

**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: 17-001494/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:

J.A.

Applicant

and

Aviva Insurance

Respondent

DECISION

Adjudicator: Billeh Hamud

For the Applicant: Lisa Bishop, Counsel

For the Respondent: Mannaneh Duval, Counsel

Heard in writing: July 12, 2017

BACKGROUND:

1. The applicant was injured in an automobile accident on July 25, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule* - Effective September 1, 2010¹ (*the "Schedule"*). The applicant initially sought a number of medical benefits including income replacement benefits.
2. When the respondent denied those benefits, the applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal").

ISSUES:

3. The following are issues in dispute:
 - i. Is the applicant entitled to income replacement benefits ("IRBs") in the amount of \$400.00 weekly from September 28, 2016 to October 23, 2016 and from March 12, 2017 to date and ongoing?
 - ii. Is the applicant entitled to attendant care benefits in the amount of \$708.34 monthly from July 12, 2015 to date and ongoing as recommended by Attendants with Care Inc.?
 - iii. Is the Applicant entitled to interest on any overdue payment of benefits?
4. In the initial application, there were several additional issues. In their submissions, the parties indicate that all of the issues have been resolved with the exception of income replacement benefits, attendant care benefits and outstanding interest.
5. Therefore, this decision will only address those three issues.

RESULT:

6. I find on all of the evidence that the applicant is entitled to receive IRBs in the amount of \$400.00 per week from September 28, 2016 to October 23, 2016 and from March 12, 2017 to date and ongoing.
7. I find that the applicant is entitled to attendant care benefits in the amount of \$3,446.81 for attendant care services recommended by Attendants with Care Inc.
8. I find that the applicant is entitled to interest for the outstanding IRBs in accordance with s. 51 of the *Schedule*.

ANALYSIS:

¹ O. Reg. 34/10.

i) Is the applicant entitled to Income Replacement Benefits?

9. Section 5(1)2. of the *Schedule* states:

5(1) The insurer shall pay an income replacement benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies one or both of the following conditions:

2. The insured person,

- i. was a self-employed person at the time of the accident, and
- ii. suffers, as a result of and within 104 weeks after the accident, a substantial inability to perform the essential tasks of his or her self-employment.

10. The respondent paid IRBs of \$400.00 per week from July 25, 2015 to September 27, 2016 and from October 24, 2016 to March 7, 2017.

11. I find that the OCF-3 in question is dated September 13, 2016 and the applicant states that it was submitted to the respondent on September 14, 2016. However, the respondent states that IRBs were suspended on September 27, 2016 because the applicant failed to submit the OCF-3. There is no evidence to substantiate this claim by the respondent. Submissions are not evidence. By contrast, I note that the OCF-3 in question was dated September 13, 2016. Therefore, I have disregarded the respondent's argument with respect to non-compliance. In any event, IRBs were reinstated by the respondent on October 24, 2016. I accept and prefer the evidence of the applicant and do not find that there has been non-compliance.

12. The parties dispute the applicant's eligibility for and quantum of IRBs in the amount of \$400.00 weekly from September 28, 2016 to October 23, 2016 and from March 12, 2017 to date and ongoing.

(i) **Eligibility for IRBs**

13. The applicant maintains that he is eligible for IRBs because he was self-employed at King Construction Inc. at the time of the accident and that as a result of the accident, he was and currently is unable to return to perform the heavy physical tasks of his employment.

14. The respondent maintains that the applicant is not eligible for IRBs because he did not suffer a substantial inability to perform the essential tasks of his employment. The respondent relies on a report from Dr. Behzad Taromi, the respondent's orthopaedic surgeon, stating that the applicant does not suffer from any disc herniation.

