

**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**

**Date: October 2, 2018**

**File Number: 17-007017/AABS**

**Case Name: 17-007017 v Pembridge Insurance Company**

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:

**S. C.**

**Appellant**

**and**

**Pembridge Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR:**

Rupinder Hans

**APPEARANCES:**

For the Appellant:

Christopher D.J. Hacio, Counsel

For the Respondent:

Heather L. Kawaguchi, Counsel

**HEARD Written Hearing:**

**May 22, 2018**

## OVERVIEW

- [1] On January 29, 2016, the twenty-four year old applicant was involved in a motor vehicle accident and sustained injuries.
- [2] The applicant applied for and received benefits under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the “Schedule”). The respondent Pembridge Insurance Company initially paid an income replacement benefit (“IRB”), but terminated the benefit as of October 22, 2017.
- [3] The applicant disputed the respondent’s decision to terminate the benefit, and appealed to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”), pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the “Act”).
- [4] Less than a month after termination of the IRB, on November 18, 2017, the applicant began working. As such, the parties agree that the period in dispute is from October 23, 2017 to November 17, 2017, a period of 3 weeks and 4 days.
- [5] A written hearing was scheduled, and a review of the evidence and submissions forms the basis for the decision.

## ISSUES IN DISPUTE

- [6] The following issues are in dispute:
  - (a) Is the applicant entitled to a weekly income replacement benefit in the amount of \$208.84 for the period of October 23, 2017 to November 17, 2017? <sup>1</sup>
  - (b) Is the applicant entitled to interest for the overdue payment of benefits?
  - (c) Is the applicant entitled to costs under Rule 19?

## RESULT

- [7] The applicant is not entitled to a weekly income replacement benefit in the amount of \$208.84, for the period October 23, 2017 to November 17, 2017.

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<sup>1</sup> I note that the Tribunal Order dated March 7, 2018 states that the applicant is seeking payment from October 22, 2017, to date and ongoing. However, in their respective submissions, the parties agree that the applicant is seeking payment from October 23, 2017 to November 17, 2017.

The applicant has failed to establish that she was substantially unable to complete the essential tasks of her pre-accident employment.

[8] The applicant is not entitled to interest.

[9] The applicant is not entitled to costs.

## PRELIMINARY ISSUE

[10] The respondent asserts that the issue of costs is being raised for the first time in the submissions for the hearing, and without notice to the respondent. The respondent states that this relief was not sought or identified in the application, the applicant's case conference summary, or the Order of the Tribunal dated March 7, 2018. The respondent asserts that the Tribunal should not consider this issue.

[11] I note that Rule 19 of the *LAT Rules of Practice and Procedure* provides that a request for costs may be made to the Tribunal in writing or orally at a case conference or hearing, at any time before the decision or order is released. The applicant is in compliance with the *LAT Rules of Practice and Procedure* as the request was made at the hearing and before a decision was released. Further, the respondent has had an opportunity to provide written submissions with respect to the applicant's request for costs, therefore I find no prejudice to the respondent. Thus, I will allow the issue to be considered.

## DISCUSSION

### (a) Eligibility to Receive Income Replacement Benefits

[12] Based upon the evidence before me, I find that the applicant has not met the eligibility test for income replacement benefits ("IRB"). To be entitled to an IRB under ss. 5(1)2 of the *Schedule*, the applicant must establish on a balance of probabilities that, as a result of the accident, she suffered an impairment that renders her substantially unable to complete the essential tasks of her employment as a hairdresser. The burden is on the applicant, and she has not met her burden.

[13] For purposes of the analysis, I will divide the inquiry into three steps:

- (i) Was the applicant employed at the time of the accident;
- (ii) Does the applicant suffer a substantial inability to perform the essential tasks of her pre-accident employment; and

(iii) Causation

(i) *Employment at the time of the Accident*

[14] It is undisputed that at the time of the accident the applicant was employed full-time as a hairdresser at First Choice Hair Cutter.

(ii) *Does the applicant suffer a substantial inability to perform the essential tasks of her pre-accident employment?*

[15] To answer the question, I must first determine the essential tasks of the applicant's employment; and second, whether the applicant is substantially unable to perform those essential tasks.

