



**Citation: de Boyrie v. TD Insurance Meloche Monnex, 2023 ONLAT
21-011865/AABS**

Licence Appeal Tribunal File Number: 21-011865/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:

Marie-Louise de Boyrie

Applicant

And

TD Insurance Meloche Monnex

Respondent

DECISION

ADJUDICATOR: Rebecca Hines

APPEARANCES:

For the Applicant: Marie-Louise de Boyrie, Applicant
Nick de Koning, Counsel

For the Respondent: Crystal Krandel, Claims Representative
Tebogo Fisher-Phala, Counsel
Derek Vihvelin, Counsel

Court Reporters: Cindy Southwell, Penfoulds Inc.
Laura Ruekes

HEARD: by Videoconference: March 21, 22 and 23, 2023

OVERVIEW

[1] Marie-Louise de Boyrie, the applicant, was involved in an automobile accident on March 29, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by the respondent, TD Insurance Meloche Monnex, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

1. Is the applicant entitled to an **income replacement benefit (IRB)** in the amount of \$400.00 per week from September 22, 2020, to date and ongoing?
2. Is the respondent liable to pay an **award under s. 10 of O. Reg. 664** because it unreasonably withheld or delayed payments to the applicant?
3. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] After considering the parties submissions and all of the evidence I find the applicant is entitled to an IRB in the amount of \$400.00 per week from September 22, 2020, to date and ongoing. Interest is payable pursuant to s. 51 of the *Schedule*. The applicant is not entitled to an award.

PROCEDURAL ISSUES

Late Attendance of Court Reporter

[4] At the beginning of the hearing when I asked the respondent whether a court reporter would be present it confirmed no. Halfway through the testimony of the applicant’s first witness, a court reporter showed up. No explanation was provided by the respondent for the late arrival of the court reporter or why one had just arrived. I canvassed with the applicant whether there were any objections to the attendance of the court reporter as I had concerns that the transcript from the proceeding would not be a full record. I asked if the applicant

had concerns about an incomplete transcript given the late attendance of the court reporter. The applicant did not have any concerns about the transcript and consented to the court reporter remaining in attendance.

Surveillance Evidence

- [5] The applicant opposed the respondent's submission of surveillance reports because the documents were not served by the deadline provided for in the Tribunal's case conference report and order. The parties were ordered to exchange all evidence 60 calendar days prior to the hearing date. She submits that it was only served 10 days prior to the hearing. In addition, she did not receive any videos from this surveillance. Further, it would be procedurally unfair to allow the respondent to rely on this evidence because her medical expert did not have a chance to review it or address it in an addendum report.
- [6] The respondent submits that the surveillance should not be excluded as it was served 10 days in advance of the hearing. Further, the surveillance was just obtained recently and is relevant to the applicant's function. As a result, it should not come as a surprise to the applicant as she has had a chance to review it. Further, it argues that it is relevant to the issues in dispute as it speaks to the applicant's post-accident function. I admitted the surveillance and advised that any relevance of this evidence would go to weight. Ultimately, I did not find it helpful. In light of my decision, I do not feel it is necessary to address further.

YouTube Videos

- [7] The applicant opposed the respondent's reliance on some YouTube videos which depict her giving self-help mental health advice. This issue arose during the cross-examination of Dr. Guows, the applicant's psychological assessor. The applicant submits that the respondent did not include these videos in its document brief or give any notice that it intended to rely on them. Further, it would be unfair to allow the respondent to cross-examine Dr. Guows on these videos as he has never seen them before and did not address them in his report.
- [8] The respondent submits that these videos are relevant as it shows the applicant attempting to market herself online as a mental health advisor. Therefore, they are directly relevant to the applicant's claim for post-104 IRBs.
- [9] I admitted the videos as I find them relevant to the applicant's claim for post-104 IRBs. However, to address any procedural unfairness I permitted Dr. Guows to take a break to review the contents of the videos prior to being asked questions about them. Further, I adjourned the hearing until the next day so that the

applicant had an opportunity to review the videos prior to her testimony. Of significance, the respondent did not end up showing either witness the YouTube videos. Therefore, I have given them very little weight.

BACKGROUND

- [10] On March 29, 2018, the applicant was involved in an accident when her vehicle was rear-ended while stopped on a congested highway. She submits that her head jolted backwards and hit the head rest. There was no secondary impact and there was very minor damage to her vehicle. She went to a collision reporting centre and attended a hospital three days later where she was diagnosed with pneumonia. She followed up with her family doctor who diagnosed her with a concussion and recommended that she stay off work for a period of time.
- [11] The applicant was off work until September 2018 and returned on modified duties. In November 2018, she quit her job because she was emotionally overwhelmed as she felt too much pressure from her employer to return to full duties. The respondent paid the applicant an IRB until September 21, 2020, when it terminated the benefit relying on the opinions of its insurer examination (“IE”) assessors.

