entitlement to IRBs, I am unable to give much weight to their conclusions about whether the applicant was entitled to IRBs.

[42] Dr. Mendis reported and initially testified that the applicant could perform the essential tasks of her employment despite having concussive symptoms of ongoing dizziness, headaches and neck pain. He testified that the applicant's headaches were mild because in his opinion, for a headache to be severe, a person would need to lie down in a dark room. He then clarified that the severity of a headache is determined by how it affects a person's function. His report was silent on the severity of the applicant's headaches or on how they affect her function.

[43] Dr. Mendis' cranial nerve examination of the applicant showed convergence insufficiency.[15] He testified that the applicant would require a work modification of not looking at a computer screen for any extended time period to address her vision problems. The applicant's headaches would require her to have more breaks. He also testified that the applicant's dizziness would not affect her ability to work based on his erroneous understanding that she had a desk job. He testified that dizziness would affect a person who is required to do overhead reaching or stacking. Dr. Mendis was unaware that this was part of the applicant's job duties. He testified that Delaudid would make the applicant drowsy and at the amount the applicant was taking, would definitely cause a reduction in her ability to work an eight hour shift and affect her cognitive abilities at work. He testified that Delaudid is not normally prescribed for headaches and that a person's headaches have to be severe for such a prescription.

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[14] Ex.4 Tab 32, IE report of Dr. Aiello dated May 27, 2019
[15] One eye turns outward instead of inward with the other eye, creating double or blurred vision.

[44] I find that, as a result of the accident impairments identified by Dr. Mendis, the applicant has a substantial inability in stocking the shelves and coolers, using a computer screen for the cash and pumps for most of the day, engaging in the cognitive activities of taking inventory and operating the cash, and to working an eight hour shift. These are all essential tasks of the applicant's employment at Canadian Tire and the level of interference in the applicant's ability to perform those activities identified by Dr. Mendis is not just a minor interference.[16] I find that the combination of the impairments and its effect on the various essential tasks amounts to a substantial inability.

[45] Dr. Cooper testified that he did not have a thorough job description and that it would have been helpful. His initial opinion was that the applicant did not complain of mood, fatigue or depression as a reason why she could not work. He believed it was her cognitive complaints, which he initially thought should be explored as being caused by a head injury. He testified that the applicant was more susceptible to disruption so her coping skills were less than average as were her problem solving abilities. Therefore, her resources would have been more stretched than the average person. He testified that, given the applicant's cognitive impairments and Dr. Garcia's opinion that they were not caused by a neurological insult, the reasonable conclusion is they were caused by psychological impairments as a result of the accident.

[46] The applicant submitted that I am to determine the quantum of IRB that she is entitled to. There is no dispute that the IRB should be calculated based on 70% of the applicant's gross income amounting to $362.22 per week, pursuant to ss. 7(1) and 7(2) of the *Schedule*. However, the respondent is entitled to deduct 70% of the applicant's gross employment income from the $362.22 per week IRB, pursuant to s. 7(3)(a). The applicant continued to work for Impark up to March 20, 2020, but has not provided her payroll information up to that date. The applicant received Canada Emergency Response Benefits ("CERB") in 2020. The parties agree that the CERB is not deductible from the IRB. There is no evidence that the applicant worked from March 21, 2020 to August 23, 2020. Accordingly the respondent is required to pay IRBs for that period at the rate of $362.22 per week subject to any other deductions the respondent may be entitled to make.

4. Entitlement to Post-104 week IRBs

[47] The test for post-104 week IRBs is whether the applicant suffers a complete inability to engage in an employment for which she is reasonably suited by

[16] Ex.4 Tab 33, IE report of Dr. Tilak Mendis, neurologist, dated May 27, 2019

education, training or experience. Suitable employment also means employment in a competitive, real-world setting, taking into account an employer's demands for reasonable hours and productivity. The work should also be comparable in terms of status and wages.[17] The onus is on the applicant to show that she meets this test.

[48] While the legal onus always remains on the applicant, the sufficiency of the proof depends on what is reasonable in the circumstances. This involves consideration of all the evidence including the nature of the applicant's condition and extent of her disability, her efforts to position herself to return to the workforce, the vocational assistance made available by the respondent and the options for alternative work that have been put forward. The applicant has the onus of proof, and that onus of proof requires the applicant to prove a negative. It is difficult to prove a negative, which for insured person's like the applicant, requires proof that she is unable to do any suitable job. I find that proof of attempts to work that have failed that are suitable based on the applicant's education, training and experience is an example of the type of evidence.

[49] The applicant testified that she obtained her high school equivalency in 2015. According to her testimony, she had experience working at fast food restaurants, grocery stores and gas bars at minimum wage.[18] The applicant started working on a part-time casual basis for Impark in September 2018 as a parking lot attendant. Her evidence was that the work was not as physically, mentally or cognitively challenging as her work at Canadian Tire. She has worked eight hour shifts for up to three weeks at Impark and testified that she was able to do the work over that period of time. She was laid off temporarily effective March 25, 2020 due to covid-19.