(a) *The essential tasks of the applicant's employment*

[16] In its submissions, the respondent provides a Verbal Job Site Analysis ("Job Analysis"), dated August 24, 2017, from physiotherapist Abbey Thawer, which lists the essential tasks of a hairdresser as follows:

- a. Cutting, styling, washing and colouring hair
- b. Cleaning the salon: sweeping and mopping the floors and dusting the shelves
- c. Completion of laundry; towels and capes; four loads per day
- d. Scheduling appointments
- e. Answering the telephone

[17] The applicant did not provide evidence with regards to the essential tasks of her hairdresser position. As such, based upon the evidence presented, I find that the essential tasks of the applicant's hairdresser position are those set forth in the Job Analysis.

(b) *Is the applicant substantially unable to perform the essential tasks?*

[18] The applicant has failed to establish on a balance of the probabilities that she is substantially unable to perform the essential tasks of her pre-accident employment as a hairdresser. The applicant asserts that due to her physical impairments she is unable to perform the essential tasks of her pre-accident hairdresser position, however, she has not provided convincing evidence

regarding how her impairments specifically affect her functionality and her ability to perform the essential tasks.

- [19] The applicant relies upon the clinical notes and records of her family physician, Dr. Lauren Sinnemaki. Dr. Sinnemaki's clinical notes and records span the period February 9, 2016 to July 10, 2017. In particular, in a May 25, 2017 note, Dr. Sinnemaki states that the applicant sustained a whiplash injury, and has low back pain related to the motor vehicle accident. Dr. Sinnemaki states that after completing physiotherapy the applicant had significant improvement but she is not back to her baseline. Dr. Sinnemaki notes that the applicant feels unable to return to her prior employment as a hairdresser, and she reports lots of neck and back pain.
- [20] However, Dr. Sinnemaki's last clinical note is dated July 10, 2017, a little more than three months prior to the termination of the IRB, and makes no reference to her whiplash injury, low back pain, or the motor vehicle.
- [21] The applicant also provides a more recent letter from Dr. Sinnemaki, dated February 22, 2018, in which Dr. Sinnemaki states that the applicant suffered a whiplash injury, strain of her left cervical spine and shoulder, and strain of her lumbar spine and bilateral buttocks. Dr. Sinnemaki states that the applicant "cannot continue to be employed as a sales associate as it likely requires her to stand for longer than 45 minutes, along with repetitive use of her left arm/shoulder." I note that since November 17, 2017, the applicant has been working as a sales associate at Exquisite Gold & Gems Inc., and it appears that Dr. Sinnemaki is referring to that new position.
- [22] The applicant further relies upon the orthopaedic surgery assessment report of the respondent's assessor, Dr. Myra McCormick, orthopaedic surgeon, dated January 6, 2017. I put little weight on this report as it is dated about ten months prior to the termination of the IRB. Dr. McCormick finds that as a result of the accident, the applicant suffered a WAD II as well as a strain of her left cervical spine and left shoulder girdle, and a strain of her lumbar spine and both buttocks.
- [23] The applicant also relies upon a clinical note from Walser & Associates Physiotherapists, dated January 22, 2018, which lists the applicant's impairments as WAD II, left shoulder strain and left spine strain. At the time the applicant was continuing to receive physiotherapy to manage her pain and symptoms.

- [24] By contrast, the respondent states that at the time the IRB was stopped on October 22, 2017, the applicant was demonstrating that she was able to perform the essential tasks of her employment as a hairdresser. The respondent points to the October 24, 2016 note from Dr. Sinnemaki which states that the applicant was feeling 75 to 80% improvement. The respondent further submits that the applicant has not provided any records from Dr. Sinnemaki, or any other medical practitioner, for the period that covers the disputed time frame. There is no contemporaneous medical evidence submitted by the applicant.
- [25] The respondent further relies upon the August 24, 2017 multidisciplinary IE assessment which includes reports by Dr. Reuven Lexier, orthopaedic surgeon, and Abbey Thawer, physiotherapist. The respondent relied upon the multidisciplinary IE assessment when terminating the IRB.
- [26] In his report dated August 24, 2017, Dr. Lexier notes that the applicant sustained contusions with ecchymosis to the left forearm, right shoulder and low back, and a WAD II injury to her cervical spine, essentially soft tissue injuries. Dr. Lexier conducted a physical examination of the applicant's cervical spine, upper extremities, shoulders, lower extremities and spine. He notes that her prognosis for a full and complete recover from the soft tissue injuries is excellent. He further concludes that from an orthopaedic and musculoskeletal perspective, she does not suffer a substantial inability to perform the essential tasks of her employment.
- [27] In the Functional Abilities Evaluation ("FAE"), dated August 24, 2017, physiotherapist Thawer notes that the applicant reports independence with her personal care and hygiene tasks, she has resumed the light meal preparation, cooking, grocery shopping, housekeeping, and laundry tasks. She is able to drive and look after her pets (lizards), and has resumed hiking and walking. Ms. Thawer further notes that the applicant demonstrated a consistent and moderate but sub-maximal effort, and thus, the functional profile demonstrated by the applicant is not a valid reflection of her actual functional abilities and tolerances. As such, Ms. Thawer does not make a determination as to whether the applicant meets the test of substantial inability to perform the essential tasks of her employment and defers this to the medical assessor.
- [28] After considering all the evidence, I prefer the medical evidence of the respondent to that of the applicant. I am persuaded by the respondent's argument that the applicant did not provide any contemporaneous medical evidence to establish that she was unable to substantially perform the essential