ANALYSIS

The applicant is entitled to post-104 IRBs in the amount of \$400.00 per week from September 22, 2020, to date and ongoing.

- [12] To receive payment for post-104-IRBs under s. 6 of the *Schedule*, the applicant must demonstrate on a balance of probabilities that she suffers from a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training, or experience.
- [13] The applicant relies on the psychological reports and testimony of Dr. Guows dated November 9 and 11, 2021 and February 23, 2022, in support of her position that she meets the post-104 IRB test as a result of her accident-related psychological impairment. Further, she relies on the clinical notes and records (“CNRs”) of her psychotherapists to corroborate that she has ongoing psychological impairments that would prevent her from returning to work in any meaningful capacity. To date, her attempts to return to work have been unsuccessful. Further, although she has taught yoga part-time, she does it for personal health and enjoyment and has not made a living from it. Finally, she

submits that the IE psychological assessment of Dr. Reis dated October 2021 supports that her psychological condition deteriorated following the IE that terminated her entitlement to post-104 IRBs.

- [14] The respondent relies on the testimony and IE report of Dr. Rockman, psychologist dated September 14, 2020, and other multi-disciplinary IE reports who opined that the applicant did not meet the post-104 IRB test. It argues that this case is not about the applicant's accident-related diagnosis, instead, it is about her real capabilities and function. It submits that she does not meet the post-104 test because she has taken yoga teaching courses post-accident which have required long hours of study and lengthy travel by car and airplane. Moreover, despite having driving anxiety she has continued to drive long distances, which was a barrier for her in returning to work post-accident. In addition, she has taught yoga part-time, has participated in physical boot camps, has volunteered, and has tried making money doing self-help YouTube videos. Further, it asserts that there are no impairments that are interfering with the applicant's ability to engage in self-care or carry out her housekeeping and home maintenance tasks. Consequently, she could return to work in another job which is less demanding than her pre-accident occupation.
- [15] For the following reasons, I prefer the applicant's evidence and find that she has a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience. I will first discuss the applicant's academic and employment history and will then address the medical evidence.

Applicant's Academic and Employment History

- [16] The applicant has a college diploma in Business Administration Management Studies, Human Resources and certificates in Management Studies and Occupational Health and Safety.
- [17] The following summarizes her employment history:
- (i) From 2004 to 2008 she worked as a Health and Safety Coordinator where she managed workplace injury claims and return to work programs and ensured compliance with health and safety legislation;
 - (ii) From 2008 to 2012 she worked in Human Resources where she conducted risk assessments and developed strategies for hazard prevention. She also delivered training programs on workplace safety;

- (iii) From 2012 to 2016 she worked as a Health and Safety Consultant where she implemented workplace accommodation programs, managed occupational injury and illness claims and developed safe strategies for return to work. Her annual salary was \$85,000.00 to \$90,000.00 per year;
- (iv) In the two years prior to the accident, she worked as a Mental Health Consultant for Workplace Safety and Prevention Services where she conducted workplace mental health training including sessions on Violence, Bullying and Harassment Prevention. She also provided consultant service to companies on workplace mental health and conducted assessments to develop policies and training programs. This job required a lot of travel (driving) to different worksites throughout Ontario. Her annual salary was \$75,000 to \$80,000 per year.

[18] The applicant testified that she loved her job as a Mental Health Consultant and is devastated both emotionally and financially as a result of her inability to return to her job. There was a reference to the pre-accident clinical notes of the family doctor where the applicant reported work-related stress, however, she was working up until the accident. She acknowledged that despite her impairments she has made some attempts to work post-accident. For example, she has taught yoga part-time and attempted to be an occupational health consultant for a dog grooming company working 10 hours per week. However, this attempt only lasted for two weeks because she found it too stressful. She has also done a few astrology readings and attempted to do mental health self-help videos on YouTube. Despite the applicant's attempts to work, the income tax records from 2020 to 2021 support that she has made minimal income and has been depleting her RRSP accounts. Overall, I find the applicant to be a credible witness and believe that her inability to return to work has had an impact on her psychological condition.

