

LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards
Tribunals Ontario



Date: **October 17, 2016**

Tribunal File Number: **16-000179/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: **Raho Mohamud**

Applicant

and

Old Republic Insurance Company

Respondent

DECISION

Adjudicator: Chris Sewrattan

Appearances:

For the Applicant: Mohamed Doli, counsel for the Applicant

For the Insurance Company: Garrett Harper, counsel for the Insurance Company

HEARD by way of a written hearing, September 9, 2016

Overview

- [1] The Applicant, Raho Mohamud, was injured in a motor vehicle accident on May 21, 2015. She applied for and received benefits under the *Statutory Accident Benefits Schedule – Effective after September 1, 2013* (the “*Schedule*”) including medical and Income Replacement Benefits (IRB).
- [2] Old Republic Insurance Company (“Old Republic”) terminated Ms. Mohamud’s IRB on March 25, 2016 taking the position that she did not meet the test for entitlement. Ms. Mohamud disputes that termination and submits that she should be paid an IRB from March 25, 2016 to May 21, 2017.
- [3] I find on all of the evidence that Ms. Mohamud is entitled to receive a weekly income replacement benefit in the amount of \$292.46 from March 25, 2016 to May 21, 2017.

Discussion:

- [4] The test for entitlement to payment of an income replacement benefit is set out in s. 5(1) of the *Schedule*. In Ms. Mohamud’s case, s. 5(1) provides that she is entitled to an IRB if she can prove on a balance of probabilities that she was employed at the time of the accident and, as a result of the accident, she suffers a substantial inability to perform the essential tasks of her pre-accident employment as a school bus driver. Analytically, the test can be broken into three steps. The third step is the truly contentious issue in this case.

1. Was Ms. Mohamud employed at the time of the accident?

[5] Old Republic does not contest the first step of the test for Ms. Mohamud's entitlement to IRB. The Independent Psychological Assessment commissioned by Old Republic and authored by Dr. Fabio Salerno ("the Salerno Report") indicates that Ms. Mohamud was employed at the time of the accident. In her affidavit, Ms. Mohamud attests that she was employed at the time of her accident. Based on these two sources, I find as a fact that at the time of the accident Ms. Mohamud was employed as a school bus driver with Stock Transportation Ltd. In this capacity, she drove a smaller school bus that can carry approximately twenty students. The motor vehicle accident occurred in the course of her employment. She was carrying four students at the time.

2. Causation

[6] Ms. Mohamud is entitled to an IRB only if her inability to work as a school bus driver is caused by and manifests within 104 weeks of the accident. Old Republic submits that the accident did not materially contribute to Ms. Mohamud's alleged inability to work. Old Republic submits this is established by the clinical notes of Ms. Mohamud's family doctor, Dr. Berih. On Old Republic's reading of the notes, Ms. Mohamud did not indicate right shoulder pain until a visit to Dr. Berih on June 10, 2015. This is approximately 20 days after her accident. The delay in reporting the pain is taken to suggest that the motor vehicle accident did not cause the injury that has rendered Ms. Mohamud unable to work.

[7] Ms. Mohamud too relies on the notes of Dr. Berih. In addition, she relies on the notes of her chiropractor, Dr. Fadumo Hassan. Ms. Mohamud submits that these notes indicate that right shoulder pain was an ongoing issue revealed on several

earlier occasions – once to Dr. Hassan on June 1 and by Dr. Berih on June 4. The earlier of these two dates is approximately 10 days post-accident.

[8] I find that Ms. Mohamud's accident caused the condition that has resulted in a substantial inability to perform the essential tasks of her employment as a school bus driver. This finding is made through consideration of the complete record of clinical notes in the evidence. Dr. Berih and Dr. Hassan's notes make clear that Ms. Mohamud complained of and was diagnosed with right shoulder pain prior to June 10. Moreover, as is clearly indicated in Dr. Berih's May 22, 2015 clinical note, Ms. Mohamud's condition is not limited to right shoulder pain. It includes back pain which "radiat[es] to lower extremity". This note is uncontested by any other clinical note in the evidentiary record. Unfortunately, Dr. Berih's note does not specify to which lower extremity the back pain radiates. Nothing turns on this lack of specificity though. The inference from this clinical note on which I rely is that Ms. Mohamud's accident caused both shoulder and back pain.

[9] I now turn to the issue of whether the shoulder and back pain cause Ms. Mohamud a substantial inability to perform the essential tasks of her employment.

3. Does Ms. Mohamud suffer a substantial inability to perform the essential tasks of her pre-accident employment as a school bus driver?

[10] The heart of the test for an IRB is whether the applicant suffers from a substantial inability to perform the essential tasks of her or his employment. To answer this question in the Applicant's case, two determinations are required. First, what are

the essential tasks of the Applicant's employment? Second, is the Applicant substantially unable to perform the essential tasks of her employment?

(a) What are the essential tasks of Ms. Mohamud's employment?

[11] I find as a fact that the essential tasks of Ms. Mohamud's employment as a school bus driver are:

1. For five days a week, drive three times per day, one hour per time, to pick up and drop off students between their homes and school. This requires approximately three hours of driving per day.
2. Conduct a safety check, which consists of the following: start the bus, lift the hood, check the fluids, check that the lights are working, look under the bus, inspect the seats, and ensure that the emergency doors open properly. The safety check takes approximately 15 minutes to complete.

