

**LICENCE APPEAL  
TRIBUNAL**

**Safety, Licensing Appeals and  
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE  
DE PERMIS**

**Tribunaux de la sécurité, des appels en  
matière de permis et des normes Ontario**



**Tribunal File Number: 18-002145/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

**F.L.**

**Applicant**

and

**Certas Home and Auto Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR:**

**Dawn Kershaw**

**HEARD IN WRITING:**

**November 5, 2018**

## OVERVIEW

- [1] On July 7, 2016, the applicant was riding his motorcycle on the highway when a car stopped suddenly in front of him and he was thrown off his motorcycle when travelling between 75 and 80 kilometres an hour. He landed on his back and struck his head on the road. The applicant sought benefits from the respondent pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “Schedule”).
- [2] Because the respondent refused to pay for certain medical benefits, the applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of this dispute.
- [3] I must decide the dispute based on the written materials the parties have filed with the Tribunal.

## ISSUES IN DISPUTE

- [4] The issues in dispute were identified and agreed to as follows:
  - i. Is the applicant entitled to receive a weekly income replacement benefit (“IRB”) in the amount of \$400.00 per week for the period of February 1, 2018 to date and ongoing?
  - ii. What is the amount of weekly income replacement benefit that the Applicant is entitled to receive?
  - iii. Is the applicant entitled to interest on any overdue payment of benefits?

## PRELIMINARY ISSUE

- [5] The respondent takes the position that the issues in dispute include whether the respondent was entitled to repayment of amounts paid as an IRB. The respondent wrote to the Tribunal on July 10, 2018, after the June 19, 2018 case conference, asking to add the issue of repayment of IRB. The Tribunal wrote back to say that the issue was put before the adjudicator for consideration, but the issue did not appear as an issue in dispute in the case conference order (“CCO”) issued by the Tribunal on July 23, 2018. The applicant denies that the repayment issue was part of this hearing because it does not appear as an issue in dispute in the CCO.

- [6] The respondent did not bring a motion to have this issue added as an issue for the hearing. For this reason and because it did not appear in the list of issues in dispute in the CCO, I have not considered the issue in this hearing.
- [7] In reviewing this matter, I have determined that the issue in dispute is not entitlement, but quantum, for the reasons that follow.

## RESULT

- [8] Based on the evidence before me, I find that the applicant is entitled to:
- i. An IRB in the sum of \$400.00 per week from February 2 to July 7, 2018;
  - ii. An IRB in the sum of \$400.00 per week from July 8, 2018 to date; and
  - iii. Interest on any outstanding amounts of an IRB to date.

## REASONS

### IRB

- [9] The respondent paid the applicant an IRB from July 14, 2016 to February 1, 2018 at the rate of \$400.00 per week. It did not pay an IRB from February 2 to July 7, 2018, which it submits is not about eligibility, but the fact that the quantum of the IRB during that pre-104 week period in its view should be \$0 based on the fact the applicant did not file his income tax returns (ITRs). Section 4(5) of the *Schedule* states:
- If, under the Income Tax Act (Canada) or legislation of another jurisdiction that imposes a tax calculated by reference to income, a person is required to report the amount of his or her income, the person's income before an accident shall be determined for the purposes of this Part without reference to any income the person has failed to report contrary to that Act or legislation.
- [10] The respondent states that because the applicant did not file his income tax returns since 2011, the applicant's income is calculated without reference to the unreported income and therefore he is entitled to \$0 per week in an IRB.
- [11] The respondent further takes the position that the applicant is entitled to an IRB in the post-104 week period at the rate of \$185.00 per week, which it began paying as of July 8, 2018. The respondent does not explain its rationale for paying \$185.00 per week.