tasks of her employment as a hairdresser during the period in question. The onus is on the applicant.

- [29] Instead, the applicant relies upon the medical report of Dr. McCormick, where the applicant was assessed about ten months prior to the termination of the IRB. This is not contemporaneous. At the time of Dr. McCormick's report, it is clear that the applicant was unable to complete the essential tasks of her employment on the basis that her standing tolerance was less than an hour, and repetitive use of her left upper limb above waist level increased the pain in the left side of her neck and shoulder girdle. At the time, the respondent was paying an IRB to the applicant, and in fact, continued to pay the IRB for almost another year. This report is not convincing in establishing that the applicant continued to experience the same impairments at the time of termination.
- [30] Similarly, the clinical notes and records of Dr. Sinnemaki are not contemporaneous. The most recent reference to the applicant's impairments in Dr. Sinnemaki's clinical notes and records is May 25, 2017, during a time when the applicant was receiving an IRB, and about five months prior to termination.
- [31] Likewise, I am not persuaded by the recent correspondence provided by Dr. Sinnemaki, dated February 22, 2018. Dr. Sinnemaki states that the applicant cannot continue to be employed as a sales associate, and makes no reference to the hair dresser position. Although Dr. Sinnemaki added that she agrees with the statements in Dr. McCormick's report, as noted above, Dr. McCormick's assessment of the applicant occurred about ten months prior to termination of the IRB. I cannot rely upon Dr. McCormick's report as reflecting the applicant's impairment at the time of termination.
- [32] In addition, Dr. Sinnemaki's October 24, 2016 note states that the applicant was feeling 75 to 80% improvement.
- [33] Although the clinical note from Walser & Associates Physiotherapists, dated January 22, 2018, lists the applicant's impairments as WAD II, left shoulder strain and left spine strain, it does not provide any evidence in terms of the applicant's limitations, restrictions or functionality.
- [34] By contrast, when terminating the IRB, the respondent relied upon the August 24, 2017 multidisciplinary IE assessment. In particular, I found the orthopaedic report of Dr. Lexier to be convincing, and his examination to be thorough. Dr. Lexier noted that from an orthopaedic and musculoskeletal perspective, the applicant's injuries were soft tissue injuries and that her reported complaints, at

this time, do not correlate with his objective findings. He found that she is capable of returning to work on a full-time basis on a non-modified basis.

[35] Given the above, I find that the applicant has not provided convincing medical evidence that at the time that the IRB was terminated, she was unable to perform the essential tasks of her employment as a hair dresser. The applicant has not met her onus.

[36] Accordingly, the applicant has failed to establish on a balance of the probabilities that she is substantially unable to perform the essential tasks of her pre-accident employment as a hair dresser. I conclude that income replacement benefits are not payable.

(iii) *Causation*

[37] As the applicant has not established that she was substantially unable to perform the essential tasks of her pre-accident employment, at the time of termination, I do not need to discuss causation. In addition, the respondent did not raise this issue.

(a) The Applicant's Entitlement to Interest and Costs

[38] As I have found that income replacement benefits are not payable, no interest is payable.

[39] With regards to costs, Rule 19.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure* is a provision for the parties to request costs if they believe that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. Rule 19.2 provides that a request for costs can be made any time before the decision or order is released. Rule 19.4 further sets out the requirements for that request, which must include the reasons for the request and the particulars of the alleged conduct.

[40] The applicant provides no reasons for the request or particulars of the respondent's conduct that is alleged to be unreasonable, frivolous, vexatious, or in bad faith. Given that no particulars are provided, the applicant has not met her burden and is not entitled to recover costs.



## **ORDER**

[41] After considering the evidence and submissions, pursuant to the authority vested in this Tribunal under the provisions of the Act, I order that the application is denied in its entirety.

**Released: December 4, 2018**

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**Rupinder Hans  
Adjudicator**