15. The essential tasks of the applicant's work were outlined by the respondent's kinesiologist, Danny Monck in his Job Site Evaluation Report dated November 25, 2015. In his report, Mr. Monck lists the essential tasks of the applicant's employment as an installer/owner of siding and eavestroughs. Specifically, the applicant is required to install siding and eavestroughs at various heights, which includes climbing up and down ladders and measuring, bending and lifting weight over 50 lbs. Mr. Monck also noted that residential and commercial installers and servicers install windows, doors, electrical appliances, water heaters, fences, play structures and septic systems at residential and commercial properties.
16. I find that the work required by the applicant's employment is labour intensive and physically demanding.
17. On November 3, 2016, Dawn Rodie, the respondent's physiotherapist, stated in her report that the applicant "demonstrated dynamic strength abilities within the limited (1 to 10lbs) strength demands level" and that the applicant demonstrated "significant pain behaviour, including sighing, wincing, grimacing, holding his low back and rubbing left shoulder".
18. On November 9, 2016, Dr. Taromi, examined the applicant and noted that the applicant's major symptoms are lower back pain and left-sided leg symptoms. Dr. Taromi notes that the applicant complained of severe, sharp, and intermittent pain to his lower back with radiation to the left leg, which aggravates with walking, standing and transition from sitting to standing and prolonged stationary positions. Dr. Taromi concluded that the applicant suffers from lower back pain, possibly discogenic, with sciatica and possible pressure over the L4 or L5 nerve root.
19. In those reports, both of the respondent's IME assessors concluded that the applicant suffered a substantial inability to perform the essential tasks of his employment.
20. However, the respondent claims that Dr. Taromi amended his report on February 28, 2017 and concluded that the applicant did not suffer a substantial inability to perform the essential tasks of his employment. Specifically, Dr. Taromi amended his previous assessment after reviewing an MRI report dated January 11, 2016 showing no evidence of disc herniation.
21. Nevertheless, I conclude that the applicant suffers a substantial inability to perform the essential tasks of his employment, based on the report of Ms. Rodie, the respondent's physiotherapist, who determined that the applicant was unable to lift more than 10lbs. An essential task of the applicant's employment requires him to lift over 50lbs. As a result, I find that the applicant is unable to perform the essential tasks of his employment.

22. I find that the applicant is eligible for IRBs from September 28, 2016 to October 23, 2016 and March 12, 2017 to date and ongoing in accordance with the provisions of the *Schedule*.

(ii) **Quantum of IRBs**

23. The applicant submits that he is entitled to \$400.00 per week of IRBs. This calculation is based on a report by Great Oak Forensic Accounting ("the report") dated September 22, 2015.

24. The respondent claims that the report notes that the IRB quantum of \$400 per week includes both income replacement as well as business losses, since the applicant was self-employed at the time of the accident. The report calculates the income loss portion of the IRB at \$285.92 per week.

25. The respondent further claims that the applicant previously reported that his business eventually closed down following this accident. As a result, the respondent claims that the applicant is only entitled to self-employed income loss of \$285.92, since his business has closed down. However, I have no reason to question the applicant's evidence, since the respondent merely has made a bald allegation providing no evidence to support their position that the applicant's business closed down.

26. In response, the applicant denies that his business has closed down and relies on the report with respect to his entitlement to IRBs in the amount of \$400.00 per week.

27. I accept the report's calculations of the quantum of IRBs and find that the applicant is entitled to IRBs in the amount of \$400.00 per week.

ii) Is the applicant entitled to attendant care benefits?

28. The applicant submits that he is entitled to attendant care benefits in the amount of \$708.34 per month as noted in the Form 1 prepared by Attendants with Care Inc. The applicant submits that he received assistance with activities of personal care by Attendants With Care Inc. and paid invoices for same in the total amount of \$7,833.00 from December 15, 2015 to November 14, 2016.

29. The respondent submits that attendant care benefits were partially approved in the amount of \$3,446.81. Specifically, the respondent maintains that this amount was calculated based on the hourly rate of \$13.19 as indicated on the Form 1 and not the rate of \$25.00 per hour, indicated on the invoice by Attendants with Care Inc.

30. In his reply, the applicant failed to address the discrepancy with respect to the invoiced hourly rate.
31. Attendant Care Benefits to be paid under the Schedule are required to follow the Financial Services Commission of Ontario's Attendant Care Hourly Rate Guideline (the "Guideline"), which provides a range from \$11.40 per hour to \$21.11 per hour depending on the category of services. The three categories of services are as follows:
- Level 1 care for routine personal care;
 - Level 2 care for basic supervisory functions; and
 - Level 3 care for complex health/care and hygiene functions.
32. I note that the invoiced hourly rate of \$25.00 per hour by Attendants with Care Inc. exceeds the maximum hourly rates noted in the Guideline and was not indicated on the Form 1. Therefore, I find this rate to be inappropriate.
33. I also find that the invoices from Attendants with Care Inc. are not sufficiently particularized to provide a breakdown of the care received according to the various levels of care on the Form 1.
34. I find the applicant is entitled to attendant care benefits based on the hourly rate indicated on the Form 1. Since the respondent paid this amount to the applicant, the issue is moot.

iii) Is the applicant entitled to interest on overdue benefits?

35. Having determined that the applicant is entitled to benefits and those benefits are overdue, I find the applicant is entitled to interest in accordance with s. 51 of the *Schedule* with respect to the outstanding IRBs.

ORDER

The Tribunal finds the applicant is entitled to:

36. IRBs in the amount of \$400.00 per week from September 28, 2016 to October 23, 2016 and from March 12, 2017 to date and ongoing.

37. Attendant care benefits in the amount of \$3,446.81 for attendant care services recommended by Attendants with Care Inc.

38. Interest for the outstanding IRBs in accordance with s. 51 of the *Schedule*.

Released: January 2, 2018



Billeh Hamud, Adjudicator