[19] The parties submitted case law from the Financial Services Commission of Ontario and this Tribunal which sets out the criteria decision makers should consider in determining whether an individual meets the post-104 IRB test. The respondent does not dispute the legal test but argues that all of the decisions relied upon by the applicant involved more serious accidents. On the whole, I did not find the fact scenarios outlined in any of the decisions relied on by the parties particularly applicable to the present case. However, I do find them helpful as far as setting out the jurisprudence and the guiding principles for a post-104 IRB analysis. In *16-00874 v. Certas Home and Auto Insurance Company*, 2017 CanLII 69444, the Tribunal defines what constitutes reasonably suitable

employment which is “employment in a competitive, real-world setting, taking into account employer demands for reasonable hours and productivity. The work should also be comparable in terms of status and wages.” I agree and apply this principle to this case.

- [20] IE vocational assessment and labour market survey reports prepared by Diamantis Zervas, vocational assessor indicated that the applicant did not have a complete inability to work from a vocational perspective. Mr. Zervas opined that the applicant could work as a Human Resources or In-house Training Specialist; Personnel and Recruitment Officer or Staff Coordinator; Personnel Clerk or Occupational Health & Safety Consultant/Coordinator and/or Administrator Administrative Officer. While I agree that most of the positions identified by Mr. Zervas are suitable based on the applicant’s education and experience, I do not find that she could work in any of these occupations as a result of her accident-related psychological impairment. I will now explain why I have come to this conclusion based on the medical evidence.

The Medical Evidence

- [21] As a starting point, I do not find that the applicant suffers from chronic pain or any physical impairment that has impacted her ability to work. The applicant relied on a physiatry report of Dr. Ghouse dated March 17, 2022, which supports that she meets the post-104 IRB test because she suffers from chronic pain. I do not find the medical record supports this diagnosis because in the time period shortly following the accident the applicant made very few physical pain complaints to her family doctor. Further, she has been diagnosed with soft-tissue injuries with no objective findings of musculoskeletal impairment. Furthermore, she has not had any functional limitations as a result of any physical impairments. The evidence supports that she continues to carry out her personal care, housekeeping and home maintenance tasks and has continued to be physically active. Examples include dancing in the park, yoga, bootcamps and hiking.
- [22] Although I do not find the applicant meets the post-104 IRB test as a result of a physical impairment, I do find that she meets the test as a result of an accident-related psychological impairment.
- [23] Dr. Rockman’s IE report dated September 14, 2020, diagnosed the applicant with Adjustment Disorder with Anxiety and Depressed Mood, Major Depressive Disorder, recurrent, in partial remission (pre-existing and exacerbated by the subject accident). In discussing whether this psychological condition would prevent the applicant from working Dr. Rockman opined that the applicant’s symptoms were not severe enough to prevent her from returning to any

employment that she is reasonably suited for education, training, or experience. However, Dr. Rockman did acknowledge that the applicant was not stable enough to return to her pre-accident work as a mental health consultant. Instead, the doctor stated that the applicant could return to teach yoga and teach crisis de-escalation training.

- [24] I did not find Dr. Rockman's opinion persuasive as she acknowledged during cross-examination that the applicant did not have the certification to teach crisis de-escalation training. In addition, I do not find this type of occupation would be suitable for the applicant given her ongoing psychological symptoms and impairment. Further, I agree with the applicant that teaching yoga part-time is not "suitable employment" as it is not comparable in terms of salary or status when compared to her pre-accident occupation and salary. Finally, Dr. Rockman did not discuss any of the positions highlighted in the vocational IE assessment or indicate whether she felt the applicant could work in the positions identified.
- [25] By contrast Dr. Guows opined that the applicant meets the post-104 IRB test because of a psychological impairment. The doctor diagnosed her with Somatic Symptom Disorder with predominant pain, Major Depressive Disorder, current episode severe Panic Disorder, moderate and Chronic Pain. I prefer the opinion of Dr. Guows as I find it more consistent with the medical record before me and the applicant's testimony about her post-accident limitations. For example, the applicant's counselling records support that she has ongoing severe depressive symptoms which I find would interfere with her ability to work in the occupations identified by the respondent's vocational assessor and Dr. Rockman.
- [26] In addition, I agree with the applicant that the IE report of Dr. Reis dated October 6, 2021, supports that her psychological condition deteriorated. This report notes suicidal ideation, daily sadness and feelings of hopelessness. Dr. Reis diagnosed her with Major Depressive Disorder, Single Episode, Moderate/Severe and recommended ongoing psychotherapy. Of significance, Dr. Reis assessed the applicant's entitlement to pre-104 IRBs and determined she met the test. It's not clear why the respondent changed assessors when Dr. Reis already had a working understanding of the applicant's psychological condition and work history.
- [27] The applicant's past employment history included professional occupations with expertise in occupational health and safety and human resources. Employment opportunities for similar occupations would require excellent written and verbal communication skills, good presentation skills, problem solving skills, the ability to manage conflicts in the workplace and interpersonal skills. I do not find the