**February 2 to July 7, 2018 IRB period**

- [12] The September 29, 2018 Explanation of Benefits stated that based on medical evidence and “CRA tax filings”, the applicant’s entitlement to an IRB from February 2 to July 7, 2018 was \$0 per week<sup>1</sup> because the applicant had not filed income tax returns since 2011. Since then, the respondent advised that it received satisfactory medical evidence to qualify the applicant for an IRB, and that the remaining issue is quantum.
- [13] On June 19, 2018, the respondent inquired of the applicant if he had filed his ITR’s and he confirmed he had not. Until that time the respondent apparently was satisfied with the income information the applicant had provided, namely the Employer’s Confirmation form, dated July 25, 2016. On June 20, 2018 the respondent served the applicant with a notice of repayment of benefits.
- [14] The applicant electronically filed his 2014 to 2016 ITR’s on August 1, 2018, supported by T4’s from his employer and provided them to the respondent. The respondent takes the position these are not satisfactory because they are not signed by the applicant, nor has the applicant provided any Notices of Assessment from Revenue Canada.
- [15] The applicant’s reported employment income from the construction company for which he works of \$32,538.00; \$63,945.05; and \$35,087.00 for 2014-2016, respectively confirms that he would be entitled to an IRB of \$400.00 per week from the standpoint of the calculation of same. The question is what, if any, is the effect is of section 4(5) of the *Schedule*.
- [16] Neither party provided any case law with respect to section 4(5) of the *Schedule*. The applicant provided two cases in which an adjudicator found that the Employer’s Confirmation of Income (OCF-2) was sufficient to calculate the quantum of the IRB, but the issue of section 4(5) was not addressed or argued in either case.<sup>2</sup>
- [17] Section 4(5) appears to clearly set out that the applicant’s income is to be determined without referring to any income the person has failed to report contrary to that Act or legislation. In this case, however, the applicant has reported his income by filing his ITR’s and has shown himself to be entitled to an IRB. The respondent did not make a request under section 33 of the

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<sup>1</sup> It is not explained why the \$0 amount would not have been in effect from the date of the accident based on the respondent’s theory

<sup>2</sup> 16-000958 v. Aviva Insurance Company, 2017 CanLII 33653 and 16-003306 v. Coachman Insurance Company, 2018 CanLII 81882.

*Schedule* for additional income information. In addition, the Tribunal has found in more than one case that the Employer's Confirmation of Income is sufficient to calculate the applicant's income, and in this case the respondent had that and did not question it, and now has T4's and the filed ITR's, albeit no notices of assessment to date.<sup>3</sup> While the applicant provided no explanation for why he had not filed his ITR's for such a long period of time, I am satisfied that his income is as stated given the Employer's Confirmation of Income and the fact that the applicant has now reported those amounts with Revenue Canada. It is of note that the respondent has not at any time alleged fraud or misrepresentation by the applicant.

- [18] In the circumstances of this case, given that the applicant has filed his ITR's and shown himself to be entitled to the IRB the respondent paid him, and in light of the fact that the respondent did not ask for any additional financial information until almost two years after the accident, I find that the applicant is entitled to an IRB in the sum of \$400.00 per week for the period February 2 to July 7, 2018.

#### **Post-104 Weeks IRB**

- [19] The respondent takes the position that the applicant is entitled to an IRB in the post-104 weeks period, but that the quantum is \$185.00 per week pursuant to section 7(2)(1)(ii) of the *Schedule*. It provides no reason for the \$185.00 weekly amount other than referring to section 4(5) of the *Schedule*, but it appears that because the respondent believes the weekly IRB amount should be \$0, it takes the position that the applicant is entitled to the greater of \$0 and \$185 per week, pursuant to section 7(2)1ii of the *Schedule*. The applicant provided no reply submissions with respect to this issue.
- [20] For the same reasons set out above, I find that the applicant is entitled to post-104 week IRB in the sum of \$400.00 per week.

#### **CPP Deduction**

- [21] The respondent asks that the applicant's IRB entitlement be reduced by any CPP received.
- [22] The only information provided by the parties with respect to CPP was that the applicant applied on October 25, 2018.
- [23] In the absence of any additional information about CPP income, I decline to make an order, particularly since it might be a prospective one.

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<sup>3</sup> See footnote 2.

## **INTEREST**

[24] The respondent is liable to pay interest on any overdue amounts of IRB in accordance with s. 51 of the *Schedule*.

## **CONCLUSION**

[25] The respondent shall pay to the applicant:

- i. An IRB from February 2 to July 7, 2018 in the sum of \$400.00 per week;
- ii. An IRB from July 8, 2018 to date in the sum of \$400.00 per week; and
- iii. Interest on any outstanding amounts of IRB to date.

**Released: May 10, 2019**

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**Dawn J. Kershaw  
Vice-Chair**