[12] My factual findings are based on Ms. Mohamud's self-report to Dr. Salerno, documented in the Salerno Report commissioned by Old Republic. Mr. Mohamud's self-report on this issue is not contested.

(b) Is Ms. Mohamud substantially unable to perform the essential tasks of her employment as a school bus driver?

[13] Ms. Mohamud submits that she has shown on a balance of probabilities that she is unable to perform the essential tasks of her employment based largely on the reports she commissioned from a psychiatrist, Dr. Shariff Desouki (the Desouki

Report), and a psychologist, Dr. Jon Mills (the Mills Report). The Desouki Report suggests that Ms. Mohamud has difficulty checking over her shoulder while driving, in addition to difficulty with general bending, twisting, reaching, heavy lifting, and maintaining prolonged positions. Furthermore, Ms. Mohamud reported to Dr. Desouki that she has difficulty sitting for more than 10-20 minutes and experiences pain when conducting shoulder checks and reaching to grip the steering wheel.

- [14] The Mills Report diagnoses Ms. Mohamud with a major depressive disorder, single episode; with anxiety, a special phobia, situational type (driver and passenger); and a somatic symptom disorder with pre-dominant pain that was moderate and persistent.
- [15] Old Republic relies on the Independent Medical Assessment of Dr. Ryan Williams (the "Williams Report"), a physiatrist, and the Salerno Report to submit that Ms. Mohamud does not have physical or psychological conditions that render her substantially unable to perform her essential tasks as a school bus driver. The Williams Report suggests that Ms. Mohamud sustained a WAD II injury along with associated sprains and strains to her thoracic and lumbar spine, and sprains and strains in her right shoulder girdle. The Report also suggests Ms. Mohamud suffered post-traumatic headaches and greater trochanteric pain syndrome, the latter of which Dr. Williams believes is not related to her involvement in the motor vehicle accident. Significantly, Dr. Williams did not consider the CAT scans, X-Rays, and MRIs that were conducted after the

accident. Dr. Williams instead relied on Ms. Mohamud's description of these documents.

[16] The Salerno Report suggests that Ms. Mohamud does not suffer from any condition classified in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) and could return to work but for her physical limitations. The DSM-5 is a document created by the American Psychiatric Association. It serves a number of functions. In the context used by the Salerno Report, it serves as a diagnostic tool for psychological disorders.

[17] Additionally, Old Republic points to the fact that Ms. Mohamud told Dr. Salerno that the panic and distress caused by the accident is "not that serious". She continues to drive her own children to and from school in her personal vehicle, which is not a bus.

[18] I place greater weight on the Desouki report than the Williams Report. Dr. Williams opined on Ms. Mohamud's ability to perform the essential tasks of her employment without discussing what those essential tasks were. This suggests, at best, an incomplete approach to preparing the report. Moreover, Dr. Williams did not consider the CAT scans, X-Rays, and MRIs that were conducted after the accident. By contrast, Dr. Desouki addressed the tasks of Ms. Mohamud's employment and considered the CAT scans, X-Rays, and MRIs conducted after the accident.

[19] My decision on Ms. Mohamud's ability to perform the essential tasks of her employment turns on her physical ability. While I have considered the psychological reports of Dr. Salerno and Dr. Mills, respectively, I make my

decision fundamentally on Ms. Mohamud's physical condition. I accept Ms. Mohamud's self-report to Dr. Deskouki that she has difficulty sitting for more than 10-20 minutes. Because of my preference for the Desouki Report over the Williams Report, I likewise accept Dr. Desouki's suggestion that Ms. Mohamud's has difficulty checking over her shoulder while driving, and general bending, twisting, reaching, heavy lifting, and maintaining prolonged positions. In all, I accept that Ms. Mohamud suffers from right shoulder pain and back pain which radiates to her lower extremity, the combination of which renders her substantially unable to drive the bus and conduct a safety check.

[20] After considering all of the evidence, in particular the four expert reports, I find that Ms. Mohamud is substantially unable to perform the essential tasks of her employment as a school bus driver. In arriving at this conclusion, the important issue for me is the ability to drive the school bus for an extended period of time - not the act of driving a vehicle in and of itself. While I do not accept that Ms. Mohamud cannot sit and drive a vehicle, I accept that she does not have the physical ability to sit and drive a school bus for approximately one hour at a time. This explains why Ms. Mohamud can drive her personal vehicle, as noted by Old Republic, but cannot drive the school bus for the time period required by her employment, as suggested by Ms. Mohamud. The duration of driving is outside of her physical ability; the ability to drive is not substantially affected. Ms. Mohamud has satisfied me on a balance of probabilities that she does not have the requisite physical ability to drive the school bus in the conditions required by her employment.

Conclusion:

[21] Ms. Mohamud is entitled to receive a weekly income replacement benefit in the amount of \$292.46 from March 25, 2016 to May 21, 2017.

Released: October 17, 2016



Chris Sewrattan,
Adjudicator