applicant could work in the jobs identified by Mr. Zervas as a result of her psychological impairment. I agree with Dr. Guows that if the applicant attempted to do this type of work it would likely result in increased stress, anxiety, and decompensation. I find the applicant's symptoms of depression, anxiety and panic attacks would interfere with her ability to have regular attendance and perform the duties these positions would require. The evidence supports that the applicant takes a variety of medications for depression, anxiety and poor sleep which results in daytime fatigue and an inability to concentrate. I find these would interfere with her ability to consistently maintain regular attendance and would likely also impact her performance.

- [28] In addition, the evidence supports that the applicant's mood has been unstable and she is prone to panic attacks and emotional outbursts. While there have been time-periods where the applicant's symptoms have been stable, I find any stability has been unpredictable. I find that the applicant's emotional outbursts would not be tolerated in the professional occupations identified by Mr. Zervas. As highlighted above the employer's demands for reasonable hours and productivity must be considered when determining whether employment is suitable.
- [29] Much was made by the respondent about the fact that the applicant was able to complete various yoga teaching courses post-accident which required travelling long distances and long periods of study for extended periods of time. In my view, the yoga teaching courses are not comparable to the applicant's pre-accident employment or occupational history. For example, one of the courses was held in Ghana which required the applicant to travel overseas. The applicant testified she is a spiritual person and has attended mystery schools. The trip to Ghana was more of a spiritual journey as opposed to work. Further, another course was split up into three separate weeks with gaps in-between and did not require the applicant to be on. I accept these explanations and do not find the fact that she completed yoga training courses post-accident means that she can work in a real-world environment.
- [30] For all of the above reasons, the applicant has met her onus in proving on a balance of probabilities that she has a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training, or experience. Consequently, she is entitled to payment of an IRB in the amount of \$400.00 per week from September 22, 2020, to date and ongoing.

The applicant is entitled to interest

[31] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. The applicant is entitled to payment of interest on post-104 IRBs in accordance s. 51 of the *Schedule*.

The applicant is not entitled to an award

[32] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. The onus is on the applicant to prove that an award is warranted.

[33] The applicant submits that she is entitled to an award because the respondent unreasonably withheld her entitlement to an IRB. In particular, it relied on the flawed IE report of Dr. Rockman when it had other medical reports and records which contradicted the doctor's opinion. Further, she submits that the respondent did not comply with the Tribunal's case conference report and order and did not produce its adjuster's log notes. As a result, she has been unable to understand the decision-making process behind the denial of important benefits. She also asserts that the respondent did not call the adjuster as a witness to provide their rationale behind the adjusting of the claim. The applicant asserts that this conduct is worthy of an award.

[34] The respondent argues that the applicant has raised the issue of it not producing its log notes for the first time in closing submissions. It submits that the applicant could have written to the respondent requesting these records or brought a motion in advance of the hearing but did not. Further, the parties agreed to a revised witness list for an efficient hearing and at no point did the applicant indicate that she wished to cross-examine the adjuster. Further, the applicant could have summoned the adjuster as witness. It submits that the applicant is attempting to reverse the onus of proof onto the respondent. Therefore, the applicant has not proven that an award is warranted as she has not relied on any evidence in support of her claim. I agree.

[35] It is trite law that in determining whether an insurer's conduct in withholding or denying a benefit warrants an award, an insurer's behaviour must be seen as "excessive, imprudent, stubborn, inflexible, unyielding, or immoderate."

[36] The applicant spent very little time on the award issue and did not submit any evidence in support of her arguments to support that the respondent unreasonably withheld payment of post-104 IRBs. In my view addressing the

issue for the first time in closing submissions is not evidence and I was not persuaded by the arguments. The applicant could have followed up with the respondent to produce its log notes in advance of the hearing but did not. Further, the applicant could have summoned the adjuster as a witness but did not. It is well established that the threshold for an award is a high one. I agree with the respondent that the applicant has not met her onus in establishing that the respondent's conduct meets this threshold. Therefore, I do not find that it is liable to pay an award.

ORDER

[37] For all of the reasons, I order as follows:

1. The applicant is entitled to an IRB in the amount of \$400.00 per week from September 22, 2020, to date and ongoing, plus interest according to s. 51 of the *Schedule*.
2. The applicant is not entitled to an award.

Released: April 19, 2023



**Rebecca Hines
Adjudicator**