[50] The applicant started work at Dollarama either on October 4 or October 21, 2021 stocking shelves at night for three hour shifts. She testified that she also worked from 7:00 p.m. to 5:00 a.m. or ten hour shifts at Dollarama. The applicant complained of numerous falls since the accident due to dizziness. She had another fall on October 11, 2020 when a sign fell on her, and she attended at the outpatient thrombosis clinic three days later with complaints of leg pain. She underwent arthroscopy and a repair of the labral tear of her left hip on January 13, 2021. She continued to work at Dollarama until she underwent shoulder surgery on December 8, 2021. She testified that she was off work from

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[17] *16-000874 v Certas Home and Auto Insurance Company*, 2017 CanLII 69444 (ON LAT), *Burtch v. Aviva Insurance Co. of Canada,* 2009 ONCA 479 (CanLII) (Ont. C.A.) paras. 15 and 23
[18] Ex. 4 Tab 60 p.1844, application to ODSB dated August 24, 2017

Dollarama at the time of the hearing on the recommendation of her shoulder surgeon.

[51] The applicant submitted that her hip surgery, bariatric or weight loss surgery and her shoulder surgery were all required as a result of the accident. She also submitted that her heart attack was caused by the accident because she gained weight due to her stress, anxiety and PTSD. She submitted that she had some minor hearing loss prior to the accident and that it is now severe. I am unable to find that any of those health issues were caused by the accident for the following reasons.

[52] The applicant had pre-accident medical issues with chest pain complaints[19] and had attended the hospital with persistent tachycardia,[20] weight gain,[21] arthritis in her legs, hands, feet and back,[22] headaches,[23] shoulder pain complaints,[24] hearing loss,[25] and falls[26] prior to the accident. She could not point me to any evidence or medical opinions that the accident caused these conditions to worsen. She was already referred for bariatric surgery because of her weight prior to the accident.

[53] Dr. Gwardjian testified that increased weight could have led to the applicant's hip surgery. Dr. Gwardjan's opinion was that it was a possibility. However, given the applicant's pre-accident weight issues, there is not enough certainty in Dr. Gwardjan's opinion for me to find that, but for the accident, the applicant would not have had a labral hip tear. There is an indication that by August 4, 2021 she weighed 285 lbs,[27] which was a 20 pound increase from her weight on December 21, 2017 and her weight of 119 kg (262 lbs) on October 16, 2017.[28] However, there was no record of her weight after December 31, 2017 up to the date of the accident. She reported to Dr. Gwardjan on May 10, 2019 that she

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[19] Ex.4 Tab 37 p.232 and 233, clinical notes of Dr. Lise-Anne Robillard, family physician, dated October 11, 2017, p.245 dated January 18, 2016, p.246 dated January 19, 2018. See also pp.247 to 249, she was scheduled for a cardio stress test on February 23, 2018, but failed to attend the appointment

[20] Ex.4 Tab 43, p.912, Ottawa Hospital clinal notes and records

[21] Ex.4 Tab 37 p.231, clinical notes of Dr. Lise-Anne Robillard, family physician, dated October 6, 2017 and p.307, referral for bariatric surgery by Dr. Robillard dated December 21, 2017, p.249 she weighed 117 kg (257 lbs.) on January 22, 2018

[22] Ex.4 Tab 60 p.1940, application to ODSP dated October 19, 2009, p.1911 report of Dr. Dan Sweet dated September 21, 2009

[23] Ex.4 Tab 43 p.835 Ottawa Hospital emergency note dated December 29, 2015,

[24] Ex.4 Tab 37 p.227, clinical notes of Dr. Lise-Anne Robillard, family physician, dated September 19, 2017, pp.236 to 238 dated November 14, 2017 to December 4, 2017

[25] Ex.4, p.2274, audiology report of July 5, 2014

[26] Ex.4 Tab 37 p.254, clinical notes of Dr. Lise-Anne Robillard, emergency report dated February 21, 2021

[27] Ex.4 Tab 37 p.536, report dated August 31, 2021 of Louise Donnelly, NP

[28] Ex.4 Tab 37 p.231

weighed 238 lbs, which is almost 30 pounds less that her pre-accident weight. Given the weight loss post accident followed by weight gain and the fact that she was referred for bariatric surgery prior to the accident, I am unable to find that the applicant's weight gain was caused or contributed to by the accident.

[54] The first mention of the applicant having hip complaints in any of the medical records was not until May 2020. The applicant submitted that the symptoms of her labral hip tear were recorded by her physiotherapist in October 2018 when the applicant complained of thigh pain in the front of her legs.[29] She also complained of the front thigh pain on May 22, 2020, which is also the first record of left hip pain, which was made to Dr. Taunya St. Pierre, physiatrist. Based on the fact that Dr. St. Pierre differentiated between hip pain and front thigh pain by listing them as separate complaints, I am unable to agree with the applicant that her thigh complaints in October 2018 were an indication that her hips were injured in the accident. [30]

[55] The applicant relies on Dr. Ismail's diagnosis of soft tissue injury to the left hip as a result of the accident for her submission that her hip surgery was required because of her accident injuries. Dr. Ismail is a physiatrist who conducted an IE assessment of the applicant on August 12, 2020. He reported that the applicant's complaints to him were notably different from her complaints to a previous physiatrist in 2019. He does not name Dr. Gwardjan. Dr. Ismail also reported that he was unable to account for the difference in his findings and those of the previous physiatry assessor in 2019. He did not find that she had any impairment as a result of the soft tissue injury to the hip. Without some explanation from Dr. Ismail as to why the hip symptoms arose two years post accident and led him to a diagnosis of soft tissue injury to the left hip, or some explanation that the hip surgery was required because of the accident in light of the lack of finding of impairment as a result of the soft tissue injury to the hip, I am unable to find that the applicant has proven that, but for the accident, she would not have required hip surgery.

[56] I am unable to find that the applicant's shoulder surgery would not have happened but for the accident. I note that the applicant complained of pain to her left shoulder after the accident. However, there was no evidence to support that the pain was any worse or different as a result of the accident than her pre-accident shoulder complaints. While no complaints of shoulder pain were recorded in the months leading up to the accident, this does not mean that the applicant's shoulder issues completely resolved. She was diagnosed with

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[29] Ex.4 Tab 38 p.635, clinical note of Elysian Wellness dated October 16, 2018
[30] Ex.4, p.424 report of Dr. Taunya St. Pierre dated May 22, 2020

supraspinatus tendinosis, subacromial bursitis and mild osteoarthritis that was causing her chronic left shoulder pain before the accident.[31] On or about November 16, 2019, she slipped while getting out of a car with her left hand landing on a rock.[32] She was seen by Dr. St. Pierre who provided similar diagnoses on September 4, 2020.[33] Given the pre-accident diagnosis of the shoulder, without any medical opinion stating otherwise, I am unable to find that the applicant would not have eventually required shoulder surgery in the absence of the accident.

[57] The applicant has failed to prove that her heart attack and hip, shoulder and bariatric surgeries were caused by accident. Given that she was able to work full shifts on consecutive days for three weeks or more at IMPARK and Dollarama, I am unable to find that she has a complete inability to engage in any occupation for which she was reasonably suited by education, training or experience. She, therefore, had not proven on a balance of probabilities that she is entitled to IRBs after August 23, 2020.

B. REG. 664 AWARD

[58] Section 10 of Reg. 664 provides the Tribunal with authority in certain situations to issue an "award" up to 50% of the amount to which an applicant is entitled if the Tribunal finds an insurer "has unreasonably withheld or delayed payments." Unreasonable behavior by an insurer in withholding or delaying payments includes behaviour that is excessive, imprudent, stubborn, inflexible, unyielding, or immoderate. The applicant has the onus to prove on a balance of probabilities that the insurer was unreasonable in the withholding or delay of the payments such that an award is warranted.[34]

[59] The applicant submitted that the respondent delayed payments of IRBs to her by failing to request addendum IE reports. She submitted that because of the failure to pay IRBs, she had to take out a litigation loan of $50,000.00. I find that the litigation loan was not taken out because the respondent denied IRBs. The applicant has been in receipt of ODSP since 2003. ODSP is entitled to deduct the IRBs that the applicant receives.[35] This means once the IRBs are

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[31] Ex.4 Tab 27 p.227, Dr. Robbilard referral letter for physiotherapy dated August 11, 2017
[32] Ex.3 Tab 55 Ottawa Civic Hospital emergency note dated November 16, 2019
[33] Ex.4 Tab 37 p.440
[34] *Foucade v Coachman Insurance Company*, 2021 CanLII 120889 (ON LAT)
[35] Sections 29, 37, and 38 of *General O. Reg 222/98* under the *Ontario Disability Support Program Act*, 1997, SO 1997, c 25, Sch B. The applicant is allowed to earn up to $200.00 employment income per month without any deduction from ODSP. Anything above that results in a deduction of 50% of the remaining employment income. Income replacement benefits are not exempt from the definition of employment income.

deducted from the ODSP benefits, the applicant's monthly benefits from both ODSP and her IRBs combined would be equal to the amount of ODSP she receives when she is not in receipt of IRBs. For this reason, I find that any debt the applicant has incurred is not because her IRBs were denied.

[60] Dr. Cooper testified that he would have recommended a neuropsychological assessment to address the applicant's cognitive complaints and that it would have been helpful for his opinion to have that assessment. However, he was not provided with Dr. Garcia's neuropsychological assessment. Courtney Sparks testified on behalf of the respondent. I found her credible. She testified that Dr. Garcia's report was not provided to Dr. Cooper because the decision was made by the previous adjuster. She did not refer the report to him for an addendum because documents had been requested from the applicant that were not provided and, until they were, there was no sense in obtaining an addendum report as it would mean the insurer would just be required to keep requesting addendum reports as the documents trickled in. Before she assumed carriage of the file, a paper review IE for catastrophic determination had recommended obtaining a number of medical records from the applicant. As of November 2021, the only documents the applicant provided that were requested by the respondent were the applicant's OHIP summary from 2013 to 2018.

[61] The respondent relies on the *Watters v Aviva General Insurance*, 2020 CanLII 80306 (ON LAT). In that case the adjudicator held that the *Schedule* does not include any obligation on the respondent to refer an insured to additional IE assessments or obtain addendum reports. Failing to do so does not demonstrate an award is necessary or appropriate in the absence of some evidence that this caused an unreasonable delay or withholding of a payment.

[62] I am unable to find that there was evidence that the respondent unreasonably delayed forwarding information to its IE assessors to obtain addendum reports. First, Dr. Garcia did not clearly recommend that her report be provided to Dr. Cooper. She found the applicant had no neurocognitive impairment that would render the applicant substantially unable to engage in her pre-accident employment. She could not speak to psychological impairments and stated that she "deferred to the psychological assessor." Dr. Cooper testified that a reasonable hypothesis was that if the applicant's cognitive complaints were determined to not have been caused by a traumatic brain injury, that more probable than not, they were caused by psychological factors. However, the evidence points to the applicant being aware that, once she provided her ODSP file, her employment file, updated medical records from 2019, and her CPP disability file to the respondent, the respondent would be forwarding them to the

IE assessors together with the MRI of the applicant's hip for addendum reports. There was no indication from the applicant that it would be problematic or that there would be any delays in obtaining the information.[36]

[63] The respondent also relies on *LPC v Aviva Insurance,* 2020 CanLII 87978 (ON LAT) (*LPC v Aviva*). In that case, Vice-Chair Shapiro held that the respondent's unanswered requests for reasonably relevant records weighed against finding its denial of IRBs unreasonable. Vice-Chair Shapiro was aware of the documents that were produced and that were requested as he determined that the documents that were produced supported the insured's submission that Aviva failed to have her re-examined. Aviva, however, eventually re-evaluated its denial and approved the pre-104 week IRBs.

[64] The facts in *LPC v Aviva* are not dissimilar to the facts before me. Dr. Garcia's deference to Dr. Cooper and the failure of the respondent to provide her report to Dr. Cooper supports the applicant's argument that the respondent failed to have her re-examined. However, as I stated earlier, the respondent could not have expected that the applicant would take almost two years to provide the documents requested. Based on my review of the correspondence between the parties, I find that the documents sought by the respondent were reasonable under the circumstances. The updated medical records sought by the respondent were relevant to the period of time for which the applicant was claiming entitlement to IRBs. The ODSP file was relevant for the applicant's pre-accident psychological impairments and her employment history, and her employment files and CPP disability file were relevant for determining what employment she was capable of and for calculating quantum of IRBs. For these reasons, I find that the respondent did not unreasonably delay the payment of IRBs.

C. INTEREST

[65] The applicant is entitled to interest on the IRBs payable from March 21, 2020 to August 23, 2020 in accordance with the *Schedule*. No interest is payable on the IRBs owed from February 8, 2020 to March 20, 2020 pending the respondent's receipt of the applicant's payroll slips for that period.

CONCLUSION AND ORDER

[66] The applicant's is entitled to IRBs up to August 23, 2020. The amount payable between February 8, 2020 and March 20, 2020 cannot be determined until the

[36] Ex.4 Tabs 11 to 31 dating from March 20, 2020 to December 8, 2021,

applicant’s payroll records from IMPARK are produced. The IRB is otherwise payable at $362.22 per week from March 21, 2020 to August 23, 2020.

[67] The applicant failed to prove on a balance of probabilities that any inability she has to engage in any employment after August 23, 2020 for which she is reasonably suited by education, training or experience was caused by the accident. Accordingly, her claim for IRBs beyond August 23, 2020 is dismissed.

[68] The applicant is entitled to interest on the IRBs payable from March 20, 2020 in accordance with the Schedule. No interest is payable on the IRBs owed from February 8, 2020 to March 20, 2020 pending the respondent’s receipt of the applicant’s payroll slips for that period.

[69] The applicant’s claim for a Reg.664 award is dismissed.

Released: August 11, 2022

Deborah Neilson
Adjudicator